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**THE
LAWS OF ENGLAND.**

VOLUME XI.

THE LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE
LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE
EARL OF HALSBURY
LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92. and 1895-1905,
AND OTHER LAWYERS.

VOLUME XI.

DESCENT AND DISTRIBUTION.

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DISTRESS.

EASEMENTS AND PROFITS À PRENDRE

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<i>For Cemeteries</i>	<i>See title</i>	BURIAL AND CREMATION.
<i>Churchyards, Disused</i>	„	OPEN SPACES AND RECREATION GROUNDS.
<i>Civil Parishes</i>	„	LOCAL GOVERNMENT.
<i>Collegiate Bodies</i>	„	CHARITIES; EDUCATION.
<i>Cremation</i>		BURIAL AND CREMATION.
<i>Marriage</i>		HUSBAND AND WIFE.
<i>Notaries</i>		NOTARIES.
<i>Rating of Ecclesiastical Pro-</i>		
<i>perty</i>	„	RATES AND RATING.
<i>Registration</i>	„	BURIAL AND CREMATION; HUS- BAND AND WIFE; REGISTRATION OF BIRTHS AND DEATHS.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> [1891] A. C.)
A.-G. ..	..	..	Attorney-General
Act. ..	..	..	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & EL. ..	..	..	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—1842
Adam ..	..	..	Adam's Justiciary Reports (Scotland), 1893—(current)
Add. ..	..	..	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen. ..	..	..	Advocate-General
Alc. & N. ..	..	..	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas. ..	..	..	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn ..	..	..	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb. ..	..	..	Ambler's Reports, Chancery, 2 vols., 1725—1783
And. ..	..	..	Anderson's Reports, Common Pleas, fol., 1 vol., 1535—1605
Andr. ..	..	..	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon. ..	..	..	Anonymous
Anst. ..	..	..	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas. ..	..	..	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley ..	..	..	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O. ..	..	..	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn. ....	..	..	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H. ..	..	..	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C. ..	..	..	Aspinall's Maritime Law Cases, 1870—(current)
Atk. ....	..	..	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan. ..	..	..	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par. ..	..	..	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad... ..	..	..	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald. ..	..	..	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C. ..	..	..	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S. ..	..	..	Best and Smith's Reports, Queen's 10 vols., Bench, 1861—1870
Bac. Abr. ..	..	..	Bacon's Abridgment
Bail Ct. Cas. ..	..	..	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Ball & B. ..	..	..	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R. ..	..	..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	..	..	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	..	..	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (Ch.)	..	..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	..	..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	..	..	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	..	..	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	..	..	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	..	..	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	..	..	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	..	..	Beawes's Lex Mercatoria
Bellewe	..	..	Bellewe's Cases temp. Richard II., King's Bench, 1 vol.
Bell, C. C.	..	..	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess.	..	..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol.	..	..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec.	..	..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	..	..	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	..	..	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	..	..	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	..	..	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	..	..	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	..	..	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	..	..	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch.	..	..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com.	..	..	Blackstone's Commentaries
Bl. D. & Osb.	..	..	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	..	..	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	..	..	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	..	..	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.)	..	..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	..	..	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	..	..	Sir J. Brooke's Abridgment
Bro. C. C.	..	..	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	..	..	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	..	..	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	..	..	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor.	..	..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	..	..	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1632—1827
Brod. & Bing.	..	..	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	..	..	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	..	..	Brown's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush.	..	..	Browning and Lushington's Reports, Admiralty 1 vol., 1863—1866
Brownl.	..	..	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1669—1624
Bruce	..	..	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	..	..	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	..	..	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	..	..	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	..	..	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	..	..	Burrow's Reports, King's Bench, 5 vols., 1756—1771
Burr. S. C.	..	..	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	..	..	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	..	..	Court of Appeal
C. B.	..	..	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	..	..	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. Ct. Cas.	..	..	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	..	..	Common Law Reports, 3 vols., 1853—1855
C. P. D.	..	..	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	..	..	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	..	..	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas.	..	..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	..	..	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	..	..	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	..	..	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	..	..	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1815—1853
Car. & M.	..	..	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	..	..	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	..	..	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	..	..	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	..	..	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B.	..	..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	..	..	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. temp. Finch	..	..	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680
Cas. temp. King	..	..	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733
Cas. temp. Talb.	..	..	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date)	..	..	Law Reports, Chancery Division, since 1890 (e.g. [1891] 1 Ch.)
Ch. App.	..	..	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	..	..	Law Reports, Chancery Division, 45 vols., 1875—1890
Ch. Rob.	..	..	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808

Char. Pr. Cas. ..	..	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas. ..	..	Charley's Chamber Cases, 1 vol., 1875—1876
Chit. .. ..	..	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin. ..	..	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay. .. ..	..	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick. ..	..	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph. ..	..	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe ..	..	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent. .. ..	..	Coke's Entries
Co. Inst. ..	..	Coke's Institutes
Co. Litt. ..	..	Coke on Littleton (1 Inst.)
Co. Rep. ..	..	Coke's Reports, 13 parts, 1672—1616
Coll. ..	..	Collyer's Reports, Chancery, 2 vols., 1844—1846
Coll. Jurid.	..	Collectanea Juridica, 2 vols.
Colles ..	..	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt. ..	..	Coltman's Registration Cases, 1 vol., 1879—1885
Com. ..	..	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas. ..	..	Commercial Cases, 1895—(current)
Com. Dig. ..	..	Comyns' Digest
Comb. .. ..	..	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law. ..	..	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al. ..	..	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas. ..	..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg. ..	..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G. ... ..	..	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas. ..	..	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. temp. Brough. ..	..	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834
Coop. temp. Cott. ..	..	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D. ..	..	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper .. ..	..	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp. .. ..	..	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C. ..	..	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk. ..	..	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas. ..	..	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H. ..	..	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J. .. ..	..	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M. ... ..	..	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R. ..	..	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph. ..	..	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Cr. App. Rep. ..	..	Cohen's Criminal Appeal Reports, 1909 (current)
Craw. & D. ..	..	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846

Craw. & D. Abr. C.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838
Cress. Insolv. Cas.	Cresswell's Insolvency Cases, 1 vol., 1827—1829
Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
Cro. Car.	Croke's Reports <i>temp.</i> Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641
Cro. Eliz.	Croke's Reports <i>temp.</i> Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	Croke's Reports <i>temp.</i> James I., King's Bench and Common Pleas, 1 vol., 1603—1625
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816
Dav. Ir.	Davys' (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611
Day	Day's Election Cases, 1 vol., 1892—1893
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835
Dears. & B.	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858
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Part I.—Definitions.

Definition of descent and distribution.

1. Descent means taking real estate by inheritance, that is, as heir of the former holder (a). Distribution means the division of the personal estate of a deceased person among his next of kin.

In order that property may be subject to the ordinary rules regulating descent or distribution it must be property which the deceased owner, if of testamentary capacity, could have disposed of by will and has not effectually done so (b). With respect to such property there is an intestacy.

Intestacy.

2. Intestacy may be either total or partial. Total intestacy occurs where a man makes no effective testamentary disposition of any of the property of which he is competent to dispose by will. Partial intestacy occurs where a man makes a testamentary disposition of part only of the property of which he is competent to dispose by will (c). If a testator does not by his will make an effective disposition of the whole of his disposable property, such property as he does not dispose of devolves as if no will had

(a) *Bickley v. Bickley* (1867), L. R. 4 Eq. 216, at p. 220; see also Co. Litt. 237 a. "A descent is a means whereby one doth derive his title to certain lands as heir to some of his ancestors" (Co. Litt. 13 b). The Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 1, defines descent as meaning "the title to inherit land by reason of consanguinity as well where the heir shall be an ancestor or collateral relation as where he shall be a child or other issue." The law of descent to foreign immovables will be found under title CONFLICT OF LAWS, Vol. VI., p. 218.

(b) For testamentary capacity, and other matter relating to the disposition of property by will, see title WILLS. This definition is scarcely applicable to the case of entailed property, as to which see p. 12, *post*.

(c) Compare *Re Twigg's Estate*, *Twigg v. Black*, [1892] 1 Ch. 579; and see Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 7, which provides that where any beneficial interest in the real estate of any deceased person, whether the estate or interest of such deceased person therein was legal or equitable, is owing to the failure of the objects of the devise or other circumstances happening before or after the death of such person in whole or in part not effectually disposed of, such person shall be deemed for the purposes of the Act to have died intestate in respect of such part of the said beneficial interest as is ineffectually disposed of.

PART I.
Definitions.

been made. And even if a testator in terms devises his real estate, but it is clear that the devisee is merely a trustee on a trust which fails, and the will contains no residuary devise, the devisee holds such real estate in trust for the testator's heir-at-law as if the testator had died intestate in respect thereof (*d*).

3. "Real estate" is a term of art, a technical term well understood (*e*). It includes manors, advowsons, messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and any undivided share thereof, and any estate, right, or interest (other than a chattel interest) therein (*f*). Real estate.

4. "Personal estate" includes leasehold estates and other chattels real, and also moneys, shares of Government and other funds, securities for money (not being real estate) (*g*), debts, choses Personal estate.

(*d*) *Muckleston v. Brown* (1801), 6 Ves. 52; and see p. 28, *post*, as to the right of an executor to take undisposed-of residue beneficially.

(*e*) *Butler v. Butler* (1884), 28 Ch. D. 66, *per* CHITTY, J., at p. 71.

(*f*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 1. Compare the definition of "land" in the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 1: "The word 'land' shall extend to manors advowsons messuages and all other hereditaments whether corporeal or incorporeal and whether freehold or copyhold or of any other tenure and whether descendible according to the common law or according to the custom of gavelkind or borough English or any other custom and to money to be laid out in the purchase of land and to chattels and other personal property transmissible to heirs and to any share of the same hereditaments and properties or any of them and to any estate of inheritance or estate for any life or lives or other estate transmissible to heirs and to any possibility right or title of entry or action and any other interest capable of being inherited and whether the same estates possibilities rights titles and interest or any of them shall be in possession reversion remainder or contingency." The division of property into "real estate" and "personal estate" only roughly corresponds with the more natural division into "immovables" and "movables"; and is derived historically from the technical names of the remedies formerly given by English law to persons deprived of their property. The action which might be brought by a person wrongfully dispossessed of land or property of the same nature as land was called a "real action" or an action *in rem*, because the remedy was the restoration of the *res* or land itself; but a person wrongfully dispossessed of "goods money and other moveables which may attend the owner's person wherever he thinks proper to go" (2 Bl. Com. 16) was only entitled to bring an action *in personam* against the wrong-doer, claiming as his remedy an order against that person for payment of damages. As to these forms of action, see title ACTION, Vol. I., p. 31. The phrase "lands tenements and hereditaments" was used as convertible with "real property," but as it included all property which was the subject of tenure and inheritable by the heir, real property has come to mean not merely land, but all such other property as is of like nature with it, *e.g.*, titles of honour, chattels annexed to the lands, heirlooms, and title deeds. So also easements, rights of common, and rents issuing out of the land are hereditaments, though incorporeal, and are of the nature of real estate. Heirlooms are such chattels as by special local custom are annexed to certain land so as to devolve with it (Co. Litt. 18 b). The popular use of the word heirlooms to denote chattels settled by will or settlement so as to go with certain land is not strictly accurate, and such chattels devolve on the personal representatives of the first person who takes a vested estate of inheritance. See also titles PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL.

(*g*) If the owner of an equity of redemption, on paying off a mortgage by demise, prevents the mortgage debt from merging by a declaration that it shall be kept alive for his protection against mesne incumbrances, and then dies

DESCENT AND DISTRIBUTION.

PART I. in action, rights, credits, goods, and all other property whatsoever
Definitions. which by law devolves upon the executor or administrator, and any
share or interest therein (*h*).

Part II.—Devolution of Real and Personal Estate.

SECT. 1.—*Real Estate belonging to Deceased Beneficially.*

Devolution of
real estate
on death.

5. On the death intestate before the 1st January, 1898, of a beneficial owner of real estate, it devolved immediately upon his heir, who was ascertained in accordance with the rules hereafter set out, subject (in cases where such rights attached) to rights of dower, free bench and curtesy (*i*), and subject also, since the 1st September, 1890, to the widows' right under the Intestates' Estates Act, 1890 (*k*), in cases where that Act applied (*l*). Such estate was also liable, in a due course of administration, for the debts of the intestate (*m*). In cases, however, of death on or after the 1st January, 1898, such of the real estate of the deceased person as was vested in him without a right in any other person to take by survivorship (other than land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant) (*n*) vests in his personal representative or representatives from time to time as if it

intestate, the mortgage debt will pass as personalty even if expressed to be payable to the mortgagee, his heirs and assigns (*Re Gibbon, Moore v. Gibbon*, [1909] 1 Ch. 367).

(*h*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 1. Leaseholds are personal estate, because it was formerly considered that a lease was merely a contract for the enjoyment of the land demised. If the tenant was wrongfully dispossessed, he had no right of action to recover the land itself, but could only bring an action against the lessor for damages for breach of the covenant for quiet enjoyment (3 Bl. Com. 166). In some cases objects of property may be either real or personal, according to the surrounding circumstances; thus deer in a lawful park, so long as they are at large, are considered as forming part of the inheritance; but if reclaimed and confined by the owner, they become part of his personal estate (*Davies v. Powell* (1738), Willes, 46; see also title ANIMALS, Vol. I., p. 365). So also fixtures are in some cases treated as passing with the land, and in others as being separable from it. And even land itself, if owned for partnership purposes, is as between the partners treated as personalty, and on the death of one of them his share in the land goes not to his heir, but to his next of kin (see p. 6, *post*).

(*i*) As to dower, free bench and curtesy, see titles COPYHOLDS, Vol. VIII., pp. 78 *et seq.*; HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL.

(*k*) 53 & 54 Vict. c. 29.

(*l*) See p. 16, *post*.

(*m*) See title EXECUTORS AND ADMINISTRATORS.

(*n*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (4). The wording of this section is wide enough to include an estate tail and even a life estate, and the only property which strictly comes within the words "real estate vested in a person with a right in any other person to take by survivorship," appears to be that of which the deceased was seized in joint tenancy with another or others who survived him. But having regard to the Act as a whole and to

were a chattel real (o), to be held with and subject to the powers, rights, duties, and liabilities mentioned in the Land Transfer Act, 1897 (a), in trust for the persons by law beneficially entitled thereto, and such persons have the same power of requiring a transfer of the real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate (b).

SECT. 1.
Real Estate
belonging to
Deceased
Beneficially.

6. The legal estate vests in all the executors irrespective of the question whether they have obtained probate or not (c), inasmuch as an executor derives his title from the will and not from probate (d); but it seems that the estate will be divested by the executor renouncing probate (e). In case of an intestacy, inasmuch as an administrator derives his title from the grant of letters of administration and not from the will (f), it has been held that until administration is taken out the legal estate in the intestate's land devolves on his heir-at-law (g).

Effect of
probate, or
grant of
administra-
tion.

SECT. 2.—*Real Estate held by Deceased as Trustee or Mortgagee.*

7. Trust or mortgage estates vested in any person dying since the year 1881 devolve as if they were chattels real (notwithstanding any testamentary disposition by him) and become vested in his personal representative or representatives, who may dispose of and deal with such estates as if the same were chattels real vesting in him or them. For this purpose the personal representatives for the time being of the deceased are deemed in law his heirs and assigns within the meaning of all trusts and powers (h).

Freehold
trust and
mortgage
states.

the words "notwithstanding any testamentary disposition" contained in s. 1, it is submitted that it applies only to such real estate, whether legal or equitable (*Re Somerville and Turner's Contract*, [1903] 2 Ch. 583), as the deceased was competent to dispose of by will. If this is the correct interpretation, the words "real estate" in this Act do not include estates tail, life estates, or any inalienable realty, such as titles of honour.

(o) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (1).

(a) 60 & 61 Vict. c. 65. These powers, rights, duties and liabilities are set out in sub-s. 2, 3 and 4 of s. 2, and in s. 3 and 4 of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65). They are administrative and do not affect the beneficial ownership. See title EXECUTORS AND ADMINISTRATORS.

(b) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (1).

(c) *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58.

(d) *Smith v. Miles* (1786), 1 Term Rep. 475, at p. 480.

(e) *Re Pawley and London and Provincial Bank*, *supra*.

(f) *Wankford v. Wankford* (1705), 1 Salk. 299, *per* Powys, J., at p. 301.

(g) *John v. John*, [1898] 2 Ch. 573, C. A., *per* NORTH, J., at p. 576. It seems questionable, however, whether this is so having regard to the words of the Act as to chattels real. It seems impossible to accept the pronouncement of NORTH, J., that until the executors named in the will took out probate the estate remained in the heir, even if it should be correct in relation to a case where no executors were named or all of them renounced. As to transfer of estate from the executors to the heir or devisee, see title EXECUTORS AND ADMINISTRATORS.

(h) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30. Before the passing of this Act, a general devise passed trust and mortgage estates, unless it was to be collected from expressions used in the will, or purposes or objects of the testator, that he did not mean they should pass (*Braybroke (Lord) v. Inskip* (1803), 8 Ves. 417), except in the case of a bare trustee dying since 7th August, 1874 (date of passing of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78)). The trust estate of such a trustee vested, like

SECT. 2.

Real Estate
held by
Deceased as
Trustee or
Mortgagee.

8. This rule does not apply to legal interests in copyholds, which vest in the customary heir (i). But equitable estates in copyholds, which pass without any assent by the lord, devolve on the legal personal representative in the case of death since the 1st January, 1898 (k).

SECT. 3.—*Personal Estate.*

Devolution of
personal
estate.

9. On the death of an owner of personal estate, such estate vests in his personal representatives if he has appointed executors; but if such owner dies wholly intestate such estate, until letters of administration have been granted, vests apparently in all the judges of the High Court of Justice in the same manner and to the same extent as previously to the year 1857 they vested in the Ordinary (l), i.e., as trustee (m) to dispose of in the manner appointed by law. On the grant of letters of administration, the property of the deceased vests in the administrator, whose title thereto (n) appears to relate back to the death of the intestate in cases where it is for the benefit of the estate that it should do so (o).

The interest of an executor, on the other hand, is derived exclusively from the will and vests immediately on the testator's death (p); the probate is merely the evidence of the will and of the executor's title (q).

SECT. 4.—*Property held as Partner.*

Devolution of
partnership
property.

10. Property held for the purposes of a partnership business, whether real or personal, and whether the legal estate is in

a chattel real, in his legal personal representative, whether he died testate or intestate, provided his death occurred between 7th August, 1874, and 1st January, 1876; but if he died between 1st January, 1876 and 1st January, 1882, it only so vested if he died intestate (Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 5, and Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 48); see also titles MORTGAGE; TRUSTS AND TRUSTEES; WILLS.

(i) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88, repealing and re-enacting Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45; see title COPYHOLDS, Vol. VIII., pp. 86 *et seq.* The statement in the text is subject to an exception in the case of deaths between the 1st January, 1882, and the 16th September, 1887, as to which see *ibid.*, p. 88.

(k) See title COPYHOLDS, Vol. VIII., p. 89; *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.

(l) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 4; and Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 19. Under these Acts the personal estate in such circumstances vested in the judge of the Court of Probate, but the Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 34, transferred to the judges of the High Court of Justice all the jurisdiction, powers, duties, and authorities formerly vested in the judge of the Court of Probate. (See also Yearly Supreme Court Practice, 1910, p. 1210). There is, however, no express provision for the vesting of estates of intestates pending the grant of letters of administration.

(m) *Dyke v. Walford* (1846), 5 Moo. P. O. C. 434.

(n) An administrator has no title until the letters are granted (*Wankford v. Wankford* (1705), 1 Salk. 299, *per* Powys, J., at p. 301; *Woolley v. Clark* (1822), 5 B. & Ald. 744).

(o) *Morgan v. Thomas* (1853), 8 Exch. 302; *Bodger v. Arch* (1854), 10 Exch. 333.

(p) *Smith v. Miles* (1786), 1 Term Rep. 475, at p. 480; *Woolley v. Clark*, *supra*.

(q) *Case of Kerby Lee* (1621), Palm. 163; see also title EXECUTORS AND ADMINISTRATORS.

the partners jointly or in one of them or in a stranger, is, unless a contrary intention appears, in equity mere personality, and the beneficial interest devolves as such (*r*). But the legal estate in land of any tenure which is partnership property devolves according to the nature and tenure thereof and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested (*s*). The question whether any particular item of property is held for the purposes of a partnership business is one of fact, to be determined on the circumstances of each case (*a*). It is immaterial whether property has come to the partners by purchase, or descent, or devise. If they use it for the purposes of the partnership business, it is to be treated as personality (*b*).

SECT. 4.
Property
held as
Partner.

Ascertain-
ment of
partnership
property.

Part III.—Descent of Real Estate.

SECT. 1.—*Descent of an Estate in Fee Simple.*

11. The heir to freehold property is ascertained according to the following rules, which apply only in cases of death on or after the 1st January 1834 (*c*). The descent of equitable estates is governed by the same rules as the descent of legal estates (*d*).

Heirship, how
ascertained.

12. RULE No. 1.—In every case descent is traced from the purchaser (*e*). For the purposes of this rule the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or enclosure by the effect of which the land became part of or descendible in the same manner as other land acquired by descent, is deemed the purchaser (*f*). The person last entitled to or who had a right to the land, whether he did or did not obtain the possession or receipt of the rents and profits of the land, is to be considered to have been the purchaser thereof, unless it is proved that he inherited the same, and in like manner the last person from

Descent
traced from
the purchaser.

(*r*) *Re Bourne, Bourne v. Bourne*, [1906] 2 Ch. 427, O. A., *per* ROMER, L.J., at p. 432; compare Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 22; and see title PARTNERSHIP.

(*a*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 20 (2). "Land" includes messuages, tenements, and hereditaments, houses and buildings of any tenure (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3). See, generally, title PARTNERSHIP.

(*a*) *Re Laurence, Ex parte McKenna, Bank of England Case* (1861), 3 De G. F. & J. 645; *Murtagh v. Costello* (1881), 7 L. R. Ir. 428; *Phillips v. Phillips* (1832), 1 My. & K. 649; *Darby v. Darby* (1856), 3 Drew. 495; and see title PARTNERSHIP.

(*b*) *Waterer v. Waterer* (1873), L. R. 15 Eq. 402.

(*c*) This is the date at which the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), came into force. The rules according to which the heir was ascertained before that date have still to be observed in cases where the death in question occurred before 1st January, 1834, and, in so far as they differ from the modern rules, they are stated in the notes to this article.

(*d*) *Banks v. Sutton* (1732), 2 P. Wms. 700, at p. 713; *Trash v. Wood* (1839), 4 My. & Cr. 324.

(*e*) Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 2.

(*f*) *Ibid.*, s. 1.

SECT. 1.
Descent of
an Estate in
Fee Simple.

whom the land is proved to have been inherited is in every case to be considered to have been the purchaser, unless it is proved that he inherited it (*g*).

The intention of the Inheritance Act, 1833 (*h*), was to leave the law of inheritance, in absolutely plain cases, just as it found it, and only to lay down rules where there was any doubt existing (*i*). Therefore, where a woman takes as a coparcener by descent, and dies intestate leaving a son, the whole of her share vests in the son, and it is not necessary to trace the descent as to that share from the purchaser from whom the coparcener derived her title (*k*).

Limitation
to heirs.

13. Where by an assurance land is limited to the grantor or to the heirs of the grantor, and, similarly, where by a will land is devised to the person who is in fact the heir of the testator, the grantor or his heir, or the testator's heir (as the case may be) takes as purchaser (*l*), and is deemed to be the purchaser for all purposes (*m*). This rule applies to a devise to or in trust for the testator's right heirs, or to any other form of words where the devise is in effect a devise to the heir or to the person who shall be the heir of the testator at the time of the testator's death, and is not confined to a devise to the testator's heir simply (*n*). And the quality of the estate taken is altered, so that where a man devises land to his own right heirs and leaves coheirresses, they take as joint tenants and not as coparceners or tenants in common (*o*).

Devise to
trustees

14. Where the descent is broken by a devise of the whole fee simple to trustees upon trust to convey it to the testator's heir, they are bound to convey it to the person who is heir according to the common law, *i.e.*, the heir *ex parte paternâ*, although it came to the testator *ex parte maternâ* (*p*). But a mere devise to trustees for a purpose which fails (such as a devise upon a trust for conversion which is void for remoteness) does not affect the quality of the

(*g*) Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 2. The rule in cases where the death took place before the 1st January, 1834, was as follows: "Inheritances lineally descend to the issue *in infinitum* of the person last actually seized, but never lineally ascend" (2 Bl. Com. 208). As to what constituted actual seisin for the purpose of this rule, see *R. v. Sutton* (1835), 5 Nev. & M. (K. B.) 353; *Goodtitle d. Newman v. Newman* (1774), 3 Wils. 516; and *Watkins, Law of Descents*, 4th ed. (1837), p. 52.

(*h*) 3 & 4 Will. 4, c. 106.

(*i*) *Cooper v. France* (1850), 19 L. J. (CH.) 313, *per* SHADWELL, V.-C., at p. 314.

(*k*) *Cooper v. France*, *supra*; *Re Matson, James v. Dickinson*, [1897] 2 Ch. 509. It is difficult to reconcile these decisions with s. 2 of the Inheritance Act, 1833, but as *Cooper v. France* has never been questioned for over fifty years, it is no doubt binding. As to coparceners, see p. 10, *post*.

(*l*) Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 3. This reverses the old rule, under which the grantor or his heir or the testator's heir was considered to be entitled as of his former estate, or part thereof (see *Pilus v. Mitford* (1674), 1 Vent. 372; *Chaplin v. Leroux* (1816), 5 M. & S. 14; *Biederman v. Seymour* (1841), 3 Beav. 368).

(*m*) *Strickland v. Strickland* (1839), 10 Sim. 374; *Owen v. Gibbons*, [1902] 1 Ch. 636, C. A.

(*n*) *Owen v. Gibbons*, *supra*.

(*o*) *Ibid.* As to coparceners, see p. 10, *post*.

(*p*) *Davis v. Kirk* (1856), 2 K. & J. 391.

interest thus undisposed of, so that the heir takes the land in the character in which the testator had it, and if it came to the testator *ex parte maternâ*, his heir *ex parte maternâ* will take, and not his heir according to the common law (g).

SECT. 1.
Descent of
an Estate in
Fee Simple.

But this rule applies only to cases where the land is limited to the person or to the "heirs" of the person conveying the land; it does not apply where there is a limitation to a *persona designata*, even though such *persona designata* is in fact the heir (a).

15. Where a person has become entitled to lands under a limitation or devise to the heirs of his ancestor, the land descends, and the descent is traced as if the ancestor had been the purchaser (b).

When descent
traced from
ancestor.

16. Where there is a total failure of heirs of the purchaser, or where any land is descendible as if an ancestor had been the purchaser thereof, and there is a total failure of the heirs of such ancestor, the land descends and the descent is traced from the person last entitled as if he had been the purchaser thereof (c).

Failure of
heirs of
purchaser.

17. The equitable estate merges in the legal estate if they unite in the same person and are co-extensive and commensurate, and the legal estate then governs the descent. Thus, if the intestate held the equitable estate as purchaser but the legal estate by descent, the descent must be traced from the last purchaser of the legal estate (d).

Merger of
equitable
and legal
estates.

18. RULE No. 2.—The descent is in the first place to the issue of the purchaser lineally, the male issue being admitted before the female (e).

Priority of
males over
females.

(g) *Buchanan v. Harrison* (1861), 1 John. & H. 662.

(a) *Heywood v. Heywood* (1865), 34 Beav. 317.

(b) Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 4. For instance, if B., being the only child of A., settles land by a settlement in which the ultimate limitation is to the right heirs of A., and all the previous limitations fail, the descent is to be traced from A., and not from B. This is contrary to the former rule, under which such a grant or devise was treated as a restoration to the grantor or testator of part of his original estate, so that the line of descent was not broken (*Moore v. Simkin* (1885), 31 Ch. D. 95). The object of s. 4 of the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), was only to provide how the land is to descend in case the purchaser does not dispose of it, not to alter the estate which he himself takes. Thus, where land is limited to the right heirs of A. B. (who takes no interest in it), and his right heirs at the date of his death are three sisters and five daughters of a deceased sister, although for the purpose of ascertaining who are the *personæ designatæ* it is necessary to trace the descent from A. B., yet such *personæ* do not take by descent from him, but under the direct gift to them, and therefore they take as joint tenants and not as coparceners (*Derens v. Fellowes* (1887), 56 L. T. 391).

(c) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), ss. 19, 20. The Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), failed to provide for this case, with the result that in the case of deaths between 1st January, 1834, and 13th August, 1859, where there was a total failure of heirs of the purchaser, the heirs of the person last seized were not entitled to the land by descent, e.g., where a bastard purchased lands which descended to his son who died intestate and a bachelor, the persons claiming through the son's mother were not entitled to take as his heirs (*Doe d. Blackburn v. Blackburn* (1836), 1 Mood. & R. 547).

(d) *Brydges v. Brydges*, *Philips v. Brydges* (1797), 3 Ves. 310; *Re Douglas, Wood v. Douglas* (1884), 28 Ch. D. 327.

(e) 2 Bl. Com. 212.

SECT. 1.

Descent of
an Estate in
Fee Simple.

Order
between
males or
females
respectively.

Lineal
descendants.

Lineal
ancestors.

Priority of
paternal over
maternal
line.

19. RULE No. 8.—Where there are two or more males in equal degree, the eldest only inherits, but females of equal degree all inherit together (*f*). Females or heirs of females who inherit together are called coparceners (*g*); coparceners are said to be one heir to their ancestor (*h*); but on the death of a coparcener intestate her share descends to her heirs (*i*), and is subject to her husband's right of curtesy (*k*). Even after a partition each coparcener continues entitled to her share by descent and not by purchase (*l*).

20. RULE No. 4.—The lineal descendants in *infinitum* of any deceased person represent their ancestor (*m*), that is, they occupy the same position as he would have occupied if he had been alive (*n*).

21. RULE No. 5.—On failure of lineal descendants or issue of the purchaser, the nearest lineal ancestor inherits (*o*). Thus, a father is heir to his intestate son, in preference to the brother of the intestate. But this rule is to be read as meaning that every lineal ancestor shall be capable of being heir to any of his issue who are capable of inheriting from him. It does not do away with the rule that in order to claim as heir the claimant must be a son born in wedlock, and it is not sufficient that he should be legitimate in the country of his birth. Therefore a son born in Scotland before wedlock, although legitimated by the subsequent marriage of his parents, cannot take land in England as heir of his father, neither can his father inherit land from him under this rule (*p*).

22. RULE No. 6.—The paternal ancestor is preferred to the maternal ancestor. Accordingly no male maternal ancestor nor any of his descendants is capable of inheriting until all the paternal

(*f*) 2 Bl. Com. 214.

(*g*) Bac. Abr. tit. Coparceners; Littleton's Tenures, ss. 241, 254.

(*h*) Littleton's Tenures, s. 241; Co. Litt. 163 b.

(*i*) Littleton's Tenures, s. 280; *Paterson v. Mills* (1850), 19 L. J. (CH.) 310; *Cooper v. France* (1850), 19 L. J. (CH.) 313; *Re Matson, James v. Dickinson*, [1897] 2 Ch. 509.

(*k*) Co. Litt. 174 b.

(*l*) *Doe d. Crosthwaite v. Dixon* (1836), 5 Ad. & El. 834.

(*m*) 2 Bl. Com. 217.

(*n*) *E.g.*, if A. dies having had an elder son, B., who predeceased his father, but leaving a son D., and a younger son C., who survived A., A.'s heir is his grandson D.

(*o*) Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 6. The rule in cases where the death took place before 1st January, 1834, was: "On failure of lineal descendants or issue of the person last seized the inheritance descends to the blood of the first purchaser" (2 Bl. Com. 220), which was based on the feudal rule that a fief could not ascend. This rule was subject to an apparent exception, called "the doctrine of *possessio fratris*," under which the descent between brothers and sisters was immediate, so that in making out their title it was not necessary to name the common father, even if living (*Cullingwood v. Pace* (1664), 1 Vent. 413), and although the father was in fact unable to hold the fief, *e.g.*, by reason of being an alien; for, it was said, although the fief is not *antiquum*, still it descends "*ut antiquum*," and the ancestor for this purpose being an assumed person, he must further be assumed to have been a capable ancestor (*Kynnaird v. Leslie* (1866), L. R. 1 O. P. 389). But s. 5 of the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), provides that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every such descent shall be traced through the parent.

(*p*) *Re Don's Estate* (1857), 4 Drew. 194; compare *Doe d. Birtwhistle v. Vardill* (1835), 2 Cl. & Fin. 571, H. L.

ancestors and their descendants have failed; nor any female paternal ancestor, nor any of her descendants, until all the male paternal ancestors and their descendants have failed; nor any female maternal ancestor, nor any of her descendants, until all the male maternal ancestors and their descendants have failed (q).

SECT. 1.
Descent of
an Estate in
Fee Simple.

Under this rule the descendants of the maternal ancestors must be sought for, and taken as heirs when it has been shown after due inquiry that there is no reasonable probability of discovering descendants of a paternal ancestor. It is not necessary to show positively that there are no descendants of a male paternal ancestor (r). Where there is a failure of male paternal ancestors and their descendants, the mother of a more remote male paternal ancestor and her descendants are preferred to the mother of a less remote male paternal ancestor and her descendants; and where there is a failure of male maternal ancestors and their descendants, the mother of a more remote male maternal ancestor and her descendants are preferred to the mother of a less remote male maternal ancestor and her descendants (s).

23. RULE No. 7.—Any person related by the half-blood is capable of being the heir, and stands in the order of inheritance next after any relation in the same degree of the whole blood and his issue where the common ancestor is a male, and next after the common ancestor where the common ancestor is a female; so that the brother of the half-blood on the part of the father inherits next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half-blood on the part of the mother inherits next after the mother (t).

Half-blood.

24. Where an owner of freeholds dies leaving his wife *enceinte*, the qualified heir (i.e., the person who would be the heir if no child were subsequently born ranking before him in accordance with the rules of descent) is entitled to go into possession of the property and receive and retain the rents for his own benefit (a). But possibly

Qualified heir.

(q) Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 7.

(r) *Greaves v. Greenwood* (1877), 2 Ex. D. 289, C. A. As to presumption of death without issue, see title EVIDENCE.

(s) Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 8.

(t) *Ibid.*, s. 9. The rule in cases where the death took place before the 1st January, 1834, was, "The collateral heir of the person last seized must be his next collateral kinsman of the whole blood and the half-blood cannot inherit" (2 Bl. Com. 224).

(a) This applies both to rents actually received, and also to those accrued due before the birth of the posthumous child (*Richards v. Richards* (1860), John. 754; *Re Mowlem* (1874), L. R. 18 Eq. 9); and see *Re Wilmer's Trusts*, *Moore v. Wingfield*, [1903] 1 Ch. 874, *per* BUCKLEY, J., at p. 888.

In order to prevent the supplanting of the heir by a supposititious child of a deceased person, the heir presumptive was entitled to obtain, on petition (*Ex parte Bellet* (1786), 1 Cox, Eq. Cas. 297), a writ *de ventre inspiciendo*, to examine whether the widow announcing herself with child by the deceased husband was pregnant or not (Co. Litt., 19th ed. by Hargrave (1832), 8 b). This writ, presumably, is still available in a proper case. It was addressed to the sheriff commanding him to impanel a jury of twelve knights and twelve matrons to examine the widow. If the jury found she was pregnant she could be detained in safe custody until after delivery, or the expiration of forty weeks from the death of

SECT. 1.
Descent of
an Estate
in Fee
Simple.

Estates tail.

this is not the case where the legal estate is outstanding in trustees (b).

SECT. 2.—*Descent of an Estate Tail.*

25. An estate tail is such an estate as is limited to a succession of owners in a descending line only, and on a failure of such owners reverts to the grantor, unless barred. On the death of an owner of an estate tail the heirs in tail are entitled *per formam doni* (c).

Within the limits marked out by the original grant, the descent of an estate tail is the same, and the rules for ascertaining the heir are the same as those of an estate in fee simple (d); but the limitation of the grant to the heirs of the body of the donee renders it impossible that any of those rules subsequent to rule No. 4 (e) should apply; and if the estate is limited in tail male or in tail female, rules Nos. 2 and 3 (f) are so far unnecessary. In cases, however, where there is a special custom of descent, that custom is to be taken into account in ascertaining the heir in tail; thus, an estate tail in gavelkind lands descends to all the sons of the donee in equal shares, while borough English lands granted to a man and the heirs of his body descend to his youngest son (or youngest brother by special custom) (g), and copyhold lands granted to a man and the heirs of his body descend to his heir according to the custom of the manor (h).

SECT. 3.—*Descent of an Estate pur autre vie.*

Estates pur
autre vie
before 1898.

26. An estate which a man has for the life of another, which is called an estate *pur autre vie* (i) (whether legal or equitable) (k),

the husband (see *Willoughby's Case* (1597), Cro. Eliz. 566; *Theaker's Case* (1626), Cro. Jac. 686), but the practice in the more modern cases was to give right of access to persons representing the petitioner, rather than to order the strict detention of the woman (*Ex parte Aiscough* (1731), 2 P. Wms. 591; *Re Brown, Ex parte Wallop* (1792), 4 Bro. C. C. 90, and cases therein cited). The grant was also extended to devisees (*ibid.*).

(b) *Goodale v. Gawthorne* (1854), 2 Sm. & G. 375, which was criticised, but not definitely dissented from, in *Richards v. Richards*, *supra*.

(c) Statute of Westminster the Second, 1285 (13 Edw. 1, c. 1), s. 1. The language of s. 1 (1) of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), is wide enough to include these estates; but it is considered that on a reasonable construction that Act does not apply to any estate which the deceased was not competent to dispose of by will.

(d) See p. 7, *ante*.

(e) See p. 10, *ante*.

(f) See p. 9, *ante*.

(g) As to gavelkind, see p. 14, *post*; as to borough English, see p. 15, *post*.

(h) Copyhold lands are only entailable by custom (*Doe v. Truby* (1774), 2 Wm. Bl. 944, 946); in cases where there is no custom to entail, a grant of copyholds in words which, in the case of freeholds would create an estate tail, creates a fee simple conditional on birth of issue (*Doe d. Spencer v. Clark* (1822), 5 B. & Ald. 458; *Doe d. Blesard v. Simpson* (1842), 3 Man. & G. 929; *Hardcastle v. Dennison* (1861), 10 C. B. (N. S.) 606). As to the power of alienation of copyhold lands by the tenant in tail (similar to the power of barring the entail possessed by tenants in tail of freeholds), see title COPYHOLDS, Vol. VIII., p. 71.

(i) Co. Litt. 41 b; *Allen v. Allen* (1842), 2 Dr. & War. 307 (an Irish case).

(k) *Raynolds v. Wright* (1860), 2 De G. F. & J. 590.

SECT. 3.
Descent of
an Estate
*pur autre
vie*.

devolved in the case of deaths before 1838 to the executors or administrators, and was an asset in their hands, except in the case where it descended to the heir as special occupant; and even the heir taking as special occupant took it as an asset by descent (*l*). But the heir did not take by descent, the estate not being an estate of inheritance, or (as it was sometimes called) a descendible freehold (*m*), although it was chargeable in his hands, as in the case of land held in fee simple (*n*). To ascertain whether an estate *pur autre vie* goes to the heir or executor, it is necessary to look at the terms of the last conveyance, and not at the original grant, and if it is to go to the heir express words are necessary, and, in a deed at all events, the word "heir" must be used (*o*). In regard to equitable estates, the fact that the legal estate is conveyed to a trustee and his heirs is not sufficient to support an inference that the equitable estate must be treated as if the heir of the *cestui que trust* had been named as special occupant (*p*). Nor does the fact that a testator, seized of an estate *pur autre vie* limited to himself and his heirs, devises the whole equitable interest therein to one person, entitle the heirs of that person to claim as special occupants (*q*).

Where an estate *pur autre vie* devolves on executors or administrators it is applicable in the same manner as personal estate of the testator or intestate (*r*).

27. In the case of deaths on or after the 1st January, 1898, all estates *pur autre vie* of a freehold nature which before that date would have vested in the heir as special occupant, vest in the legal personal representatives (*s*).

Estates *pur
autre vie*
since 1897.

(*l*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 2, 6, repealing and re-enacting the Statute of Frauds (29 Car. 2, c. 3), s. 12; stat. (1774) 14 Geo. 2, c. 20, s. 9. The heir took as special occupant where the estate was limited to the grantee and his heirs (*Re Michell*, *Moore v. Moore*, [1892] 2 Ch. 87, 96), or to the grantee, his heirs, executors, and administrators (*Atkinson v. Baker* (1791), 4 Term Rep. 229); but not where the conveyance was to the grantee, his executors and administrators (*Northen v. Carnegie* (1859), 4 Drew. 587). If there was no heir in fact, although the heir, if any, would take as special occupant by virtue of the grant, the estate went to the legal personal representatives (*Reynolds v. Wright* (1860), 2 De G. F. & J. 590; and see *Plunket v. Reilly* (1852), 2 I. Ch. R. 585; *Doe d. Lewis v. Lewis* (1842), 9 M. & W. 662; *Doe d. Jeff v. Robinson* (1828), 8 B. & C. 296).

(*m*) *Doe d. Blake v. Luxton* (1795), 6 Term Rep. 289, per Lord KENYON, C.J., at p. 291.

(*n*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 6; *Doe d. Blake v. Luxton*, *supra*; *Re Inman*, *Inman v. Inman*, [1903] 1 Ch. 241.

(*o*) *Mount-Cashell (Earl) v. More-Smyth*, [1896] A. C. 168, per Lord DAVEY, at p. 165; *Re Sheppard*, *Sheppard v. Manning*, [1897] 2 Ch. 67; compare *Chatfield v. Berchtholdt* (1872), 7 Ch. App. 192.

(*p*) *Ibid.*

(*q*) *Re Inman*, *Inman v. Inman*, [1903] 1 Ch. 241, where the Irish cases of *Wall v. Byrne* (1845), 2 Jo. & Lat. 118, and *Re King*, *King v. King*, [1898] 1 I. R. 91; [1899] 1 I. R. 30, O. A., were not followed; *Sheffield (Sir J.) v. Mulgrave (Lord)* (1794), 5 Term Rep. 571.

(*r*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 6.

(*s*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1. See title REAL PROPERTY AND CHATELS REAL.

SECT. 4.

Descent of Customary Lands.**Customary freeholds.****Equitable estates.****Breaking descent of customary lands.****Copyholds.****SECT. 4.—Descent of Customary Lands.****SUB-SECT. 1.—Customary Freeholds.**

28. Customary lands of all kinds (*a*) descend to the heir according to the custom; but, subject to the custom, the rules for ascertaining the heir set out above (*b*) apply to customary lands as if they were freeholds (*c*).

With regard to equitable estates, where the trust is executed (*e.g.*, in the case of an equity of redemption or of a resulting trust) the descent is the same as if the estate were legal (*d*), except in the cases where the customary descent is only applicable to the case of "a tenant" or "a tenant dying seized" (*e*). But an executory interest descends to the heir according to the common law (*f*).

The descent of customary lands will not be broken unless the owner conveys away all his interest and, upon another transaction and by another conveyance, takes back the estate as a new estate, and so as to take it by purchase. It is not sufficient to convey it to a trustee for the owner (*g*).

SUB-SECT. 2.—Copyholds.

29. Copyholds (*h*) descend according to the custom of the manor of which they are held (*i*). In deciding questions as to the custom of a manor, the court should not depart from the literal meaning of the words of the custom as proved (*i*), or supply other words in their place, and in cases to which the custom as proved does not extend, the lands descend to the heir at common law (*k*).

(*a*) Under the term "customary lands" are included customary freeholds, gavelkind lands, borough English lands, and copyholds.

(*b*) See p. 7, *ante*.

(*c*) See Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 1, defining land as manors, advowson, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold, copyhold, or of any other tenure, and whether descendible according to the common law or according to the custom of gavelkind or borough English, or any other custom; and *Brown's Case* (1581), 4 Co. Rep. 21 a, 22 a; *Hook v. Hook* (1862), 1 Hem. & M. 43.

(*d*) *Blunt v. Clark* (1657), 2 Sid. 61; *Roberts v. Dixwell* (1738), 1 Atk. 607; *Starkey v. Starkey* (1745), 8 Bac. Abr. 802; *Faucet v. Lowther* (1751), 2 Ves. Sen. 300; *Re Hudson, Cassels v. Hudson*, [1908] 1 Ch. 655.

(*e*) Elton on Copyholds, 2nd ed., p. 139; *Payne v. Barker* (1662), O. Bridg. 18; *Rider v. Wood* (1855), 1 K. & J. 644, at p. 657. In *Trash v. Wood* (1839), 4 My. & Cr. 324, the custom as proved was that upon the death of a tenant seized of copyholds they should go to the younger son; but it was held that, despite the word "seized," the customary heir in tail was entitled to lands vested in a trustee in trust for the intestate and his heirs in tail, "for it is not to be expected that the court rolls should furnish evidence of a custom immediately applicable to trust estates, because all the transactions recorded in the court rolls are of transfers of the legal estate" (*per* Lord COTTENHAM, L.C., at p. 329).

(*f*) *Payne v. Barker*, *supra*; *Mallinson v. Siddle* (1870), 39 L. J. (OH.) 426; *Trash v. Wood*, *supra*; *Re Hudson, Cassels v. Hudson*, *supra*.

(*g*) *Nanson v. Barnes* (1869), L. R. 7 Eq. 250.

(*h*) Copyhold land is land holden by copy of court roll, held at the will of the lord according to the custom of the manor. See title COPYHOLDS, Vol. VIII., pp. 65 *et seq.*

(*i*) As to the customs of descent of copyholds, see title COPYHOLDS, Vol. VIII., pp. 86 *et seq.*; and as to the evidence by which customs of the manor are proved, see *ibid.*, pp. 9 *et seq.*

(*k*) *Denn d. Goodwin v. Spray* (1786), 1 Term Rep. 466; *Muggleton v. Barnett*

SUB-SECT. 3.—*Gavelkind Land.*SECT. 4.
Descent of
Customary
Lands.Descent of
gavelkind
land.

30. In Kent gavelkind (*l*) is the common law ; it is matter of judicial knowledge and need not be proved by evidence (*m*). The descent is among all the sons or their representatives ; where one brother dies without issue, all his brothers inherit (*a*), but if he has issue such issue stand in their father's place *per stirpes* (*b*).

In default of sons and their issue, lands subject to the custom of gavelkind descend to daughters (*c*). The partibility among heirs of the same degree extends to all degrees of remoteness (*d*). Females take after males of the same degree ; but *jure representationis* they may inherit together with males (*e*).

It seems that under a devise to the right heirs of the testator or of a stranger the heir at common law and not the gavelkind heirs take the devised estate (*f*).

SUB-SECT. 4.—*Borough English Land.*Descent of
borough
English
land.

31. Lands which are subject to the custom of borough English (*g*) descend to the youngest son of the deceased owner (*h*). By special custom lands may descend to the youngest brother, the youngest daughter or sister, or the youngest in any other degree (*i*). The daughter of a younger son (who has died in the lifetime of his father) takes *jure representationis* in preference to the next younger son who has survived the father (*k*).

A devise of borough English land to the heir or heirs of a deceased person may be read as a devise to the heir or heirs at

(1857), 2 H. & N. 653, Ex. Ch. Where the custom was for the lands to descend to the youngest son or daughter, brother or sister, uncle or aunt, and a tenant died leaving none of these but sons of a deceased uncle, it was held that the heir at common law was entitled to the lands, and not the youngest son of the youngest uncle (*Re Smart, Smart v. Smart* (1881), 18 Ch. D. 165).

(*l*) As to the custom of gavelkind generally, see title REAL PROPERTY AND CHATELS REAL.

(*m*) *Re Chenoweth, Ward v. Dwelley*, [1902] 2 Ch. 488. "In the county of Kent, where lands and tenements are holden in gavelkind, there by the custom and use the issues male ought equally to inherit" (Littleton's Tenures, 210).

(*a*) *Re Chenoweth, Ward v. Dwelley, supra*.

(*b*) Co. Litt. 140 a ; *Crump v. Norwood* (1815), 7 Taunt. 362.

(*c*) Statute de Prærogativa Regis (*temp. incert.*), c. 18.

(*d*) *Re Chenoweth, Ward v. Dwelley, supra* ; *Hook v. Hook* (1862), 1 Hem. & M. 43.

(*e*) *Clements v. Scudamore* (1703), 1 P. Wms. 63.

(*f*) *Thorp v. Owen* (1854), 2 Sm. & G. 90 ; *Garland v. Beverley* (1878), 9 Ch. D. 213 ; and compare *Polley v. Polley* (No. 2) (1862), 31 Beav. 363 (a case of borough English), and Co. Litt. 10 a. But see *contra Sladen v. Sladen* (1862), 2 John. & H. 369, *per* PAGE WOOD, V.-C., at p. 373, and *Hawes v. Hawes* (1880), 14 Ch. D. 614 (a limitation in a deed).

(*g*) As to the custom of borough English generally, see title REAL PROPERTY AND CHATELS REAL.

(*h*) Littleton's Tenures, s. 165 : "For some boroughs have such a custome that if a man have issue many sonnes and dyeth the youngest son shall inherit all the tenements which were his father's within the same borough as heire unto his father by force of the custome: the which is called Borough English."

(*i*) 1 Roll. Abr. 624, pl. 2 ; *Bayly v. Stevens* (1607), Cro. Jac. 198 ; *Ross v. Malster* (1635), Cro. Car. 410 ; *Rapley and Chaplein's Case* (1610), Godb. 166 ; *Denn v. Spray* (1786), 1 Term Rep. 466 ; *Re Smart, Smart v. Smart* (1881), 18 Ch. D. 165 ; compare *Muggleton v. Barnett* (1857), 2 H. & N. 653, Ex. Ch.

(*k*) *Clements v. Scudamore, supra*.

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Descent of
Customary
Lands.

common law, who take as *personæ designatæ*, and not to the borough English heir or heirs (l).

A younger son who takes land by the custom of borough English is nevertheless entitled to his full share of the intestate's personalty (m).

Part IV.—Distribution of Personal Estate.

Rules of
distribution
of personal
estate.

32. After an executor or administrator has paid the debts and funeral and testamentary expenses of the deceased and all other lawful liabilities and charges (n), it is his duty to distribute the clear surplus of the undisposed-of personal estate among the next of kin, who are ascertained in accordance with the following rules (o) :—

Married
woman
leaving
husband
surviving.

33. RULE No. 1.—If a woman dies intestate leaving a husband, the whole of her estate goes to him (p). If, however, a wife who has obtained a decree of judicial separation dies intestate, all property acquired by her since the date of the decree goes at her death in the same way as it would have gone if her husband had been then dead (q).

Widow and
issue.

34. RULE No. 2.—If a man dies intestate leaving a widow and issue, the widow is entitled to one-third of the estate, and if he leaves

(l) *Polley v. Polley* (No. 2) (1862), 31 Beav. 363 ; and see p. 15, note (f), and p. 13, note (b), ante.

(m) *Lutwyche v. Lutwyche* (1735), Cas. temp. Talb. 276.

(n) For the duties of an executor or administrator, see title EXECUTORS AND ADMINISTRATORS ; and for the law affecting the succession to foreign movables, see title CONFLICT OF LAWS, Vol. VI., pp. 220 *et seq.* Prior to 16th July, 1830 (the date of the passing of the Executors Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 40), the undisposed-of residue of the personal estate of a testator who had by his will appointed executors was taken by them beneficially ; that Act made executors trustees for the next of kin, unless the will or codicil showed an intention that the executors should take beneficially. See p. 28, *post*, and title WILLS.

(o) The interests under the Statute of Distribution (22 & 23 Car. 2, c. 10) vest in the persons entitled thereunder immediately on the death of the intestate (*Elliot v. Collier* (1747), 3 Atk. 526 ; *Browne v. Shore* (1689), 1 Show. 25 ; *Cooper v. Cooper* (1874), L. R. 7 H. L. 53). A direction by a testator that his estate is not to go to his next of kin according to the statutes would be inoperative if he died intestate, for he cannot override the law (*Johnson v. Johnson* (1841), 4 Beav. 318) ; but a direction by a testator that in case of his dying intestate as to any part of his property certain persons who would be some of his next of kin should not take, will be construed as an implied gift to the other persons who would take under the statutes (*Bund v. Green* (1879), 12 Ch. D. 819). The rules laid down in the Statute of Distribution (22 & 23 Car. 2, c. 10) are applied by analogy in cases of partial intestacy as to the beneficial interest to ascertain the persons to take, and the proportions in which they are to take (*Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71, C. A., *per FARWELL, J.*, at pp. 81, 82). Where a will contains a gift to a class to be ascertained by reference to the Statute of Distribution, the shares in which the class are to take, as well as the persons who are to take, are *prima facie* to be determined by reference to the statute (*Re Nightingale, Bowden v. Griffiths*, [1909] 1 Ch. 385).

(p) Statute of Frauds (29 Car. 2, c. 3), s. 24.

(q) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 25

a widow and no issue she is entitled to one moiety (r). But in cases where a man has died totally (s) intestate after the 1st September, 1890, leaving a widow but no issue, the whole of his real and personal estate, whether in possession, reversion, or contingency, if not exceeding £500 in net value at the date of his death (t), belongs to his widow absolutely (u). If such estate exceeds £500 in net value the widow is entitled to £500 thereof absolutely in addition to her interest and share in the residue of the real and personal estate of the intestate (a). This sum of £500 is secured to her by a charge upon the whole of such real and personal estate, with interest thereon from the date of the death of the intestate at 4 per cent. per annum until payment (b). But her rights under the Act may be barred by the provisions of her marriage settlement (c). As between the real and personal representatives of the intestate the charge is borne and paid in proportion to the values of the real and personal estates respectively (d), such values being ascertained in the case of a fee simple upon the basis of twenty years' purchase of the annual value by the year at the date of the death of the intestate as determined by law for the purposes of property tax, less the gross amount of any mortgage or other principal sum charged thereon, and less the value of any annuity or other periodical payment chargeable thereon (to be valued according to the tables and rules in the schedule annexed to the Succession Duty Act, 1853 (e)), and in the case of an estate for life or lives according to the said tables and rules (f), and in the case of personal estate by deducting from the gross value thereof all debts, funeral and testamentary expenses (g), and all other lawful liabilities and charges to which the said personal estate is subject (h).

35. RULE No. 8.—If the intestate leaves a widow but no next of kin, and the estate is over £500 in value, the widow takes, it is submitted, the first £500 and one moiety of the residue, and the other moiety goes to the Crown (i). But a widow is not entitled to

Widow and
no next of
kin.

(r) Statute of Distribution (22 & 23 Car. 2, c. 10), s. 3; *Keilway v. Keilway* (1726), Gilb. (CH.) 189; *Stanley v. Stanley* (1739), 1 Atk. 455.

(s) The Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), does not apply to cases of partial intestacy (*Re Twigg's Estate*, *Twigg v. Black*, [1892] 1 Ch. 579), but it applies to a case where the person named as executor and all the persons to whom benefits are given by the will predecease the testator (*Re Cuffe*, *Fooks v. Cuffe*, [1908] 2 Ch. 500).

(t) *Re Heath*, *Heath v. Widgeon*, [1907] 2 Ch. 270.

(u) Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), s. 1.

(a) *Ibid.*, ss. 2, 4.

(b) *Ibid.*, s. 2. The widow's dower is subject to the charge for £500 created by the Act, and must abate proportionately with the rest of the estate (*Re Charriere*, *Duret v. Charriere*, [1896] 1 Ch. 912).

(c) *Hogan v. Hogan*, [1901] 1 I. R. 168.

(d) Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), s. 3.

(e) 16 & 17 Vict. c. 51.

(f) Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), s. 5.

(g) The expression "testamentary expenses" here means the expenses of obtaining letters of administration and of administration generally (*Re Twigg's Estate*, *Twigg v. Black*, *supra*, per CHITTY, J., at p. 582).

(h) Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), s. 6.

(i) *Cave v. Roberts* (1836), 8 Sim. 214. The question whether the words

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Barred
widow's
claim.

take as one of the next of kin under a trust in a deed for "the next of kin according to the statutes for the distribution of the personal estates of persons dying intestate" (*k*).

A woman who has been judicially separated from her husband appears to be entitled upon his death intestate to her share of his property under the Statutes of Distribution (*l*); and a covenant by a wife in a separation deed that she will accept an annuity in lieu of all thirds out of her husband's estate does not bar her claim to her share of his estate on his intestacy (*m*).

36. The widow's claim under her husband's intestacy may, however, be barred wholly or partially either by the provisions of her marriage settlement or of her husband's will. Thus, if by a settlement the husband covenants that he will leave, or that his executors shall pay, a certain sum to his wife and he subsequently dies intestate, the sum is to be taken in satisfaction, or part satisfaction, as the case may be, of her rights under his intestacy (*n*). And similarly if by the settlement the wife (even during infancy (*o*)) agrees to take the provision thereby made for her in lieu of dower or thirds, she is thereby barred from claiming any interest on her husband's intestacy (*p*). But the settlement must be read as a whole to ascertain whether it is intended to bar the wife's claim against the whole of the husband's property or only against part of it (*q*).

A covenant by the husband to pay a sum in lieu of dower and thirds must be distinguished from a covenant by him which creates a present debt to the wife or to a trustee for her. Such a debt

"absolutely and exclusively" in s. 1 of the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), are sufficient, in the case of an estate not exceeding £500, to oust the Crown in favour of the widow has not yet been judicially decided. The Crown is not reached except by express words or by necessary implication (see title CONSTITUTIONAL LAW, Vol. VI., p. 409). There are no express words binding the Crown in this Act, but it is conceived that it would be held that the words "absolutely and exclusively" are sufficient to bind it by implication.

(*k*) *Cholmondeley v. Ashburton* (Lord) (1843), 6 Beav. 86.

(*l*) See *Rolfe v. Perry* (1863), 1 New Rep. 428, where a woman who had been divorced *à mensa et thoro* from her husband who died intestate was held entitled to her share of his property. By the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 7, a judicial separation is substituted for and has the same force and the same consequences as a divorce *à mensa et thoro*; and compare *In the Goods of Ihler* (1873), L. R. 3 P. & D. 50.

(*m*) *Slatter v. Slatter* (1834), 1 Y. & O. (ex.) 28. *Quære* whether this case ought not to be supported on the ground that an annuity is not a satisfaction of the wife's rights on an intestacy; compare *Couch v. Stratton* (1799), 4 Ves. 391; *Salisbury v. Salisbury* (1848), 6 Hare, 526.

(*n*) *Benson v. Bellasis* (1681), 1 Vern. 15; *Davila v. Davila* (1716), 2 Vern. 724; *Blandy v. Widmore* (1716), 1 P. Wms. 324; *Lee v. Cox* (1746), 3 Atk. 419; also reported *sub nom.* *Lee v. D'Aranda* (1746), 1 Ves. Sen. 1.

(*o*) *Drury v. Drury* (1762), 4 Bro. O. C. 506, n., H. L.; also reported *sub nom.* *Buckingham (Earl) v. Drury* (1762), 3 Bro. Parl. Cas. 492; *Glover v. Bates* (1739), 1 Atk. 439; but see *Seaton v. Seaton* (1888), 13 App. Cas. 61, *per* Lord HERSCHELL, at p. 67.

(*p*) *Gurly v. Gurly* (1842), 8 Cl. & Fin. 743, H. L.; *Druce v. Denison* (1801), 6 Ves. 385.

(*q*) *Colleton v. Garth* (1833), 6 Sim. 19; *Thompson v. Watts* (1862), 2 John. & H. 291. Compare *Creswell v. Byron* (1791), 3 Bro. O. C. 362.

must be paid out of the estate before there is any residue divisible among the persons claiming under the intestacy, and, therefore, cannot be set off against the wife's share (r).

Again, if the covenant by the husband is entire and indivisible, it does not bar, even *pro tanto*, the widow's rights under his intestacy where those rights are different from the rights secured by the covenant, *e.g.*, a covenant to pay an annuity does not bar her right to her distributive share of his estate, nor can the estimated value of the annuity be set off against such share (s). If a man by his will gives property to his wife and declares that it is to be taken in satisfaction of all dower and thirds, and dies partially intestate, the wife's rights in respect of the property as to which he has died intestate are determined by considering whether the intestacy appears to have been accidental or intentional. If the husband has on the face of his will disposed of all his property, but in the events which have happened part of it does not pass by his will, it is considered that he did not intend his wife to be in any worse position than his next of kin, and she takes her share of the property which is undisposed of (t). But where the intestacy is apparent on the face of the will, it is considered that the testator deliberately left the property to pass to his statutory next of kin in reliance on the exclusion of his wife by the declaration contained in his will, and she is therefore barred of her share under the intestacy (a).

37. RULE No. 4.—Subject to the rights of the husband or the widow (if any) the personal estate of an intestate who leaves issue is distributed by equal portions to and amongst the children of such person dying intestate and such persons as legally represent such children in case any of the said children be then dead, other than such child or children (not being the heir-at-law) who shall have any estate by the settlement of the intestate or shall be advanced by the intestate in his lifetime by a portion or portions; but if the portion of an advanced child is less than the distributive share of an unadvanced child, he or she takes out of the estate an amount sufficient to make up the deficiency (b). A posthumous child is for this purpose treated as if born in the lifetime of its father (c).

The word "children" means "legitimate children." The question of legitimacy is one of status, to be decided by the law of the domicile; therefore, if a child is legitimate by the law of the country where at the date of its birth its parents were domiciled, the law of

Issue.

Children.

(r) *Oliver v. Brickland* (1732), cited in *Lee v. Cox* (1746), 3 Atk. 419, at p. 420; *Lang v. Lang* (1837), 8 Sim. 451.

(s) *Couch v. Stratton* (1799), 4 Ves. 391; *Salisbury v. Salisbury* (1848), 6 Hare, 526.

(t) *Pickering v. Stamford* (Lord) (1797), 3 Ves. 332; *Garthshore v. Chalie* (1804), 10 Ves. 1.

(a) *Lett v. Randall* (1855), 3 Sm. & G. 83.

(b) Statute of Distribution (22 & 23 Car. 2, c. 10), s. 3. This rule applies to the case of an intestacy caused by the death of a sole legatee and executrix of a will in the lifetime of the testator (*Re Ford, Ford v. Ford*, [1902] 2 Ch. 603, O. A.).

(c) *Wallis v. Hodson* (1740), 2 Atk. 114; *Burnet v. Mann* (1748), 1 Ves. Sen. 156.

PART IV.
Distribution
of Personal
Estate.

Representa-
tives of
children.

England (except in the case of succession to real estate in England) recognises and acts on the status declared by the law of the domicil (*d*).

38. The persons who legally represent the children of an intestate are their descendants and not their next of kin (*e*); thus, if a person dies intestate leaving the child and widow of a deceased son him surviving, the child takes the whole share which the deceased son would have taken if he had survived the intestate, although the widow might equally with him have been termed a legal representative of the deceased son (*f*).

Notwithstanding the use of the plural in the Statute of Distribution (*g*), a single child takes the whole of the estate (*h*), or of the children's share (*i*), as the case may be.

Descendants of the intestate to the remotest degree stand in the place of their parent or other ancestor, and take *per stirpes* the share which he or she would have taken (*k*).

Heir-at-law.

The heir-at-law takes equally with the other children without taking into account any lands or the value of any lands to which he may be entitled as heir (*l*), or any sum laid out by the parent in his lifetime in improving such lands (*m*); but the heir must equally with the other children account for advances of personalty (*n*).

Advances.

39. In determining what payments are to be deemed payments by way of advancement and brought into hotchpot, a distinction is

(*d*) *Re Goodman's Trusts* (1881), 17 Ch. D. 266, C. A., in which case it was decided (overruling *Boyes v. Bedale* (1863), 1 Hem. & M. 798) that where parents domiciled in Holland had a child who was legitimated according to Dutch law by their subsequent marriage, the child could claim as a "brother's child," within the Statute of Distribution, of the father's brother, who died intestate domiciled in England. See also title CONFLICT OF LAWS, Vol. VI., pp. 224, 274.

(*e*) *Bridge v. Abbot* (1791), 3 Bro. C. C. 224, *per* ARDEN, M.R., at p. 226; *Evans v. Charles* (1793), 1 Anst. 128, *per* EYRE, C.B., at p. 132.

(*f*) *Price v. Strange* (1820), Madd. & G. 159.

(*g*) 22 & 23 Car. 2, c. 10.

(*h*) *Palmer v. Garrard* (1690), Prec. Ch. 21.

(*i*) *Brown v. Farndell* (1689), Carth. 51.

(*k*) *Re Ross's Trusts* (1871), L. R. 13 Eq. 286; *Re Natt, Walker v. Gammage* (1888), 37 Ch. D. 517. In the latter case NORTH, J., held that ss. 6, 7 (s. 5 in The Statutes Revised) of the Statute of Distribution (22 & 23 Car. 2, c. 10) ought to be read together, and the proviso at the beginning of s. 7 should be read at the end of the joint section. Thus, the statute provides for the cases of an intestate leaving (a) a wife and children (or descendants of children); (b) a wife and no children (or descendants of children); (c) no wife but children (or descendants of children); (d) neither wife nor children (or descendants of children); and in the case (c) the property is to go exactly as in case (a) so far as the children (or their descendants) are concerned. The direction in s. 6 for division equally among "next of kindred" only operates in default of children or their descendants, i.e., kindred must be read as meaning kindred other than children. And see *Lockyer v. Wade* (1741), Barn. (OH.) 444.

(*l*) Statute of Distribution (22 & 23 Car. 2, c. 10), s. 5. This applies to borough English land which descends to the younger son as heir (*Lutwyche v. Lutwyche* (1735), Cas. temp. Talb. 275), and to all realty, e.g., an annuity charged on land (*Chantrell v. Chantrell* (1877), 37 L. T. 220).

(*m*) *Smith v. Smith* (1801), 5 Ves. 721.

(*n*) Statute of Distribution (22 & 23 Car. 2, c. 10), s. 5; *Phiney v. Phiney* (1708), 2 Vern. 638; *Kirkcudbright (Lord) v. Kirkcudbright (Lady)* (1802), 8 Ves. 51.

PART IV.
Distribution
of Personal
Estate.

drawn between sums given as casual payments (*o*) or to relieve a child from temporary difficulties, and sums given to start a child in life or make a provision for him. The latter only are to be deemed advances by way of portion; but if the gift is of large amount there is a *prima facie* presumption that it is given by way of portion (*p*). No general rule can be laid down as to what is and what is not to be considered a portion, for the time and manner of the gift have in every case to be considered (*q*). Payments for education or maintenance (*r*), or apprenticeship (*s*), or gifts of jewellery or clothing (*t*), or annual allowances (*u*), are not advances. The payment which is made as a provision for a child is none the less a portion because it will not necessarily be permanent, or because it is not paid directly or entirely to him; thus, where a father makes a provision for a son on his marriage, or a daughter's portion is paid to her husband who covenants to lay it out in land to be settled, these are advances, and the whole sum paid, not merely the value of the child's life interest, is to be brought into account (*v*). The payment must, however, be made by the father in his lifetime (*w*), and the doctrine does not apply to cases of partial intestacy as to the beneficial interest (*x*), nor does it apply to advances made by a mother, even during her widowhood (*y*), nor is a widow entitled to the benefit of the doctrine for the purpose of ascertaining the amount of her share of her intestate husband's estate, the intention being merely to secure equality among the children (*z*). Descendants of an intestate who take by substitution the share which their parent or ancestor would have taken if living have to bring into account advances by way of portion made to such parent or ancestor (*a*).

Advances under the statute are taken without interest up Interest on
advances.

(*o*) Compare *Watson v. Watson* (1864), 33 Beav. 574.

(*p*) *Re Scott, Langton v. Scott*, [1903] 1 Ch. 1, C. A., in which case *Taylor v. Taylor* (1875), L. R. 20 Eq. 155 was followed in preference to *Boyd v. Boyd* (1867), L. R. 4 Eq. 305, and *Re Blockley, Blockley v. Blockley* (1885), 29 Ch. 1). 250. As to advancement, hotchpot, and portions, see also titles INFANTS AND CHILDREN; TRUSTS AND TRUSTEES; WILLS.

(*q*) *Re Scott, Langton v. Scott*, *supra*.

(*r*) *Pusey v. Desbouvrie* (1734), 3 P. Wms. 315, 317, n. (*o*).

(*s*) *Hender v. Rose* (1718), cited in *Pusey v. Desbouvrie*, *supra*.

(*t*) *Elliot v. Collier* (1747), 3 Atk. 526, 528.

(*u*) *Hatfeild v. Minet* (1878), 8 Ch. D. 136, C. A., at p. 144, *per* JAMES, L.J., in which case the payments of an annuity to a child under a deed of covenant during the father's life were not ordered to be brought into hotchpot, but the value of the annuity at the death was treated as an advancement.

(*v*) *Weyland v. Weyland* (1742), 2 Atk. 632; *Kirkcudbright (Lord) v. Kirkcudbright (Lady)* (1802), 8 Ves. 51; *Taylor v. Taylor* (1875), L. R. 20 Eq. 155; *Re Scott, Langton v. Scott*, *supra*.

(*w*) *Edwards v. Freeman* (1727), 2 P. Wms. 435.

(*x*) *Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71, where it was held that *Vachell v. Breton* (1706), 5 Bro. Parl. Cas. 51, *Wheeler v. Sheer* (1730), Mos. 288, and *Couper v. Scott* (1731), 3 P. Wms. 119, are still good law; and see *Twisden v. Twisden* (1804), 9 Ves. 413, at p. 425.

(*y*) *Holt v. Frederick* (1726), 2 P. Wms. 356.

(*z*) *Kirkcudbright (Lord) v. Kirkcudbright (Lady)*, *supra*.

(*a*) *Proud v. Turner* (1729), 2 P. Wms. 560; *Weyland v. Weyland*, *supra*, at p. 635; compare *Re Scott, Langton v. Scott*, *supra*. As to children of collaterals, see p. 23, *post*.

— IV.
Distribution
of Personal
Estate.

Father.

Mother,
brothers or
sisters.

Brothers or
sisters and
grandparent.

Nephews and
nieces.

to the death, but from the death (inasmuch as the distribution is referred back to the actual date of the death) interest at the rate of £4 per cent. per annum is allowed (b).

40. RULE No. 5.—If there are no descendants, then, subject to the rights of the widow, if any, the father takes the whole of the estate (c).

41. RULE No. 6.—If there are neither descendants, nor father, nor brothers, nor sisters, nor children of brothers or sisters of the intestate, then, subject to the rights of the widow, if any, the mother takes the whole of the estate (d); but if there are brothers or sisters, or children of brothers or sisters of the intestate, the mother shares the estate (or a moiety of the estate (after the first £500 has been deducted) if the deceased leaves a widow) equally with them (e), whether they are of the whole-blood or of the half-blood (f). But the right to stand in place of a deceased brother or sister as against the mother is confined to children of such brother or sister, so that if a man leaves a mother and grandchildren of his brother, the mother takes the whole (g). Neither a step-mother nor a mother-in-law can take anything, they not being any relation in blood (h).

42. RULE No. 7.—If there are neither descendants nor parents, but a grandparent and brothers or sisters, the brothers or sisters take the whole in priority to the grandparent (i).

43. RULE No. 8.—If there are no parents, but the next of kin (other than the widow) are brothers or sisters and children of deceased brothers or sisters, the estate goes to them *per stirpes*, but this is limited to the case where there is at least one brother or sister living; if all the next of kin are children of deceased brothers or sisters, the distribution among them is *per capita* (k).

Descendants of deceased collateral relatives of the intestate, other than the children of brothers and sisters, do not represent such collateral relatives (l).

(b) *Stewart v. Stewart* (1880), 15 Ch. D. 539, *per* JESSEL, M.R., at p. 545. The rate has not been reduced (*Re Davy, Hollingsworth v. Davy*, [1908] 1 Ch. 61, C. A., following *Re Hargreaves, Hargreaves v. Hargreaves* (1902), 86 L. T. 43; affirmed (1903), 88 L. T. 100; and not following *Re Whiteford, Inglis v. Whiteford*, [1903] 1 Ch. 889). See also *Re Gilbert, Gilbert v. Gilbert*, [1908] W. N. 63.

(c) *Blackborough v. Davis* (1701), 1 P. Wms. 41, at p. 51.

(d) *Jackson v. Prudhomme* (1716), 11 Vin. Abr. 196, *Executors*, Z, 12.

(e) Stat. (1685), 1 Jac. 2, c. 17, s. 7; *Kellway v. Kellway* (1726), 2 Stra. 710; *Stanley v. Stanley* (1739), 1 Atk. 455.

(f) *Crooke v. Watt* (1690), 2 Vern. 124; *Jessopp v. Watson* (1833), 1 My. & K. 665; *Burnet v. Mann* (1748), 1 Ves. Sen. 156.

(g) *Stanley v. Stanley*, *supra*; *Re Ross's Trusts* (1871), L. R. 13 Eq. 286.

(h) *Rutland (Duke) v. Rutland (Duchess)* (1723), 2 P. Wms. 209, 216.

(i) *Winchelsea (Earl) v. Norcliff* (1686), Freem. (OH.) 95; *Norberry v. Richards* (undated), cited 3 Atk. 763; *Evelyn v. Evelyn* (1754), 3 Atk. 762.

(k) *Re Ross's Trusts*, *supra*, *per* WICKENS, V.O., at p. 293; *Lloyd v. Tench* (1751), 2 Ves. Sen. 213, *per* STRANGE, M.R., at p. 215; *Walsh v. Walsh* (1695), Prec. Ch. 54; *Bowers v. Littlewood* (1719), 1 P. Wms. 594.

(l) Statute of Distribution (22 & 23 Car. 2, c. 10), s. 4; *Carter v. Crauley* (1681), T. Raym. 496; *Valdicot v. Smith* (1683), 2 Show. 286.

44. RULE No. 9.—In all other cases, subject to the rights of the widow (if any) the estate goes to the next of kin ascertained in accordance with the civil law rule, namely, *quot personæ tot gradus*, computing up from the intestate to the common ancestor and then down again to the claimant, the next of kin of equal degree sharing equally *inter se*, and no priority being given to males over females (*m*), or to the whole-blood over the half-blood (*n*). Thus, the aunt of an intestate is in the same degree as his nephews, for each of them is three steps removed (namely, in the case of the aunt, the father, grandfather and aunt; in the case of the nephews, the father, brother and nephew), and shares with them equally *per capita* (*o*). So an uncle takes before a cousin of the intestate, and a grandmother takes before an uncle or an aunt (*p*), and a nephew or niece takes before a grandnephew or grandniece (*q*), while a great-grandparent and an uncle or aunt take in equal shares (*r*).

Distribution
of Personal
Estate.

Other
relations.

The children of deceased brothers or sisters of an intestate do not have to bring into account advances made to their parent (*s*).

Advances to
collaterals.

Part V.—Escheat and Right to Bona Vacantia.

SECT. 1.—*Escheat of Real Estate.*

45. Escheat is the right whereby land of which there is no longer any tenant returns, by reason of tenure, to the lord by whom, or by whose predecessors in title, the tenure was created (*t*). It is not strictly a reversion, as there cannot be a reversion expectant upon an estate in fee simple (*a*), nor is it accurate to speak of the lord as taking the land by way of succession or inheritance as if from the tenant. The tenant's estate, subject to any charges upon it which he may have created, has come to an end, and the lord is in by

Nature of
escheat.

(*m*) *Mentrey v. Petty* (1722), Proc. Ch. 593; *Thomas v. Ketteriche* (1749), 1 Ves. Sen. 333; *Moor v. Barham* (1723), cited 1 P. Wms. (6th ed.) 53.

(*n*) *Watt v. Crooke* (1690), Show. Parl. Cas. 108.

(*o*) *Lloyd v. Tench* (1751), 2 Ves. Sen. 213.

(*p*) *Ibid.*, per STRANGE, M.R., at p. 215; *Blackborough v. Davis* (1701), 1 P. Wms. 41; *Woodroff v. Wickworth* (1719), Proc. Ch. 527; *Mentrey v. Petty* (1722), Proc. Ch. 593.

Pett v. Pett (1700), 1 Salk. 250.

Lloyd v. Tench, *supra*, at p. 215.

Re Gist, *Gist v. Timbrill*, [1906] 2 Ch. 280, C. A.

A.-G. of Ontario v. Mercer (1883), 8 App. Cas. 767, P. O., per Lord SELBORNE, L.C., at p. 772; "Escheate is a term of art and derived from the French word *escheate* that is *cadere excidere* or *accidere* and signifyeth property when by accident the lands fall to the lord of whom they are holden" (Co. Litt. 13 a; *ibid.* 92 b; and see *Termes de la Ley*, Escheate; 3 Com. Dig. tit. Escheat (A. 1); *May and Bannister v. Street* (1688), Cro. Eliz. 120). For escheat, see also titles COPYHOLDS, Vol. VIII., pp. 54 *et seq.*; REAL PROPERTY AND CHATELS REAL; as to the procedure on escheat, see title CROWN PRACTICE, Vol. X., p. 35.

(*a*) *A.-G. of Ontario v. Mercer*, *supra*.

SECT. 1.
Escheat of
Real Estate.

Lands
subject to
escheat.

Intestates
Estates Act,
1884.

his own right (*b*). Escheat was an incident of feudal tenure, and was based on the want of a tenant to perform the feudal services (*c*).

46. Lands held in socage, whether of the Crown or a mesne lord (*d*), have always been liable to escheat; but the interest which escheats must be the whole fee (*e*). On the failure of issue under an estate tail, the land entailed does not escheat, but reverts to the owner of the reversion in fee expectant on the determination of the estate tail (*f*).

47. In the case of the death intestate and without heirs since the 14th August, 1884 of a person entitled to any estate or interest, legal or equitable, in any incorporeal hereditament, or to any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat applies as if his estate or interest were a legal estate in corporeal hereditaments (*g*); and where any beneficial interest in the real estate of any deceased person, whether legal or equitable, is, owing to the failure of the objects of the devise or other circumstances happening either before or after the death of such person, in whole or in part not effectually disposed of, such person is deemed for the purposes of the Intestates Estates Act, 1884, to have died intestate in respect of such part of the said beneficial interest as is ineffectually disposed of (*h*).

(*b*) *A.-G. of Ontario v. Mercer* (1883), 8 App. Cas. 767, P. C.

(*c*) See *A.-G. v. Sands* (1669), Hard. 488; Tudor, L. C. Real Prop. 211; *Burgess v. Wheate* (1759), 1 Eden, 177, per CLARKE, M.R., at p. 201.

(*d*) The law of escheat as it affects copyholds will be found discussed under title COPYHOLDS, Vol. VIII., pp. 54 *et seq.*

(*e*) Prior to the passing of the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), things which did not lie in tenure were not subject to escheat. Thus a rentcharge did not escheat on the death of the owner intestate and without heirs, but ceased for the benefit of the owner of the land charged (*A.-G. v. Sands* (1669), Hard. 488, per HALE, C.B.; Tudor, L. C. Real Prop. 211; and see *Windsor (Dean and Canons) v. Webb* (1613), Godb. 211).

(*f*) 3 Com. Dig. tit. Escheat (A. 1); Fitz. Nat. Brev. 144.

(*g*) Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4.

(*h*) *Ibid.*, s. 7. Ss. 4 and 7 of the Act are to be read together; so that where a testatrix who left no heir devised a house to trustees in trust to sell and pay debts and legacies, and the will contained no gift of the residue of the proceeds of sale, it was held under s. 7 that she had died intestate as regards such residue, and under s. 4 that it escheated to the Crown (*Re Wood, A.-G. v. Anderson*, [1896] 2 Ch. 596). Previously to the passing of the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), the legal owner of the estate was entitled to retain it for his own benefit notwithstanding that the equitable owner had died intestate and without heirs, for there could not be an escheat where the Crown or the lord had a tenant. This principle was applied to the case of a trustee of freeholds who had no *cestui que trust* (*Burgess v. Wheate* (1759), 1 Eden, 177; *Cox v. Parker* (1856), 22 Beav. 168); a trustee of copyholds (*Taylor v. Haygarth* (1844), 14 Sim. 8); a trustee of shares in the New River Company (*Davall v. New River Co.* (1849), 3 De G. & Sm. 394); and a legal mortgagee (*Beale v. Symonds* (1853), 16 Beav. 406). But an equitable mortgagee, or a mortgagee of a term, was not entitled to the estate on failure of heirs of the mortgagor. Subject to the mortgage debt the estate escheated to the Crown (*Rogers v. Maule* (1841), 1 Y. & C. Ch. Cas. 4; *Prescott v. Tyler* (1837), 1 Jur. 470). The Crown was not entitled to call upon a trustee, to whom personalty had been bequeathed upon trust for conversion, to convert it in order to raise a title in the Crown by way of escheat (*Walker v. Denne* (1793), 2 Ves.

48. There is some conflict of authority on the question whether the freehold lands of a corporation which has been dissolved escheat to the Crown or the mesne lord, or whether they revert to the grantor. The weight of authority seems to be in favour of the latter view (i).

On the winding-up of a company incorporated under the Companies Acts, 1862 to 1908, its property is sold and the net proceeds are distributed among the members (k). It does not appear to have been decided in whom the real estate of a defunct company, the name of which has been struck off the register (l), vests; but it would appear to vest in the Crown (m). But the term created by a lease which is vested in a defunct company appears to come to an end when the company is dissolved (n).

49. Property of which the deceased was seized as a trustee or mortgagee cannot escheat. It passes to the legal personal representatives of the deceased (o), unless it is copyhold, in which case it passes to the customary heir (if any) (p). But the court has power to make an order vesting trust or mortgage estates in the person entitled thereto (q).

SECT. 1.
**Escheat of
Real Estate.**
Dissolved
corporations.
Defunct
companies.

Trust and
mortgage
estates.

170); nor was the Crown entitled to call upon a trustee, to whom land had been devised upon condition that he paid a certain sum to a charity, the gift to the charity being void under the Statutes of Mortmain, to raise that sum and pay it to the Crown (*Henckman v. A.-G.* (1834), 3 My. & K. 485).

(i) The authorities in favour of the view that the lands revert to the grantor are Co. Litt. 13 b; *A.-G. v. Gower* (Lord) (1740), 9 Mod. Rep. 224, per Lord HARDWICKE, L.C., at p. 226; *Burgess v. Wheate* (1759), 1 Eden, 177, per Lord MANSFIELD, C.J., at p. 229; *Colchester Corporation v. Brooke* (1846), 7 Q. B. 339, per Lord DENMAN, at p. 384; 1 Bl. Com. 484; 2 Bl. Com. 256; 1 Preston, Abstracts of Title, 272; Grant, Law of Corporations, p. 303; Lewis on Perpetuities, p. 621; and compare the judgments of DARLING and PHILLIMORE, JJ., in *Hastings Corporation v. Letton & Sons*, [1908] 1 K. B. 378, a case of chattels real; the authorities supporting the view that the land escheats are *Johnson v. Norway* (1622), Win. 37; *Southwell v. Wade* (1598), 1 Roll. Abr. 816 (A), pl. 1; Hargrave's note (71) to Co. Litt. 13 b; Gray, The Rule against Perpetuities, pp. 32 *et seq.* As to the disposition of freehold land on the dissolution of a corporation, see title CORPORATIONS, Vol. VIII., p. 401; and on the winding-up of a company, see title COMPANIES, Vol. V.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 170, 186.

(l) See Companies Act, 1880 (43 Vict. c. 19), s. 7; Companies Act, 1900 (63 & 64 Vict. c. 48), s. 26; both repealed and re-enacted by Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 49), s. 242.

(m) Compare *Re Higginson and Dean, Ex parte A.-G.*, [1899] 1 Q. B. 325.

(n) *Hastings Corporation v. Letton & Sons*, *supra*; but where a company is a trustee of the term new trustees can be appointed and a vesting order made (*Re General Accident Assurance Corporation, Ltd.*, [1904] 1 Ch. 147; *Re No. 9, Bomore Road*, [1906] 1 Ch. 359).

(o) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), 30.

(p) See title COPYHOLDS, Vol. VIII., p. 55.

(q) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26, 29. In former times, on the death intestate and without heirs of a trustee or mortgagee, the estate escheated to the Crown or the lord (*A.-G. v. Leeds (Duke)* (1833), 2 My. & K. 313), unless the lord had admitted the trustee or mortgagee on a surrender which gave him notice of the trust, in which case he was bound by it (*Weaver v. Maule* (1830), 2 Russ. & M. 97). The hardship thereby inflicted on *certain que trust* and mortgagors has been remedied by statute (see Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26, 29, whereby the court is enabled to make vesting orders of trust and mortgage estates).

SECT. 1.

Escheat of
Real Estate.Escheat
propter
delictum
tenentis.

50. An escheat must arise either *propter delictum tenentis* or *propter defectum tenentis* (r). Escheat *propter delictum tenentis* is confined to cases of outlawry, for escheats and forfeitures to the Crown in all cases of treason, felony, and *felo de se* have been abolished since the 4th July, 1870 (s). Outlawry in civil proceedings has been abolished (t), but in criminal proceedings, though almost obsolete, it has not been abolished, and a sentence of outlawry would still carry with it the penalty of forfeiture (u).

Escheat
propter
defectum
tenentis.

51. Escheat *propter defectum tenentis* occurs where the last owner dies intestate as to the land and without any heir. In this event (which most commonly occurs where a bastard (v) has become possessed of lands as purchaser, and dies intestate without issue) the lord or the Crown, as the case may be, re-enters in right of his or its former ownership, the estate which was granted having come to an end (a).

To whom
land escheats.

52. Escheat is to the mesne lord if he can be found; but as since the year 1290 sub-infeudation has been forbidden (b), in the great majority of cases there is no record of the mesne tenure, and the escheat is to the Crown as the lord paramount of the whole soil of the country, or to the Duchy of Lancaster in cases within the Duchy (c). Copyhold land cannot escheat to the Crown unless the Crown is lord of the manor of which the copyholds are held (d).

(r) Co. Litt. 13 a, 92 b.

(s) The date of the passing of the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 1. Before this Act was passed a conviction of treason or felony or a judgment of outlawry or an *abjuratio regni* (as to which, see 4 Bl. Com. 327) was held in law to cause corruption of the blood. No inheritance could be claimed through a person whose blood was corrupt, and the Crown became entitled to his lands during his life, and for a year, day, and waste (1 Com. Dig. 618; 22 Vin. Abr. 550). In cases of high treason the Crown became absolutely entitled to the convict's lands; but in the other cases the lord was entitled subject to the right of the Crown during the life of the person convicted and for a year, day, and waste; but the Crown, of course, also became absolutely entitled if no person could prove his title as lord (4 Bl. Com. 378, 381). S. 10 of the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), provided that after the death of an attainted person his descendants might trace their descent through him as if he had not been attainted. Lands held in gavelkind were forfeited by a conviction for treason, but not for felony (1 Doctor and Student, Dialogue 1, c. 10; Robinson on Gavelkind, 5th ed., pp. 176, 180). Copyholds were forfeited to the lord, not to the Crown (*Cornwallis (Lord) Case* (1683), 2 Vent. 38, 39). The estates of inheritance of a man who died a *felo de se* did not escheat to the Crown, but passed to his heir-at-law (*Norris v. Chambers* (1861), 29 Beav. 246).

(t) Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), s. 3.

(u) The procedure in these cases, which is highly technical, is stated in rr. 88—110 of the Crown Office Rules, 1906. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 431.

(v) A bastard is *nullius filius* (Co. Litt. 3 b.); and see title BASTARDY, Vol. II., pp. 438 *et seq.*

(a) *Burgess v. Wheate* (1759), 1 Eden, 177; 2 Co. Inst. 64.

(b) Statute Quia Emptores, 1289 (18 Edw. 1. stat. 1, c. 1).

(c) *Dyke v. Walford* (1846), 5 Moo. P. C. C. 434; *Megit v. Johnson* (1780), 2 Doug. (x. b.) 542, per Lord MANSFIELD, O.J., at p. 548; and see Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 8, and title CONSTITUTIONAL LAW, Vol. VII., pp. 217 *et seq.* As to escheat in the Duchy of Cornwall, compare *Cornwall (Solicitor of Duchy) v. Canning* (1880), 5 P. D. 114.

(d) *Walker v. Denne* (1793), 2 Ves. 170. See title COPYHOLDS, Vol. VIII.,

As the Land Transfer Act, 1897 (e), does not bind the Crown, it would appear that escheated real estate vests in the Crown and not in the legal personal representative, so that where the solicitor to the Treasury applies for a grant to him, as the representative of the Crown, of administration of the estate of a person who has died without issue a bastard and intestate, the proper form is to grant letters of administration of the personal estate only (f).

The right of the Crown to an escheat can be barred by adverse possession (g).

SECT. 1.
Escheat of
Real Estate.
Effect of
Land Transfer
Act, 1897.

Barring
Crown rights.

53. Property which has escheated to the Crown may in certain cases be granted to the family of, or to persons adopted as part of the family of, the person whose estates the same have been, or to the person discovering the escheat (h), and upon application being duly made this may be done by way of waiver of the right of the Crown (i); but subject as above, the Crown cannot grant any real estate alleged to be escheated until after an inquisition finding the title thereto has been returned to the Central Office of the Supreme Court of Judicature (k). Such inquisition should find of whom the estate was held, and if it does not so find, any person aggrieved is entitled to obtain from the High Court of Justice an order for the taking of another inquisition (l), but no inquisition can prejudice any rights which at the time of the death leading to the inquisition were vested in some other person (m).

Regrant of
escheated
lands.

54. The rights of a mesne lord taking by escheat are similar to those of the Crown (n), but some act of the lord is requisite to perfect his title; the actual possession of the land cannot be gained until he enters or brings his action to recover the land (o). And since the 4th of July, 1870, the lord has had no right to escheat *propter delictum tenentis* (p). His right to escheat *propter defectum tenentis* has since the 29th of August, 1833 (q), been subject to the payment

Escheats to
mesne lord.

(e) 60 & 61 Vict. c. 65.

(f) *In the Goods of Hartley*, [1899] P. 40. Where, on the other hand, a creditor of the intestate applied for administration, the grant was made "in respect of all the estate of the deceased, which by law devolves to and vests in the legal personal representative" leaving the question open (*In the Goods of Ball*, [1902] W. N. 226). See title CONSTITUTIONAL LAW, Vol. VII., pp. 178, 209.

(g) *Tuthill v. Rogers* (1844), 6 L. Eq. R. 429.

(h) Crown Private Estate Act, 1800 (39 & 40 Geo. 3), c. 88; Crown Land Act, 1819 (59 Geo. 3), c. 94; Intestates Estates Act, 1884 (47 & 48 Vict. c. 71) s. 6; and compare *Moggridge v. Thackwell* (1803), 7 Ves. 36, at p. 71; *Mason v. A.-G. of Jamaica* (1843), 4 Moo. P. C. C. 228.

(i) Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 6.

(k) Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53), s. 2 (3).

(l) *Ibid.*, s. 2 (5).

(m) *Ibid.*, s. 2 (4). For the rules made under this Act, see Statutory Rules and Orders Revised, Vol. IV., Escheat, England. As to the inquisition of escheat, see title CROWN PRACTICE, Vol. X., p. 35.

(n) See pp. 24 *et seq.*, *ante*.

(o) 3 Cru. Dig. tit. 30, pl. 9.

(p) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 1. Prior to 4th July, 1870, in cases of felony, other than high treason, the land escheated to the lord subject to the Crown's right to a year, day, and waste. A remainder or reversion in fee was the subject of escheat just as much as an estate in possession (Bro. Abr. tit. Prerogative, pl. 25).

(q) Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104).

SECT. 1.
Escheat of
Real Estate.

of the debts of his tenant, even though such debts were not charged by the tenant on his lands (*r*). The Intestates Estates Act, 1884, appears to be as much in favour of the mesne lord (if any) as of the Crown (*s*).

SECT. 2.—Right to Personal Estate.

Bona
vacantia.

55. The Crown is entitled to goods which have no other owner, commonly called *bona vacantia* (*t*). This right is one of the *jura regalia* which have been inherent in the Crown from the earliest times (*u*). It extends not only to the property of persons who die intestate leaving no next of kin (*a*), but also to personal property other than a leasehold interest in land (*b*) held in trust for a corporation aggregate which has been dissolved (*c*), to the proceeds of sale of real estate sold by a tenant for life, and paid to trustees appointed under the Settled Land Acts, 1882 to 1890 (*d*), and to moneys held by trustees for a purpose which has failed (*e*). But it is doubtful whether the Crown is entitled to things consisting purely of legal rights of action, such as debts. It may be that they are extinguished (*f*). The Crown is also entitled to property in this country belonging to a foreigner who has died abroad intestate and without next of kin, although by the law of his domicile such property would go to the foreign State (*g*).

When
executors
take against
the Crown,

56. Where a testator appoints an executor, or executors, but does not make any disposition of his residuary personalty, or makes a disposition which fails, the residuary personalty is taken by the executor or executors beneficially, and if more than one as joint tenants, unless on the true construction of the will the testator has signified his intention that they shall not take beneficially, in which case, the Crown takes the residuary personalty as *bona vacantia* (*h*). The Executors Act, 1830 (*i*), does not alter the old law as between the executors and the Crown, and it is therefore proper to consider the decisions before the date of that statute, as well as those subsequent to it, in order to ascertain what language indicates an intention that the executors are not to take beneficially (*k*). The

(*r*) *Evans v. Brown* (1842), 5 Beav. 114; *Hughes v. Wells* (1852), 9 Hare, 749.

(*s*) See p. 24, *ante*. The commonest case of escheat to a mesne lord arises in the case of copyholds, as to which see title COPYHOLDS, Vol. VIII., pp. 54 *et seq.*

(*t*) *Dyke v. Walford* (1846), 5 Moo. P. C. C. 434; *Taylor v. Haygarth* (1844), 14 Sim. 8; *Powell v. Merrett* (1853), 1 Sm. & G. 381; and see title CONSTITUTIONAL LAW, Vol. VII., p. 209.

(*u*) *Dyke v. Walford*, *supra*.

(*a*) *Taylor v. Haygarth*, *supra*; *Powell v. Merrett*, *supra*. See also title CONSTITUTIONAL LAW, Vol. VII., p. 209.

(*b*) *Hastings Corporation v. Letton & Sons*, [1908] 1 K. B. 378.

(*c*) *Re Higginson and Dean, Ex parte A.-G.*, [1899] 1 Q. B. 325.

(*d*) *Re Bond, Panes v. A.-G.*, [1901] 1 Ch. 15.

(*e*) *Cunnack v. Edwards*, [1896] 2 Ch. 679, C. A.; *Braithwaite v. A.-G.*, [1909] 1 Ch. 510.

(*f*) *Re Higginson and Dean, Ex parte A.-G.*, *supra*, at p. 332.

(*g*) *Re Barnett's Trusts*, [1902] 1 Ch. 847.

(*h*) *Read v. Stedman* (1859), 26 Beav. 495, and cases cited in notes (*o*) (*p*), *on p. 29, post*.

(*i*) 11 Geo. 4 & 1 Will. 4, c. 40; see p. 16, note (*n*), *ante*.

(*k*) *Read v. Stedman*, *supra*; *Re Knowles, Roose v. Chalk* (1880), 28 W. R. 975.

rules laid down in those decisions are not to be extended as against the executors (*l*).

**SECT. 2.
Right to
Personal
Estate.**

What words import an intention that executors are not to take.

57. There must be on the face of the will a "strong and violent" presumption that the executors are not to take beneficially (*m*); but it need not be "irresistible" (*n*). Thus, the presumption is raised by the gift of a pecuniary legacy to a sole executor (*o*), or by equal pecuniary legacies to all the executors (*p*), since it cannot be thought that the testator would expressly give a part when he is also giving the whole. But a legacy to one only of several executors (*q*), or unequal pecuniary legacies to them (*r*), or equal pecuniary legacies in addition to different specific gifts (*s*), will not be held to show an intention that they are not to take beneficially, since if they took as executors, they would take in equal shares.

If it is clear on the face of the will that the testator intended his executors to take as trustees, they cannot take beneficially (*t*), and it makes no difference that the property is given to them in their own names and the appointment as executors is contained in a subsequent part of the will (*a*), or that only one of several executors is expressed to take as a trustee (*b*). But expression of an intention that the executors are to be trustees of part of the estate is no ground for inferring that they are intended to be trustees of the whole (*c*).

Indication from express trusteeship.

58. Expressions in the will showing that the testator intended to pass only such property as he specifically mentioned (*d*), or intended to make a further disposition of such of his property

Other indications of intention.

(*l*) *A.-G. v. Jefferys*, [1908] A. C. 411.

(*m*) *Dacre v. Patrickson* (1860), 1 Drew. & Sm. 182.

(*n*) *Pratt v. Sladden* (1807), 14 Ves. 193.

(*o*) *Androvin v. Poilblanc* (1745), 3 Atk. 299; *Urquhart v. King* (1802), 7 Ves. 225; *Ommaney v. Butcher* (1823), Turn. & R. 260.

(*p*) *A.-G. v. Tomkins* (1754), 1 Amb. 216; *Middleton v. Spicer* (1783), 1 Bro. C. C. 201; *Nourse v. Finch* (1791), 1 Ves. 344; *Taylor v. Haygarth* (1844), 14 Sim. 8; *Craddock v. Owen* (1854), 2 Sm. & G. 241; *Saltmarsh v. Barret* (1861), 3 De G. F. & J. 279, C. A.; *Chester v. Chester* (1871), L. R. 12 Eq. 444.

(*q*) *Cloyne (Bishop) v. Young* (1750), 2 Ves. Sen. 91; *Bennet v. Batchelor* (1789), 3 Bro. C. C. 28; *Pratt v. Sladden*, *supra*.

(*r*) *Griffiths v. Hamilton* (1806), 12 Ves. 298; *Re Knowles*, *Roose v. Chalk* (1880), 28 W. R. 975.

(*s*) *A.-G. v. Jefferys*, [1908] A. C. 411.

(*t*) *North (Lord) v. Purdon* (1752), 2 Ves. Sen. 495; *A.-G. v. Tomkins*, *supra*; *Bennet v. Batchelor* (1789), 3 Bro. C. C. 28; *Muckleston v. Brown* (1801), 6 Ves. 52; *Vezey v. Jamson* (1822), 1 Sim. & St. 69; *Taylor v. Haygarth*, *supra*; *Johnstone v. Hamilton* (1865), 11 Jur. (N. S.) 777; *Chester v. Chester*, *supra*. In Ireland it has been held that the mere fact that persons are appointed in the same sentence to be trustees and executors is a sufficient indication of a testator's intention that they are not to take beneficially (*Dillon v. Reilly* (1881), 9 L. R. Ir. 57). As to the admission of parol evidence, see *Re Bacon's Will*, *Camp v. Coe* (1886), 31 Ch. D. 460.

(*a*) *Ellcock v. Mapp* (1851), 3 H. L. Cas. 492; *Read v. Stedman* (1859), 26 Beav. 495.

(*b*) *Milnes v. Slater* (1803), 8 Ves. 295, at p. 308; *Griffiths v. Hamilton*, *supra*.

(*c*) *Battleley v. Windle* (1786), 2 Bro. C. C. 31; *Dawson v. Clarke* (1811), 18 Ves. 247.

(*d*) *Urquhart v. King* (1802), 7 Ves. 225

SECT. 2.
Right to
Personal
Estate.

as he did not specifically deal with (e), or imagined that he had in fact disposed of the whole of his property (f), are sufficient to defeat the executor's claim to take beneficially. And where a testator uses language implying that he is imposing a burden rather than a benefit on his executors, the inference is drawn that he intends only to confer on them the office, without any possibility of benefit (g).

A declaration in the will that the testator intends his property to pass according to law was sufficient to oust the executors in favour of the next of kin (h) and, presumably, is still sufficient to oust them in favour of the Crown.

Proceedings
by the
Crown to
recover *bona*
vacantia.

59. In cases where a person has died intestate and it is considered that his property belongs to the Crown as *bona vacantia*, letters of administration are taken out by an administrator "for the use and benefit of the Crown"; and the duty of the administrator is to get in the estate, pay the debts of the intestate, and account for the balance for the use of the Crown (i). At the present time the proper person to take the grant of administration is the Treasury Solicitor, who is a corporation sole (j) and deals with the property according to rules made in pursuance of the Treasury Solicitor Act, 1876 (k).

Proceedings
by next of
kin against
the Crown.

60. Where administration is taken out by the Treasury Solicitor or other nominee of the Crown, and the next of kin subsequently appear and make good their claim, they are entitled to recover the property from the Crown; but if the Sovereign to whom the property has been handed over is dead before the claim is established, the right of the next of kin appears to be against his executors, not against his successor (l). Interest is payable by the Crown as from the date when the property came to the hands of its nominee (m).

Procedure
etc.

61. All actions and proceedings by or against the Treasury Solicitor, or other nominee of the Crown for the recovery of personal estate of an intestate which has been received by the Crown as *bona vacantia*, are of the same character, and are brought, instituted, and carried on, and are subject to the same rules of law and equity (including the rules of limitation under the Statutes of Limitation or otherwise) in all respects as if the administration had been granted to the Treasury Solicitor or other nominee as one of the next of

(e) *Mordaunt v. Hussey* (1798), 4 Ves. 117; *Mence v. Mence* (1811), 18 Ves. 348.

(f) *Giraud v. Hanbury* (1817), 3 Mer. 150.

(g) *North (Lord) v. Purdon* (1752), 2 Ves. Sen. 495; *Giraud v. Hanbury*, *supra*; *Braddon v. Ferrand* (1827), 4 Russ. 87.

(h) *Cranley (Lord) v. Hale* (1807), 14 Ves. 307.

(i) *Megit v. Johnson* (1780), 2 Doug. (K.B.) 542; *R. v. Sutton* (1670), 1 Wms. Saund. 271 b, n. 1.

(j) See title CONSTITUTIONAL LAW, Vol. VII., p. 78.

(k) Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), s. 4.

(l) *A.-G. v. Kohler* (1861), 9 H. L. Cas. 654, at p. 672.

(m) *Ibid.*; *Partington v. A.-G.* (1869), L. R. 4 H. L. 100; *Re Dewell, Edgar v. Reynolds* (1858), 4 Drow. 269.

kin of the deceased (*n*). No information or other proceeding on the part of the Crown can be filed or instituted, and no petition of right can be presented in respect of such personal estate or any claim thereon, except within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought by or against a subject *o*).

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Right to
Personal
Estate.

62. Where an estate is administered by an executor or administrator who hands over the balance to the Crown because he cannot discover any next of kin to the deceased, the next of kin are entitled to treat this as a breach of trust, and to proceed against him and make him responsible, but their right is against the executor or administrator personally, and not against an administrator subsequently nominated by the Crown, unless the latter makes himself personally responsible, *e.g.*, by taking out letters of administration *de bonis non* (*p*).

Liability of
executor
who hands
property to
Crown.

63. The Crown is not liable to pay interest to next of kin who subsequently prove their title in respect of property handed over to it by an executor or administrator who has administered the estate and handed over the balance to the Crown because he cannot discover any next of kin (*q*).

Interest.

64. The right to *bona vacantia* within the Duchy of Lancaster is vested in the Crown by a separate title (*r*); and that to *bona vacantia* within the Duchy of Cornwall is vested in the Prince of Wales as Duke of Cornwall (*s*). The *jura regalia* relating to property within the County Palatine of Durham have been separated from the royalty or franchise of the County Palatine and revested in the Crown (*t*).

Duchies of
Lancaster and
Cornwall.

n) Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 2.

o) *Ibid.*, s. 3. See title EXECUTORS AND ADMINISTRATORS.

A.-G. v. Kohler (1861), 9 H. L. Cas. 654, at p. 672.

Re Gosman (1881), 17 Ch. D. 771, O. A.

r) See title CONSTITUTIONAL LAW, Vol. VII., pp. 217 *et seq.*

s) *Ibid.*, pp. 228 *et seq.*; *Cornwall (Solicitor of Duchy) v. Canning* (1880), 5 D. 114.

t) See title CONSTITUTIONAL LAW, Vol. VII., p. 216.

DESIGNS.

See PATENTS AND DESIGNS.

DESTRUCTIVE INSECTS.

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DETINUE AND DETENTION.

See ACTION ; TROVER AND CONVERSION.

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DISCOVERY, INSPECTION, AND INTERROGATORIES.

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Part I.—The Nature of Discovery.

Meaning of
term
"Discovery."

65. The term "Discovery" is used to describe certain processes by which a party to a civil cause or matter (a) is enabled to obtain from the opposite party information in writing and on oath relating to the questions of fact (b) in dispute between them for the

(a) A mandamus to enforce a civil right (*R. v. Ambergate etc. Rail. Co.* (1852), 17 Q. B. 957), an information in the nature of a *quo warranto* (*R. v. Shelley* (1789), 3 Term Rep. 141), and proceedings in the Divorce Court (*Mordaunt v. Moncrieffe* (1874), L. R. 2 Sc. & Div. 374), are civil proceedings. As to criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 387.

(b) Matters of law cannot be the subject-matter of discovery (see *Flight v.*

PART I.
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Discovery.

purpose of preparing for the trial of the cause or of perfecting the judgment delivered, or for the purpose of enabling the judgment when perfected to be carried into effect. Discovery for the latter purpose is called "Discovery in aid of execution," and is essentially different from discovery for the former purpose, since it consists of oral examination as opposed to written, and is of the nature of a cross-examination, whereas the former is much less extensive in scope. The modes of discovery for the former purpose are really three in number, namely, disclosure of the existence of documents, inspection of documents, and interrogatories, but the term "Discovery" is often used as meaning the two former modes considered as one. In this article the term "Discovery" is used as applying to these three modes unless the contrary is stated, and not to discovery in aid of execution (c).

Extent of
right to
discovery.

66. The extent to which discovery may be called in aid by a party will be discussed in connection with the various forms discovery may take (d); but, generally, it extends to enable the one party to get information on oath from the opposite party relating to any relevant facts material to the question in issue which are in the possession of the latter, and it does not matter whether such facts are required as evidence or in aid of proof, or to avoid the expense or delay of proving them in some other way, nor whether the applicant already knows the facts or could prove them in some other way (e). Discovery may be granted when the facts sought to be obtained will prove even the whole cause of action, or substantiate the entire defence (f). There are certain restrictions on the right to discovery which are dealt with hereafter (g).

Practice.

67. With respect to actions in the High Court, the practice and procedure as to discovery are governed by the Rules of the Supreme Court, made under the Judicature Acts (h), so far as such rules exist (i). Where, however, no provision is made by rules the practice formerly obtaining in the Court of Chancery (j), and even the old common law practice, whether under the Common Law Procedure Acts or otherwise, so far as it does not conflict with that formerly obtaining in the Court of Chancery, may be resorted

Robinson (1844), 8 Beav. 22, 33; *Hoffmann v. Postill* (1869), 4 Ch. App. 673; *Whateley v. Crowter* (1855), 5 E. & B. 709).

(c) For discovery in aid of execution, see title EXECUTION.

(d) See pp. 58, 67, 92, *post*.

(e) *A.-G. v. Gaskill* (1882), 20 Ch. D. 519, 526 *et seq.*, C. A.; *Finch v. Finch* (1752), 2 Ves. Sen. 491; *Chadwick v. Chadwick* (1852), 22 L. J. (CH.) 29; *Grumbrecht v. Parry* (1883), 32 W. R. 203; *Bustros v. White* (1876), 1 Q. B. D. 423, C. A.; *Hodsoll v. Taylor* (1873), L. R. 9 Q. B. 79, 82. For admissions of facts under R. S. C., Ord. 32, see titles EVIDENCE; PRACTICE AND PROCEDURE.

(f) See *Hodsoll v. Taylor*, *supra*; *Acheson v. Henry* (1871), 5 I. R. O. L. 496; *McFadden v. Liverpool Corporation* (1868), L. R. 3 Ex. h. 279.

(g) See pp. 67, 72, *post*.

(h) R. S. C., Ord. 31.

(i) *Jones v. Monte Video Gas Co.* (1880), 5 Q. B. D. 556, 557, C. A.; *Bolckow v. Fisher* (1882), 10 Q. B. D. 161, 168, C. A.; *Kearsley v. Philips* (1883), 10 Q. B. D. 465, 466, C. A.

(j) R. S. C., Ord. 72, r. 2; *Wilson v. Church* (1878), 9 Ch. D. 552, 554; *A.-G. v. Gaskill*, *supra*, at pp. 525, 526, 530.

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Effect of
Judicature
Acts.

to or followed (*k*). Where there is a variance the rules of equity prevail (*l*).

68. It has been said that the Judicature Acts have not altered the law with regard to discovery, but the practice merely (*m*), neither the right to grant it nor to refuse it having been enlarged (*n*) or diminished (*o*). But it does not follow that the provisions of the Acts do not affect the substance as well as the form of the procedure by means of which these rights are to be ascertained (*p*), and in one sense of the word they may be said to alter the rights, and to enable a party to obtain discovery where it could not previously have been had either at law or in equity. For instance, where the auxiliary jurisdiction of the Court of Chancery was sought to procure discovery by a plaintiff suing at law on his legal title, if the defendant pleaded that he was a *bonâ fide* purchaser for value without notice, the plea was a complete answer to the bill, though this did not hold good where the court of equity had concurrent jurisdiction. Now the plaintiff in every action is entitled to discovery as ancillary to the relief he claims (*q*).

And again, a court of equity in the exercise of its auxiliary jurisdiction would refuse its aid to enforce discovery in some actions of tort, though it was enforced in common law actions under the powers of obtaining discovery given by the Common Law Procedure Acts. Now, however, it may be obtained in every action (*r*), notwithstanding the rule as to the prevalence of equitable principles under the Judicature Acts, since it has been held that the rule has no application where an action is properly brought in a court which has power to enforce discovery by interrogatories (*a*).

Any right to discovery which existed under the old practice by bill in Chancery can now be enforced under the Rules of the Supreme

(*k*) See *Cooke v. Oceanic Steam Co.*, [1875] W. N. 220; *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, 654, C. A.; *China Steamship Co. v. Commercial Assurance Co.* (1881), 8 Q. B. D. 142, 145, C. A.; *Bolckow v. Fisher* (1882), 10 Q. B. D. 161, C. A., at p. 168; *Dalrymple v. Leslie* (1881), 8 Q. B. D. 5, 7; *A.-G. v. Gaskill* (1882), 20 Ch. D. 519, 530, C. A.; and *Eade v. Jacobs* (1877), 3 Ex. D. 335, 337, C. A.

(*l*) *Bustros v. White* (1876), 1 Q. B. D. 423; *Anderson v. Bank of British Columbia*, *supra*, at pp. 654, 658; *Bolckow v. Fisher*, *supra*; *Atherley v. Harvey* (1877), 2 Q. B. D. 524, 528; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11).

(*m*) *Kearsley v. Phillips* (1883), 10 Q. B. D. 465, C. A.; *Hunnings v. Williamson* (1883), 10 Q. B. D. 459, 462; *Ind, Coope & Co. v. Emmerson* (1887), 12 App. Cas. 300, *per* Lord WATSON at p. 309.

(*n*) *Hunnings v. Williamson*, *supra*, at p. 464; *Roberts v. Oppenheim* (1884), 26 Ch. D. 724, 729, C. A.; *Lyell v. Kennedy* (1883), 8 App. Cas. 217, *per* Lord SELBORNE, L.C., at p. 223; but see *Bolckow v. Fisher*, *supra*, *per* BAGGALLAY, L.J., at p. 166, and *Philips v. Philips* (1879), 40 L. T. 816, *per* LINDLEY, J., at p. 821.

(*o*) *Bustros v. White*, *supra*, *per* JESSEL, M.R., at p. 426; *Philips v. Philips*, *supra*; *Roberts v. Oppenheim*, *supra*, at p. 733. As to the discretion conferred by R. S. C., Ord. 31, rr. 12, 18, see pp. 59, 107, *post*.

(*p*) *Ind, Coope & Co. v. Emmerson*, *supra*, *per* Lord WATSON, at p. 309.

(*q*) *Ibid.*, *per* Lord HERSCHELL, at pp. 310, 311.

(*r*) *Lyell v. Kennedy*, *supra*, *per* Lord FITZGERALD, at pp. 233, 234.

(*a*) *Fisher v. Owen* (1878), 8 Ch. D. 645, C. A., *per* COTTON, L.J., at p. 654.

Court (b), and any principles which previously existed in the Court of Chancery are now binding in all divisions of the High Court (c). So, also, the Judicature Acts have not done away with any right to discovery which existed at common law before any statutory powers were conferred upon the common law courts (d).

**PART I.
The
Nature of
Discovery.**

69. In former days it was often necessary to resort to the Court of Chancery and commence a suit by bill there for the purpose alone of getting discovery. But from the time of the passing of the Common Law Procedure Acts and the Judicature Acts this practically ceased to be necessary. Instances of such actions are now rarely met with, since any discovery formerly obtainable only by bill in Chancery can now be obtained in an action in any division of the High Court (e).

Action for
discovery.

But in some cases an action for discovery will still lie, *e.g.*, at the suit of the owner of a trade mark against shipowners who have shipped goods bearing counterfeits of the plaintiff's trade mark for discovery of the names of the consignors of the goods against whom an action is contemplated (f). An action will not, however, be entertained for the purpose of getting discovery in aid of proceedings in an inferior or foreign court which has power to compel discovery (g), nor in aid of proceedings to be commenced in England for the recovery of land situate out of the jurisdiction, since the proper course is to sue in the foreign court (h).

70. Another mode of enforcing discovery is by writ of mandamus. This method is practically confined to public documents or to documents of public companies (i), and lies outside the scope of the present article (k).

Discovery by
mandamus

Part II.—Discovery in General.

SECT. 1.—In what Proceedings Discovery may be granted.

71. Discovery may be ordered in any "cause" or "matter" (l). "Cause," as used in the Judicature Acts, includes any action, suit, or other original proceeding between a plaintiff and defendant, and

Generally.

(b) *Ramsden v. Brearley* (1875), 33 L. T. 322, 323; and see *Eade v. Jacobs* (1877), 3 Ex. D. 335, 337, C. A.

(c) *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, C. A., at p. 658.

(d) *Brown v. Liell* (1885), 16 Q. B. D. 229, 230. See as to discovery relating to ship's papers, p. 65, *post*.

(e) *Ramsden v. Brearley*, *supra*.

(f) *Orr v. Diaper* (1876), 4 Ch. D. 92. See for another instance, *Ainsworth v. Starkie*, [1876] W. N. 8.

(g) *Dreyfus v. Peruvian Guano Co.* (1889), 41 Ch. D. 151, 157.

(h) *Reiner v. Salisbury (Marquis)* (1876), 8 Ch. D. 378, 385.

(i) See *R. v. Southwold Corporation, Ex parte Wrightson* (1907), 97 L. T. 431; *R. v. Bradford-on-Avon Rural District Council, Ex parte Thornton* (1908), 99 L. T. 89; *Davies v. Gas Light and Coke Co.*, [1909] 1 Ch. 248, 253, affirmed [1909] 1 Ch. 708, C. A.; *Bank of Bombay v. Suleman Somji* (1908), 99 L. T. 62, P. C.

(k) See titles COMPANIES, Vol. V.; CORPORATIONS, Vol. VIII., p. 323; CROWN PRACTICE, Vol. X., p. 81.

(l) R. S. C., Ord. 31, rr. 1, 12.

SECT. 1.
In what
Proceedings
Discovery
may be
granted.

any criminal proceeding by the Crown of a civil nature, while "matter" includes every proceeding in court not in a cause(m). It includes a motion to set aside an award (n). The right, therefore, exists in all actions in the High Court, including actions for recovery of land (a), actions for specific performance when the defendant challenges the plaintiff's title in some particular respect (b), and actions for conspiracy (c); in proceedings under the Patents and Designs Act and the Trade Marks Acts (d); in interpleader proceedings (e); in proceedings under a reference to an official or special referee under s. 14 of the Arbitration Act, 1889 (f), where either the court or the referee may order discovery (g). But after an action and all matters in difference have been referred to arbitration by consent, the court has no power to order discovery (h). Discovery may also be granted in third party proceedings (i); proceedings under the Companies Acts (j) and Copyright Acts (k); proceedings by mandamus to enforce a civil right (l); an inquiry

(m) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100; R. S. O., Ord. 71, r. 1.

(n) *Re Fenner Lord*, [1897] 1 Q. B. 667, C. A.

(a) *Lyell v. Kennedy* (1853), 8 App. Cas. 217 (reversing 20 Ch. D. 484); *Wrentmore v. Hagley* (1882), 46 L. T. 741; *Fortescue v. Fortescue* (1876), 34 L. T. 847; *New British Mutual Investment Co. v. Peed* (1878), 3 C. P. D. 196; *Miller v. Kirwan*, [1903] 2 I. R. 118; *Eyre v. Rodgers* (1891), 40 W. R. 137. Where the claim to recover possession is founded on an alleged forfeiture, discovery will not be ordered as against the defendant unless there are other issues involved, in which case discovery will be confined to those issues (*Mexborough (Earl) v. Whitwood Urban District Council*, [1897] 2 Q. B. 111, C. A., overruling *Seaward v. Dennington* (1896), 44 W. R. 696); and see pp. 65, 103, *post*, and title LANDLORD AND TENANT.

(b) *Jones v. Watts* (1890), 43 Ch. D. 574, C. A.

(c) *National Association of Operative Plasterers v. Smithies* (1906), 22 T. L. R. 678, H. L.

(d) *Birch v. Mather* (1883), 22 Ch. D. 629; *Re Haddan's Patent* (1884), 54 L. J. (CH.) 126; *Ashworth v. Roberts* (1890), 45 Ch. D. 623; *Re Wills' Trade-marks*, [1892] 3 Ch. 201, C. A.; *Benno Jaffe und Darmstaedter Lanolin Fabrik v. Richardson & Co.* (1893), 62 L. J. (CH.) 710; *Fennessy v. Clark* (1887), 37 Ch. D. 184, C. A.; *Crossley v. Tomey* (1876), 2 Ch. D. 533; and see titles PATENTS AND DESIGNS; TRADE MARKS.

(e) R. S. O., Ord. 57, r. 13; and see title INTERPLEADER.

(f) 52 & 53 Vict. c. 49; and see title ARBITRATION, Vol. I., p. 487.

(g) *Macalpine v. Calder*, [1893] 1 Q. B. 545, C. A.; compare *Hayward v. Mutual Reserve Association*, [1891] 2 Q. B. 236; R. S. O., Ord. 36, r. 50.

(h) *Penrice v. Williams* (1883), 23 Ch. D. 353; and see *Darlington Wagon Co. v. Harding and Trouville Pier and Steamboat Co.*, [1891] 1 Q. B. 245, C. A. A county court judge sitting as an arbitrator under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), has no jurisdiction to make an order for discovery before the hearing, either by affidavit of documents or by interrogatories (*Sutton v. Great Northern Rail. Co.*, [1909] 2 K. B. 791, C. A., applying *Mountain v. Parr*, [1899] 1 Q. B. 805, C. A.).

(i) *McAllister v. Rochester (Bishop)* (1880), 5 C. P. D. 194; and see *Eden v. Weardale Coal and Iron Co.* (1887), 34 Ch. D. 223, 35 Ch. D. 287; and p. 44, *post*.

(j) *Re Credit Co.* (1879), 11 Ch. D. 256; *Re National Funds Assurance Co.* (1876), 24 W. R. 774, C. A.; see, further, title COMPANIES, Vol. V.

(k) *Ecclesiastical Gazette v. Nisbet & Co.* (1901), 110 L. T. Jo. 493, C. A.; and see title COPYRIGHT, Vol. VIII., p. 168.

(l) *R. v. Ambergate etc. Rail. Co.* (1852), 17 Q. B. 957; see also *R. v. London and St. Katharine Docks Co. (Directors)* (1874), 44 L. J. (Q. B.) 4; and titles COMPANIES, Vol. V.; CORPORATIONS, Vol. VIII., p. 328; CROWN PRACTICE, Vol. X., p. 81.

pro interesse suo (*m*); but not in election petitions (*n*), nor, so far as the suppliant is concerned, petitions of right (*o*), though the Crown is not under a like disability (*p*), and not in criminal, as opposed to civil, proceedings (*q*). Moreover, in civil proceedings where the action is brought merely to establish a forfeiture or enforce a penalty, discovery will not be allowed, and if allowed may be resisted (*r*). But if there are other issues in the action, not involving a penalty or forfeiture, or the action is to establish some civil right apart from the penalty, the court may make an order for discovery as to those issues or with regard to that part of the action (*s*). The refusal of the courts to order discovery in such an action must not be confused with the right of a party in any action to object on oath that the discovery will tend to criminate him or expose him to a penalty (*a*).

SECT. 1.
In what
Proceedings
Discovery
may be
granted.

Action for
forfeiture or
penalty.

72. The Probate, Divorce, and Admiralty Division, as a division of the High Court, is invested with the jurisdiction formerly exercised by the courts transferred to the High Court (*b*), and

Probate,
Divorce, and
Admiralty
Division of
the High
Court.

(*m*) *Alton v. Harrison*, [1869] W. N. 81.

(*n*) *Wells v. Wren* (1880), 5 O. P. D. 546, followed in *Moore v. Kennard* (1883), 10 Q. B. D. 290; and see title ELECTIONS.

(*o*) *Thomas v. R.* (1874), L. R. 10 Q. B. 44; see title CROWN PRACTICE, Vol. X., p. 33.

(*p*) *Tomline v. R.* (1879), 4 Ex. D. 252, C. A.

(*q*) *Montague (Lord) v. Dudman* (1751), 2 Ves. Sen. 396; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 387.

(*r*) *Mexborough (Earl) v. Whitwood Urban District Council*, [1897] 2 Q. B. 111, 117, C. A. (forfeiture of land, overruling *Seaward v. Dennington* (1896), 44 W. R. 696); *Whiteley v. Barley* (1887), 56 L. J. (Q. B.) 312 (penalties under Public Health Act, 1875 (38 & 39 Vict. c. 55)); *Jones v. Jones* (1889), 22 Q. B. D. 425 (penalties for pound breach and rescue of chattels, under stat. (1689) 2 Will. & M. c. 5, s. 4); *Hunnings v. Williamson* (1883), 10 Q. B. D. 459 (penalties for acting as a vestryman after ceasing to be one); *Martin v. Treacher* (1886), 16 Q. B. D. 507, C. A. (penalties under Public Health Act, 1875 (38 & 39 Vict. c. 55)); *Hobbs & Co. v. Hudson* (1890), 25 Q. B. D. 232, C. A. (action for double value under Distress for Rent Act, 1737 (11 Geo. 2, c. 19)); *Saunders v. Wiel*, [1892] 2 Q. B. 321, C. A. (under Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 58); compare *Adams v. Batley* (1887), 18 Q. B. D. 625, C. A. (under Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15), s. 2); and *Derby Corporation v. Derbyshire County Council*, [1897] A. C. 550 (where action held not penal and discovery allowed); *United States of America v. MacRae* (1867), 3 Ch. App. 79 (penalties in a foreign country); *A.-G. v. Lucas* (1843), 12 L. J. (CH.) 506 (marriage with a minor, charge under Marriage Act, 1823 (4 Geo. 4, c. 76), s. 23); *Honeywood v. Selwin* (1738), 3 Atk. 276 (seat in Parliament); *Short v. Mercier* (1851), 3 Mac. & G. 205; and *Williams v. Trye* (1854), 2 Eq. Rep. 766 (penalties under Stock Jobbing Acts); *Brownsword v. Edwards* (1751), 2 Ves. Sen. 243; *Chetwynd v. Lindon* (1752), 2 Ves. Sen. 450; and *Finch v. Finch* (1752), 2 Ves. Sen. 491 (punishment in Ecclesiastical Courts, as to which, see title ECCLESIASTICAL LAW, *post*). A possibility of liability is sufficient to justify refusal (*Harrison v. Southcote* (1737), 1 Atk. 526, 539).

(*s*) *Mexborough (Earl) v. Whitwood Urban District Council*, *supra*; *Martin v. Treacher*, *supra*, at p. 513, *per* LINDLEY, L.J.; *A.-G. v. Brown* (1818), 1 Swan. 265, 294.

(*a*) See p. 82, *post*.

(*b*) Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 23; Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 18; *Harvey v. Lovekin* (1884), 10 P. D. 122, C. A.; *The Bula* (1876), 34 L. T. 185; *The Radnorshire* (1880), 5 P. D. 172. See also title COURTS, Vol. IX., p. 52.

SECT. 1.
In what
Proceedings
Discovery
may be
granted.

Matrimonial
causes.

where no special provision is made such jurisdiction is to be exercised in the same manner as was formerly done by those courts. The rules made under the Judicature Acts apply to probate and admiralty actions, but not to matrimonial causes (c). As to the last-mentioned causes, therefore, the court is thrown back upon the old practice of the Ecclesiastical Courts and the Court for Divorce and Matrimonial Causes. These courts granted discovery both by interrogatories (d) and discovery of documents (e), and in practice it is granted now, but where it is sought for the purpose of proving a charge of adultery it will not be allowed, and the party need not take the objection on oath as in an ordinary case (f). Where the King's Proctor intervenes, an order for discovery by him will not be made (g).

Probate
actions.

73. In consequence of the peculiar nature of the inquiry in probate actions it may be said generally that the court tends to exercise a wider latitude in ordering discovery in these actions than is exercised in actions in other divisions of the High Court. For instance, when the issue raised relates to the testamentary capacity of the deceased the inquiry may legitimately extend to the history of the large part or even the whole of his life, and everything in the handwriting of the testator is material (h). The usual practice, therefore, is to order discovery of all facts and documents throwing light on that history which might turn out to have any possible bearing on the issue raised. The same remarks also apply, though to a less extent, where the issue raised is the exercise of undue influence or of fraud (i), or where the allegation is that the deceased did not know or approve of the contents of the will in question. With regard to documents belonging to the deceased, inspection will be allowed to the other party to the suit when they happen to be under the control of a party pending the suit, subject to the right to refuse it dealt with hereafter (j), and if the possession is other than that of a party inspection will be granted equally to the parties (k).

(c) R. S. O., Ord. 68, r. 1 (d).

(d) *Dunn v. Coates* (1738), 1 Atk. 288; *Anon.* (1752), 2 Ves. Sen. 451; *Harvey v. Lovekin* (1884), 10 P. D. 122, at pp. 127, 129, O. A., following *Euston v. Smith* (1884), 9 P. D. 67.

(e) See *Redfern v. Redfern*, [1891] P. 139, 149, O. A.; *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, O. A., per CHITTY, L.J., at p. 134.

(f) *Redfern v. Redfern*, *supra*, at pp. 139, 146, 149. In *E. v. E.* (1907), 24 T. L. R. 78, interrogatories as to the communication of a venereal disease were disallowed in a divorce suit, notwithstanding the contention that they were permissible to prove cruelty and not adultery, that being one of the grounds of the petition. See also p. 82, *post*, and title HUSBAND AND WIFE.

(g) *D. v. D.* (1909), 53 Sol. Jo. 359.

(h) *Austin v. Collett* (1907), *Times*, 7th December, per BARGRAVE DEANE, J.

(i) See also p. 80, *post*, and title WILLS.

(j) See p. 72, *post*.

(k) See *In the Goods of Shepherd*, [1891] P. 323, where the executor and solicitor of a deceased testatrix were ordered to deposit in the Registry all wills and testamentary papers of the deceased which were in their possession, and the applicant was given liberty to take copies. As to discovery by opening a coffin, see *Druce v. Young*, [1899] P. 84; *R. v. Tristram*, [1898] 2 Q. B. 371.

74. In Admiralty actions for damage by collision, interrogatories which seek to obtain information given in the preliminary act filed by the party interrogated are permissible (l).

SECT. 1.
In what
Proceedings
Discovery
may be
granted.

Admiralty
actions.
Trade marks.

75. In proceedings for removal of a trade mark from the register, an order for discovery of documents ought not in general to be made in the common form, but the extent of the discovery to be enforced must depend upon the particular circumstances of each case, and the order ought to be guarded in such manner as to prevent, so far as possible, the inconvenience, with its additional delay and expense, which might result from requiring a trader to set forth all the labels and other documents touching a particular trade mark from time to time used in his business. It is convenient in such a case that the applicant should state in writing to the court the grounds on which he seeks to have the mark removed from the register (m).

76. In actions for infringement of patents, notwithstanding that ample particulars must be given both by the plaintiff and the defendant, the ordinary rules apply, and discovery by way of interrogatories, disclosure of the existence of documents, and inspection of documents may be ordered as in other actions (n). Where discovery is sought as to a process, the court is not prevented from allowing the discovery by the allegation that if given a trade secret or secret process will be divulged. The matter is one for the discretion of the court, but in exercise of its discretion the court will, so far as is possible, limit the order in such a way that the secret process is not compelled to be disclosed (o). Discovery is not prevented by the fact that the answers may expose the defendant's customers to actions (p).

Patents and
designs.

77. Discovery in the ordinary way, by interrogatories or affidavit of documents, is rarely allowed in actions transferred to the commercial list, and only after every effort has been made to ascertain the facts by other means, and the judge is satisfied that there are facts which the applicant for discovery is entitled to ascertain. Instead of an affidavit of documents an order is usually made on the hearing of the summons to transfer the cause to the

Actions in
commercial
list.

(l) *The Radnorshire* (1880), 5 P. D. 172; *The Isle of Cyprus* (1890), 15 P. D. 134; *The Bernard*, [1905] W. N. 73, C. A.; but see *The Bwla* (1876), 34 L. T. 185; and, further, title ADMIRALTY, Vol. I., p. 97.

(m) *Re Wills' Trade-marks*, [1892] 3 Ch. 201, C. A., per KEEWICH, J., at pp. 206, 208. See also title TRADE MARKS.

(n) R. S. O., Ord. 53A.

(o) *Ashworth v. Roberts* (1890), 45 Ch. D. 623; *Mistovski v. Mandelberg & Co.* (1890), 6 T. L. R. 207; *Benno Jaffé und Darmstaedter Lanolin Fabrik v. Richardson & Co.* (1893), 10 R. P. O. 136, 139; *Renard v. Levinstein* (1864), 10 L. T. 94; *Badische Anilin und Soda Fabrik v. Levinstein* (1883), 24 Ch. D. 156. But in an action for an account against a licensee of the plaintiff's process the defendant cannot, by denying user and setting up a plea of "secret process," refuse to give discovery as to the extent to which either alone or in combination with his own process he has used the plaintiff's process (*Ashworth v. Roberts*, *supra*). See also p. 106, *post*, and title PATENTS AND DESIGNS.

(p) *Tetley v. Easton* (1856), 18 O. B. 643; *Howe v. McKernan* (1862), 30 Beav. 547; *Bovill v. Cowan*, [1867] W. N. 115.

SECT. 1.
In what
Proceedings
Discovery
may be
granted.

Bankruptcy
proceedings.

commercial list, for the parties to exchange lists of documents, with a direction that each party shall produce such documents for inspection. Interrogatories will not be ordered on the hearing of this summons, but must be separately applied for after delivery of Points of Claim and Defence (if any) and after inspection of documents (a).

78. In bankruptcy matters any party may with the leave of the court administer interrogatories to or obtain discovery of documents from any other party to the proceeding, and the practice is regulated as nearly as may be by the Rules of the Supreme Court for the time being in force in relation to these matters (b).

SECT. 2.—By and against whom Discovery may be obtained.

Generally.

79. Any party to a cause or matter may obtain discovery from any other (c) or any opposite party (d). Discovery is not confined to plaintiff and defendant, or to opposite parties in the ordinary sense of the word, for it may be ordered wherever there are parties between whom there is some right to be adjusted or some question to be decided in the cause (e). Therefore, where there is such a right or question, a defendant or plaintiff may obtain discovery against a co-defendant or co-plaintiff (f); a third party brought in by counterclaim as co-defendant to it with the plaintiff may obtain discovery against such plaintiff (g) if there are rights to be adjusted between them in the action, but not otherwise (h);

(a) See, generally, title PRACTICE AND PROCEDURE.

(b) Bankruptcy Rules, 1886—1890, r. 72. See also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 318.

(c) R. S. C., Ord. 31, r. 12 (discovery of documents).

(d) R. S. C., Ord. 31, r. 1 (interrogatories).

(e) *Shaw v. Smith* (1886), 18 Q. B. D. 193, C. A., at pp. 197, 198, 200, explaining *Brown v. Watkins* (1885), 16 Q. B. D. 125, C. A. "Plaintiff" includes every person asking any relief (otherwise than by way of counterclaim as defendant) against any other person by any form of proceeding, whether action, suit, petition, motion, summons, or otherwise. "Defendant" includes every person served with any writ of summons or process or served with notice of or entitled to attend any proceedings. "Party" includes every person served with notice of or attending any proceedings, although not named on the record (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100). "The words plaintiff and defendant in this section are so wide as to include all persons who litigate one against the other, in any proceeding, any question which the court may properly decide" (*Eden v. Weardale Iron and Coal Co.* (1887), 35 Ch. D. 287, C. A., per COTTON, L.J., at p. 295). In this sense it may be said that there cannot be an opposite party within the meaning of the rules as to discovery unless he is either plaintiff or defendant (*ibid.*, per LINDLEY, L.J., at p. 296). Where an order is made against a firm each of the partners are called upon to give the discovery if necessary (*Seal and Edgelow v. Kingston*, [1908] 2 K. B. 579, C. A.). It is not necessary that the order should specify the name or names of the individual member or members required to make the discovery (*Herskind & Co. v. Hall & Co.*, [1908] 2 I. R. 99).

(f) *Shaw v. Smith*, *supra*; *Kennedy v. Wakefield* (1870), 39 L. J. (CH.) 827; *Purdy's Mozambique Syndicate, Ltd. v. Alexander*, [1903] 1 Ch. 191; compare *Brown v. Watkins*, *supra*.

(g) *Alcoy and Gandia Rail. Co. v. Greenhill* (1896), 74 L. T. 345; but see *Mulloy v. Kilby* (1880), 15 Ch. D. 162, C. A.

(h) See cases cited in note (l), on p. 45, *post*.

a third party brought in by third party notice may obtain discovery against the defendant (i), and even against the plaintiff where the third party is placed in the position of defendant and an issue is raised between him and the plaintiff (k), and *vice versa*.

But unless there be some right to be adjusted or question to be decided between the parties concerned, or there is the relationship of plaintiff and defendant, or the parties are on opposite sides of the record, there is no power to order discovery (l). Provided this relationship is present, it has been held that it is not necessary, in order to obtain discovery, that some relief be claimed against the party from whom it is sought, so long as he is a necessary party (a).

As a general rule the right to obtain and the liability to give discovery are limited to the parties to the cause or matter (b), but within certain limits this right has been extended as against a person who, though in truth and substance he is a party, is not so in form (c). Where an agent sues in his own name on a contract entered into by him as agent, discovery may be obtained against the principal, who is the real plaintiff, and, provided the agent has no interest in the action, the action may be stayed till such discovery be given (d); but where the plaintiffs on the record retain a real and substantial interest of their own in the suit, discovery cannot be granted against the persons actually conducting the suit and who seek to enforce a remedy which exists directly for the plaintiffs, though indirectly and by way of subrogation its enforcement may benefit themselves (e). On the other hand, though the plaintiffs on the record are but nominal plaintiffs they are liable to give discovery (f).

Discovery may be ordered against persons residing out of the

SECT. 2.
By and
against
whom
Discovery
may be
obtained.

Non-party
in form, but
party in
substance.

Persons out
of jurisdic-
tion.

(i) R. S. C., Ord. 16, r. 48; *Bates v. Durell*, [1884] W. N. 108; *M'Alister v. Rochester (Bishop)* (1880), 5 C. P. D. 194.

(k) *Eden v. Weardale Iron and Coal Co.* (1887), 34 Ch. D. 223; 35 Ch. D. 287, C. A.; *M'Alister v. Rochester (Bishop)*, *supra*.

(l) *Molloy v. Kilby* (1880), 15 Ch. D. 162, C. A.; *Eden v. Weardale Iron and Coal Co.* (1887), 34 Ch. D. 223, at p. 226; *Brown v. Watkins* (1885), 16 Q. B. D. 126, C. A.; *Marshall v. Langley*, [1889] W. N. 222.

(a) R. S. C., Ord. 31, r. 12; *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, C. A. *Quere* whether this is not a departure from old Chancery principles.

(b) *Hadley v. McDougall* (1872), 7 Ch. App. 312, 313; *Straker v. Reynolds* (1889), 22 Q. B. D. 262, 265; *Elder v. Carter, Ex parte Slide and Spur Gold Mining Co.* (1890), 25 Q. B. D. 194, 198, 202, C. A.; *Burchard v. Macfarlane, Ex parte Tindall*, [1891] 2 Q. B. 241, 247, 250, 251, C. A.; *Pollock v. Garle*, [1898] 1 Ch. 5, C. A.; *James Nelson & Sons, Ltd. v. Nelson Line (Liverpool), Ltd.*, [1906] 2 K. B. 217, 223, 224, C. A., *per* COLLINS, M.B.; *O'Shea v. Wood*, [1891] P. 286, 288, C. A.; *Massey v. Allen*, [1878] W. N. 426.

(c) *James Nelson & Sons, Ltd. v. Nelson Line (Liverpool), Ltd.*, *supra*.

(d) *Willis & Co. v. Baddeley*, [1892] 2 Q. B. 324, C. A.

(e) *James Nelson & Sons, Ltd. v. Nelson Line (Liverpool), Ltd.*, *supra*.

(f) *Wilson v. Raffalovich* (1881), 7 Q. B. D. 553, C. A., *per* JESSEL, M.B., at p. 558. In this case an order for further discovery was made against the nominal plaintiffs notwithstanding that the real plaintiffs swore they had done all in their power to get the order for discovery obeyed.

SMCT. 2.
By and
against
whom
Discovery
may be
obtained.

Defendant
for purpose of
discovery
only.

jurisdiction, a reasonable time being allowed for the affidavit in answer (g).

A stranger to the cause cannot be compelled to give discovery (h), nor can the proceedings be stayed until he does give it (i), but the court will not allow its jurisdiction to be defeated or evaded by means of a contrivance to which the stranger is party (i).

80. Although discovery may be ordered against a person who is made a defendant solely for the purpose of discovery being obtained against him, as a general rule the court, in the exercise of its discretion, will refuse discovery in such a case, and, consequently, a person should not be made a party to an action merely for the purpose of getting discovery, however essential the discovery which he could give may be (k).

Under the old practice by bill in Chancery a solicitor, agent, or arbitrator, who was party to a fraud alleged in the bill, was liable to be made a defendant, though he got no benefit from the fraud, for the purposes of making him chargeable with the costs of the action and of discovery (l). Later cases show that the practice was regarded with disapprobation, and it is now practically obsolete (m).

Company or
corporation.

81. In the ordinary way the person to give discovery is the actual party to the action. But from the nature of things this is sometimes impossible, and in such cases it has to be given by another person on behalf of the party.

Where the party is a company or corporation one or more of its officers or members will be ordered to answer the interrogatories or make the affidavit of documents (n). The officer or member should not be made a party to the action merely for the purpose of getting discovery (o), except in proceedings on the revenue side by English

(g) *Pohl v. Young* (1855), 1 Jur. (N. S.) 1139; *The Emma* (1876), 34 L. T. 742. Where the plaintiffs are a firm carrying on business abroad and the action is to recover the price of goods ordered through their agent in the United Kingdom, the discovery may be ordered to be given by the agent in England on behalf of the firm (*Donovan & Co. v. Todd, Burns & Co.*, [1908] 2 L. R. 100).

(h) *Williams v. Ingram* (1900), 16 T. L. R. 434, 451, C. A.

(i) *Walburn v. Ingilby* (1833), 1 My. & K. 61, 79.

(k) *Wilson v. Church* (1878), 9 Ch. D. 552, 555; *Barnes v. Addy* (1874), 9 Ch. App. 244, 255; *Burstall v. Beyfus* (1884), 28 Ch. D. 35, 40, 41, 42, C. A.; *Weise v. Wardle* (1874), L. R. 19 Eq. 171, 172; *Berry v. Keen* (1882), 26 Sol. Jo. 312; *Burchard v. Macfarlane, Ex parte Tindall*, [1891] 2 Q. B. 241, 247, C. A.; *Fenwick v. Reed* (1816), 1 Mer. 114; *Symonds v. City Bank, Ltd.* (1885), 79 L. T. Jo. 175.

(l) *Marshall v. Sladden* (1849), 7 Hare, 428; *Gilbert v. Lewis* (1862), 1 De G. J. & Sm. 38, 52, per Lord WESTBURY; *Innes v. Mitchell* (1857), 4 Drew. 57, 97; *Walham v. Stainton* (1863), 1 Hem. & M. 322, 337, 338; *Weise v. Wardle, supra*; *Mathias v. Yette* (1882), 46 L. T. 497, 502, C. A.

(m) *Weise v. Wardle, supra*; *Mathias v. Yette, supra*; *Burstall v. Beyfus, supra*; *A.-G. v. Bermondsey Vestry* (1883), 23 Ch. D. 60, 67, C. A.

(n) *Cooke v. Oceanic Steam Co.*, [1875] W. N. 220; *Dyke v. Stephens* (1885), 80 Ch. D. 189, 191, per PEARSON, J.; R. S. O., Ord. 31, r. 5, which in terms is confined to interrogatories.

(o) *Wilson v. Church, supra*.

information (*p*). The secretary of the company is *prima facie* the person against whom the order should be made (*q*), but any officer who is more likely to be able to give the required information (*r*), or who has personal knowledge as to the documents in possession of the corporate body (*s*), may be named, and in cases of doubt the order may be made for "the secretary or clerk or other proper officer," (*t*) or merely "the proper officer," of the corporation to give the required information; but where any reasonable objection can be shown by the company against the person proposed by the applicant the order will not be made against him (*a*).

SMO. 2.
By and
against
whom
Discovery
may be
obtained.

Discovery will not be ordered to be given by an ordinary member of the body unless (1) there is no officer capable of giving it (*b*); (2) it can be shown that the proposed member has the means of answering (*c*); and (8) notice of the application has been given to him (*d*). In a proper case interrogatories may be required to be answered by more than one officer or member (*e*).

In actions by or against a company which is being wound up either by the court or voluntarily, or where in the course of the winding-up proceedings there is a proceeding which in substance is an action by or against the company, the adverse party has the same right to obtain discovery from the liquidator as representing the company as from any other litigant, and *vice versa* (*f*), except that in such proceedings, in a winding up by the court, the liquidator, being an officer of the court and under its control, will not, as a rule, be ordered to make an affidavit of documents before the opposite party has applied to him for inspection and it has been refused or not satisfactorily given (*g*).

Liquidator of
a company.

(*p*) See *A.-G. v. Newcastle Corporation*, [1897] 2 Q. B. 384, O. A. B. S. C., Ord. 31, does not apply to these proceedings. See title CROWN PRACTICE, Vol. X., p. 22.

(*q*) *Re Alexandra Palace Co.* (1880), 16 Ch. D. 58; *Berkeley v. Standard Discount Co.* (1879), 13 Ch. D. 97, 99.

(*r*) See *Tannetta, Walker & Co. v. Newport (Alexandra) Dock Co.* (1890), 6 T. L. R. 325; *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.*, [1900] 2 Ch. 1, C. A., per RIGBY, L.J., at p. 12.

(*s*) See *Liberia Republic v. Royle* (1876), 1 App. Cas. 139, 142; *A.-G. v. North Metropolitan Tramways Co.*, [1892] 3 Ch. 70, 74.

(*t*) *Swansea Corporation v. Quirk* (1879), 5 C. P. D. 106; *Chaddock v. British South Africa Co.*, [1896] 2 Q. B. 153, C. A.

(*a*) *Manchester Val de Travers Paving Co. v. Slagg*, [1882] W. N. 127, C. A.; *Berkeley v. Standard Discount Co.*, *supra*.

(*b*) *Berkeley v. Standard Discount Co.*, *supra*, at p. 99; *Costa Rica Republic v. Erlanger* (1875), 1 Ch. D. 171, 174, C. A.

(*c*) *Berkeley v. Standard Discount Co.*, *supra*.

(*d*) *Chaddock v. British South Africa Co.*, *supra*.

(*e*) *Wilson v. Church* (1878), 9 Ch. D. 552, at p. 557; but see *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.*, *supra*, per RIGBY, L.J., at p. 13. As to the extent of an officer's or member's duty to answer interrogatories, see p. 109, *post*.

(*f*) *Re Barnard's Banking Co., Ex parte Contract Corporation* (1867), 2 Ch. App. 350; *Re Contract Corporation, Gooch's Case* (1872), 7 Ch. App. 207; *Re Alexandra Palace Co.*, *supra*. Where documents came into his possession as voluntary liquidator he will be compelled to produce them though the company is dissolved, if no property or control over them remains in the company (*London and Yorkshire Bank v. Cooper* (1885), 15 Q. B. D. 7, 473, C. A.).

(*g*) *Re Mutual Society* (1883), 22 Ch. D. 714, 720, 721, C. A. See, further, title COMPANIES, Vol. V.

SMOY. 2.
By and
against
whom
Discovery
may be
obtained.

Crown.
Foreign
sovereign.
Infants.

82. Where the Crown is a party to the matter it has the same right to discovery as a subject has against a subject, but it cannot be compelled to give discovery (*h*), though, in practice, it often does unless some principle of public interest is involved (*i*).

83. Where a foreign sovereign or state brings an action in this country, he or it is as liable as any other suitor to give discovery (*k*), and the action may be stayed until a proper person is named to give it (*l*).

84. Where one of the parties is an infant, the rules as to discovery apply to him and to his next friend or guardian *ad litem* (*m*), and the order will be for the affidavit to be made by the infant or his representative, according to the circumstances of the case. And the same rule applies where he is defending an action by his guardian *ad litem*.

Lunatics.

85. Where a lunatic so found by inquisition is party to an action, an order for inspection of documents in the custody of the court having jurisdiction in lunacy cannot be made against the committee of the lunatic, since the documents are not in his possession (*n*). But, according to the practice in lunacy, the court in lunacy will order production of all documents in its custody, subject to certain exceptions (*o*), which relate to the estate of a deceased lunatic, on the application of any person (*p*) claiming under

(*h*) *A.-G. v. London Corporation* (1850), 2 Mac. & G. 247, 258; *A.-G. v. Newcastle Corporation*, [1897] 2 Q. B. 384, 389, 395, C. A.

(*i*) *Ibid.*, at p. 395. In proceedings by English information on the revenue side, the Crown's right to further discovery is not barred by the fact that no exception was taken within the time limited by the rules, to the sufficiency of the answer to the information (*A.-G. v. London Corporation*, *supra*; *A.-G. v. Emerson* (1882), 10 Q. B. D. 191, C. A.; *A.-G. v. Newcastle Corporation*, *supra*, at p. 389); and see title CROWN PRACTICE, Vol. X., pp. 22—25.

(*k*) *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190; *United States of America v. Wagner* (1867), 2 Ch. App. 582; *Rothschild v. Portugal (Queen)* (1839), 3 Y. & C. (Ex.) 594; *Prioleau v. United States and Andrew Johnson* (1866), L. R. 2 Eq. 659, 663, 664; *Liberia Republic v. Imperial Bank* (1873), L. R. 16 Eq. 179.

(*l*) *Costa Rica Republic v. Erlanger* (1875), 1 Ch. D. 171, 173, C. A., *per JAMES, L.J.*; *Peru Republic v. Weguelin* (1875), L. R. 20 Eq. 140; *United States of America v. Wagner*, *supra*. See also title ACTION, Vol. I., p. 18.

(*m*) R. S. O., Ord. 31, r. 29, which only applies to infants, and does not extend to lunatics. This rule renders obsolete the decisions in *Mayor v. Collins* (1890), 24 Q. B. D. 361; *Curtis v. Mundy*, [1892] 2 Q. B. 178; *La Corseilis, Lawton v. Elwes* (1883), 53 L. J. (Ch.) 399; *Dyke v. Stephens* (1885), 30 Ch. D. 189; *Scott v. Consolidated Bank*, [1893] W. N. 56; *Ingram v. Little* (1883), 11 Q. B. D. 251.

(*n*) *Vivian v. Little* (1883), 11 Q. B. D. 370.

(*o*) The court will not allow inspection of reports made confidentially to it by its own medical advisers (*Re H. W. Strachan*, [1895] 1 Ch. 439, C. A., *per LINDLEY, L.J.*, at p. 444; see also *Re B.* (an alleged lunatic), [1892] 3 Ch. 194, C. A., and Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 26 (1), (2)).

(*p*) The application is made to the master in lunacy (*Re H. W. Strachan*, *supra*). No one is allowed to see them without an order of the master or judge in lunacy, either during the lunatic's lifetime or after his death (*Re Sartoris* (1862), 1 New Rep. 4; *Re Silcock's Lunacy* (1862), 1 New Rep. 4, C. A.; *Re Wood* (1863), 4 De G. J. & Sm. 134; *Re H. W. Strachan*, *supra*, at p. 413.

him (a), or claiming an interest in his property (b), who can make out a *prima facie* title to the lunatic's property, or who can satisfy the court that he wants the inspection for some reasonable and proper purpose, even though the request is opposed by a rival litigant (c). This also applies to proceedings in which an alleged lunatic is a party if the documents are in the possession of the court (d). Where the lunatic is alive, inspection will be allowed for any reasonable and proper purpose, provided the lunatic is not prejudiced thereby (e).

SECT. 2.
By and
against
whom
Discovery
may be
obtained.

With regard to documents not in the custody of the court, and with regard to interrogatories, the position of a next friend or guardian *ad litem* of a person of unsound mind not so found, and the committee of a person so found, is somewhat doubtful (f). They do not come within the terms of the Rules of the Supreme Court (g), and it would seem that discovery cannot be ordered against such a person, as a guardian *ad litem*, under the old practice of the Court of Chancery, was a party only for the purpose of protecting the interest of the lunatic or person of unsound mind, and not for the purpose of making admissions against him (h).

In inquiries as to the alleged lunacy of a person, inspection of documents in the hands of the person appointed receiver of the estate for the time being will be allowed to the alleged lunatic, to the extent to which the master in lunacy, after looking through them, considers them relevant to the inquiry (i); and there is power for the court in lunacy to order inspection of documents deposited with a company for safe custody by a lunatic before he became of unsound mind (k).

Inquisition
in lunacy.

As a matter of law, as distinguished from a matter which the court ought to consider in the exercise of its discretion, privilege is no bar to discovery in lunacy, but discovery may be disallowed where it would, if allowed, confer an unfair advantage on a litigant (l).

(a) *Re Smyth* (1880), 15 Ch. D. 286; (1881) 16 Ch. D. 673, C. A., following *Re Wood* (1863), 4 De G. J. & Sm. 134. See also *Re Ferrior* (1867), 3 Ch. App. 175, 182.

(b) *Re H. W. Strachan*, [1895] 1 Ch. 439, C. A., per LINDLEY, L.J., at p. 444.

(c) *Ibid.*, at p. 443. But the court will act impartially and not give one litigant an advantage over the other (*ibid.* at pp. 445, 447, 448).

(d) *Re H. W. Strachan*, *supra*.

(e) *Ibid.*, at p. 443.

(f) In *Ingram v. Little* (1883), 11 Q. B. D. 251, it was held that a guardian *ad litem* of an infant could not be compelled to answer interrogatories, he not being a party; or to make discovery of documents (see *Curtis v. Mundy*, [1892] 2 Q. B. 178); while in *Higginson v. Hall* (1879), 10 Ch. D. 235, a lunatic plaintiff was ordered to file an affidavit of documents by his next friend, but these cases were not followed in *Dyke v. Stephens* (1885), 30 Ch. D. 189, nor in *Curtis v. Mundy*, *supra*. They were decided before the alteration of the rule making discovery applicable to the next friend or guardian *ad litem* of an infant.

(g) R. S. O., Ord. 31, r. 29.

(h) See *Ingram v. Little*, *supra*, and compare R. S. O., Ord. 19, r. 19.

(i) *Re Cathcart*, [1902] W. N. 80, C. A.

(k) *Re Campbell* (1880), 13 Ch. D. 323, C. A. In this case inspection was granted to the official solicitor, there being no committee appointed.

(l) *Re H. W. Strachan*, *supra*, at pp. 445, 447, 448. As to privilege, see p. 71, *post*.

SECT. 2.
By and
against
whom

Discovery
may be
obtained.

Actions
against
sheriff.

General rule.

86. In actions against a sheriff in respect of any matter connected with the execution of his office, an order may be made for the discovery to be given by the officer actually concerned (*m*).

SECT. 3.—*At what Stage of the Proceedings Discovery may be granted.*

87. As a general rule discovery cannot be obtained till after defence has been delivered, since it is not until then that it is known what are the matters in dispute (*n*). But in the Chancery Division interrogatories and discovery of documents have frequently been allowed before defence (*o*), and sometimes production of documents also (*p*), and there is a discretion to so allow them in the King's Bench Division (*q*). No absolute rule exists in either division (*r*). A plaintiff will seldom be allowed discovery in any form until delivery of his statement of claim (*a*) in order to prevent "fishing" discovery, and for a like reason it is not usually granted to a defendant before defence (*b*).

Leave to obtain discovery may be given after the close of the pleadings (*c*), but the application should be made a reasonable time before the trial is likely to come on.

Before
particulars.

Where the circumstances are such that a party ordered to give particulars does not know the facts necessary to enable him to

(*m*) R. S. C., Ord. 31, r. 28.

(*n*) *Mercier v. Cotton* (1876), 1 Q. B. D. 442, C. A.; *Disney v. Longbourne* (1876), 2 Ch. D. 704; *Egremont Burial Board v. Egremont Iron Ore Co.* (1880), 14 Ch. D. 158; *Union Bank of London v. Manby* (1879), 13 Ch. D. 239, 241, 242, C. A.; *Hancock v. Guerin* (1878), 4 Ex. D. 3; *Cleary v. Fitzgerald* (1878), 1 L. R. Ir. 492; *British and Foreign Contract Co. v. Wright* (1884), 32 W. R. 413; *Fairbairn v. Lay* (1870), 22 L. T. 785; *Costa Rica Republic v. Stronsberg* (1879), 11 Ch. D. 323, C. A.; *Sachs v. Speilman* (1887), 37 Ch. D. 295, 303.

(*o*) *Harbord v. Monk* (1878), 9 Ch. D. 616, where it is stated that *Mercier v. Cotton*, *supra*, does not apply in the Chancery Division; *Union Bank of London v. Manby*, *supra*, where *Hancock v. Guerin*, *supra*, is considered. See also *Sachs v. Speilman*, *supra*. In *Young v. Brassey* (1875), 1 Ch. D. 277, HALL, V.-C., held that in order to save the expense of several applications an order giving leave to serve a writ out of the jurisdiction should also provide for service of interrogatories, if interrogatories should be allowed, the order as to them being expressed to come into operation from and after the issuing of the writ.

(*p*) *Union Bank of London v. Manby*, *supra*.

(*q*) *Mellor v. Thompson* (1883), 49 L. T. 222, C. A.; and see *Costa Rica Republic v. Stronsberg*, *supra*, at p. 326; *Beal v. Pilling* (1878), 38 L. T. 486; *Hawley v. Reade*, [1876] W. N. 64; see also *Megaw v. McDiarmid* (1882), 10 L. R. Ir. 376, where discovery was allowed as to damages with a view to payment into court.

(*r*) *Edelston v. Russell* (1888), 57 L. T. 927; *Mellor v. Thompson*, *supra*.

(*a*) *Davies v. Williams* (1879), 13 Ch. D. 550; *Cashin v. Craddock* (1876), 2 Ch. D. 140; *Philipps v. Philipps* (1879), 40 L. T. 815; but see *Costa Rica Republic v. Stronsberg*, *supra*, at p. 326; *Mellor v. Thompson*, *supra*; *Edelston v. Russell*, *supra*; *The Murillo* (1873), 28 L. T. 374, where plaintiff interrogated before petition filed; *Ley v. Marshall*, [1876] W. N. 23. In *Seaver v. Burslinghaus* (1908, July 27th, unreported) SWINFEN EADY, J., allowed a plaintiff in an inquiry as to damage for infringement of patent to interrogate before any evidence had been filed in answer.

(*b*) *Fairbairn v. Lay*, *supra*; *Egremont Burial Board v. Egremont Iron Ore Co.*, *supra*; *Disney v. Longbourne*, *supra*. But by R. S. C., Ord. 31, r. 19 (3), the court may now, in the circumstances prescribed by that rule, order discovery of documents at any time; see p. 63, *post*.

(*c*) *London and Provincial Marine Insurance Co. v. Davies* (1877), 5 Ch. D. 775; compare *Ellis v. Ambler* (1877), 36 L. T. 410 (leave refused).

SECT. 2.
At what
Stage of the
Proceedings
Discovery
may be
granted
—

do so, but his opponent does or ought to know them, he may sometimes obtain discovery before giving the particulars (*d*). There is no fixed rule, the question depending on the circumstances of each case, and being one for the discretion of the master or judge (*e*). In most of the reported cases where it has been allowed some fiduciary relationship has existed between the parties, but the existence of this relationship is not essential (*f*). The court will take care that when ordered the discovery allowed is limited to what is actually necessary at the time (*g*). Discovery is not as a rule allowed in favour of a defendant to an action for defamation where justification is pleaded, before he has given particulars (*h*).

(*d*) *Millar v. Harper* (1888), 38 Ch. D. 110, C. A., where BOWEN, L.J., said, "It is good practice and good sense that where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiff delivers particulars"; *Waynes Merthyr Co. v. D. Radford & Co.*, [1896] 1 Ch. 29 (in which plaintiffs alleged loss of business through fraudulent acts of defendants, giving one specific instance, and alleging "divers other occasions," and it was held that as defendants had means of ascertaining from their books whether other frauds of the kind alleged had been committed and the plaintiffs had not, the defendants were not entitled to particulars before giving discovery); *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt*, [1893] 3 Ch. 122, 127, 128, C. A. (where an inquiry as to damages was ordered, and the plaintiffs were ordered by the court of first instance to give defendants the heads under which they sought to recover damages, before defendants filed any affidavit of documents. It was held by the Court of Appeal that plaintiffs being ignorant of the particulars of breaches, such order could not be complied with, and discovery must be given first); *Edelston v. Russell* (1888), 57 L. T. 927 (action by principal against agent; a false representation by agent alleged in statement of claim, particulars of which were unknown to plaintiff but known to defendant. Held entitled to discovery before particulars); *Whyte v. Ahrens* (1884), 26 Ch. D. 717, C. A. (action by principals against agents; fraud alleged generally. Plaintiffs held not bound to give particulars before obtaining discovery of documents); *Leitch v. Abbott* (1886), 31 Ch. D. 374, C. A. (see judgment of BOWEN, L.J., at p. 379: "If at a particular stage of an action you are stopped by reason of your ignorance of some fact which is known only to the other party, that is the very reason why you should have discovery of that fact from him"); *Sachs v. Spielman* (1887), 37 Ch. D. 295 (action by principal against agent; fraud alleged, particulars of which could only be known to defendants. Application by latter for particulars ordered to stand over till after defence delivered). See also *Philipps v. Philipps* (1878), 4 Q. B. D. 127, C. A., per BRAMWELL, L.J., at pp. 130, 131, and observations on his judgment in *Philipps v. Philipps*, as reported (1879), 40 L. T. 815, at pp. 819, 822, per DENMAN and LINDLEY, JJ. As to the difference in the principles underlying particulars and interrogatories, see *G. W. Young & Co., Ltd. v. Scottish Union and National Insurance Co.* (1907), 24 T. L. R. 73, C. A.

(*e*) *Waynes Merthyr Co. v. D. Radford & Co.*, *supra*, at p. 35; *Russell v. Stubbs, Ltd.* (1908), 52 Sol. Jo. 580, H. L.

(*f*) *Ibid.*

(*g*) See cases cited in note (*d*).

(*h*) *Arnold and Butler v. Bottomley*, [1908] 2 K. B. 151, C. A.; *Zierenberg v. Labouchere*, [1893] 2 Q. B. 183, C. A., at pp. 188, 189; compare *Hennessey v. Wright* (1888), 24 Q. B. D. 445, 448, n. In *Russell v. Stubbs*, *supra*, where in an action for libel the plaintiffs alleged a publication to named persons and other persons whom they could not specify, the House of Lords, affirming the Court of Appeal, held that, under the particular circumstances of the case, further particulars of publication should not be ordered to be given until after discovery or interrogatories, under penalty, if not given, of having the allegation of publication to persons other than those who were particularly named and who were known to the defendants, but not to the plaintiffs, struck out from the statement of claim.

SECT. 3.

At what
Stage of the
Proceedings
Discovery
may be
granted.

Where issue
to be
determined
first.

88. In cases where the right to discovery, in any form, depends upon the determination of any issue or question in dispute in the cause or matter, or it is desirable that some issue or question of law or fact or mixed question of law and fact in dispute should be determined first, the master has a discretion to reserve the question of discovery till after the issue or question has been determined (i). The rule is intended to give the court the opportunity of saying that discovery shall not be given before the trial of an action unless it is wanted for the purposes of the trial—*e.g.*, if a mortgagor wishes to redeem an estate and it is denied that he has the right to redeem at all, discovery relating to questions of account will be postponed till it is known whether there is such a right or not (k). So also in an action by a principal against an agent where agency is denied (l). Where there is a question as to the right to relief at all, the court is always unwilling, before that right is established, to make an order for discovery which may be injurious to the defendant and only be useful to the plaintiff if he succeeds in establishing the right (m). So, also, discovery bearing only on the question of damages or accounts, and not on the question of defendant's liability, where it is possible to deal separately with the questions of liability and of the amount of damages, will sometimes be postponed until the question of liability is determined (n). But where the discovery is for the purpose of enabling the party seeking it to obtain complete relief at the trial, and to do away with the necessity of an account being taken subsequently, the court may refuse to postpone it (o). The discretion given by the

(i) R. S. C., Ord. 31, r. 20; *Whyte v. Ahrens* (1884), 26 Ch. D. 717, C. A.:—"In some cases it may be perfectly right that when there is a plea which would prevent the necessity of the discovery, that should be settled first," *per* COTTON, L.J., at p. 721; but where discovery is necessary for the purpose of determining whether the plea is true or false discovery should be allowed (*ibid.*); *Benno Jaffé und Darmstaedter Lanolin Fabrik v. Richardson & Co.* (1893), 62 L. J. (CH.) 710, 712; *Tasmanian Main Line Rail. Co. v. Clark* (1879), 27 W. R. 677, 678; *Wood v. Anglo-Italian Bank* (1876), 34 L. T. 255; *Vermynck v. Edwards* (1861), 29 W. R. 189. The rule is limited, however, to cases where the right to discovery depends on the determination of an issue or question in dispute in the case, and does not apply where the discovery is wanted for the determination of the plaintiff's right at the trial (*Leitch v. Abbott* (1886), 31 Ch. D. 374, 376, 378; *Benno Jaffé und Darmstaedter Lanolin Fabrik v. Richardson & Co.*, *supra*, at p. 712). See also *Wilson v. Thornbury* (1874), 43 L. J. (CH.) 356 (a case involving disputes as to handwriting).

(k) *Benno Jaffé und Darmstaedter Lanolin Fabrik v. Richardson & Co.*, *supra*, at p. 712.

(l) *Ibid.*; *Great Western Colliery Co. v. Tucker* (1874), 9 Ch. App. 376, C. A., *per* JAMES, L.J., at p. 378.

(m) *Fennessy v. Clark* (1887), 37 Ch. D. 184, C. A., *per* COTTON, L.J., at p. 187; compare *A.-G. v. North Metropolitan Tramways Co.*, [1892] 3 Ch. 70 at p. 74 (interrogatories allowed, discovery of documents disallowed).

(n) *Schreiber v. Heymann* (1894), 63 L. J. (Q. B.) 749; *Fennessy v. Clark*, *supra*; *Parker v. Wells* (1881), 18 Ch. D. 477, C. A., *per* JESSEL, M.R., at p. 484 (interrogatory as to accounts held oppressive till title of plaintiff was established); *Great Western Colliery Co. v. Tucker*, *supra*; *Elkin v. Clarke* (1873), 21 W. R. 447.

(o) *Saunders v. Jones* (1877), 7 Ch. D. 435, 449, 453, C. A.; *Re Howel Morgan, Owen v. Morgan* (1888), 39 Ch. D. 316, 320, C. A.

rule may be exercised at any time, either before or after the ordinary form of order for discovery has been made (*p*).

In a patent action where the defendant denies the validity of the patent he may, nevertheless, be compelled to answer interrogatories before the validity of the patent has been established (*q*).

89. Where discovery is not required for the determination of any matter which is to be tried at the hearing, but only for the purpose of working out the order or judgment, and the giving of it at that stage might be prejudicial to the party from whom it is required, it may be postponed until after judgment has been given. No time limit as to discovery is imposed by the rules, other than the pendency of the cause or matter (*r*). In proceedings before the masters in the Chancery Division power is given to them to require the production of documents (*s*), and, when so directed by the judge, to examine parties upon interrogatories (*t*). It is not prevented by the pendency of an appeal (*u*). Discovery may, if necessary, be ordered for the purpose of an appeal (*x*).

SECT. 3.
At what
Stage of the
Proceedings
Discovery
may be
granted.

For purpose
of working
out the
judgment or
order.

SECT. 4.—Security for Costs of Discovery.

90. On an application for discovery in any form the applicant may be ordered to give security for the costs which will be occasioned by the discovery (*a*). The matter is one for the discretion of the

Practice.

(*p*) *Lever v. Land Securities Co.* (1893), 70 L. T. 323, C. A. "At whatever stage the party comes to ask for the intervention of the court in order to procure inspection, inspection is sought within the meaning of this rule," and an order can then be made for questions of law to be determined before inspection (*ibid.*).

(*q*) *Benno Jaffé und Darmstaedter Lanolin Fabrik v. Richardson & Co.* (1893), 62 L. J. (CH.) 710; *Swinborne v. Nelson* (1853), 16 Beav. 416; *Crossley v. Stewart* (1863), 1 New Rep. 426.

(*r*) R. S. C., Ord. 31, r. 14.

(*s*) The place for deposit of the documents is the Filing Department of the Central Office (R. S. C., Ord. 61, r. 30).

(*t*) R. S. C., Ord. 65, r. 16. Instances are: *Saxby v. Easterbrook* (1872), L. R. 7 Exch. 207 (account of profits in patent action notwithstanding appeal pending production of documents enforced); *Kennedy v. Wakefield* (1870), 39 L. J. (CH.) 827 (after decree for sale in a partition suit); *Groves v. Groves* (1853), 2 W. R. 86 (plaintiff in administration action held entitled to inspection as against a claimant); *Joy v. Hadley* (1883), 22 Ch. D. 571 (decree for specific performance); *Hanslip v. Kitton* (1863), 1 De G. J. & Sm. 440, C. A. (partnership accounts); *Ladds v. Walthew* (1884), 32 W. R. 1000 (held that court had power to order inspection of documents after judgment in default in action for breach of promise for the purpose of assessment of the damages by the master); *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt*, [1893] 3 Ch. 122, C. A. (affidavit of documents ordered after inquiry as to damages directed); *Huldane v. Eckford* (1869), L. R. 7 Eq. 425 (inquiries as to domicile); see also *Hennessy v. Lavery*, [1903] 1 I. R. 87.

(*u*) *Saxby v. Easterbrook*, *supra*.

(*x*) *Re National Funds Assurance Co.* (1876), 24 W. R. 774. As to discovery in aid of Execution, see title EXECUTION.

(*a*) R. S. C., Ord. 31, rr. 25, 26. These rules are somewhat contradictory in their terms, but the above statement represents the way in which they are construed in practice. Security for costs is not usually required in commercial causes.

SECT. 4.
Security for
Costs of
Discovery.

master or judge (b), but the practice has changed, and it is not now usual to order security to be given, the cases in which it is ordered being almost confined to those in which there is substantial doubt as to whether the discovery is really necessary, and a further doubt whether the applicant can pay the costs of the action if he fails. But the mere fact that the applicant is a poor man is not, as a general rule, a sufficient ground in itself for ordering security (c). On the other hand, the fact that security has already been given for the costs of the action does not necessarily exempt the applicant for discovery from being ordered to give fresh security for the costs which will be occasioned thereby (d).

Where rules
do not apply.

Where application is made for inspection of a document in which both parties have a common interest, the rules as to security either do not apply or, if they do, security may be dispensed with (e). The rules do not apply to applications for discovery of a ship's papers (f), nor to inspection of documents procured by notice as distinct from an order (g).

Form and
amount.

91. Where security is ordered, it is in the form of payment into court to the credit of a separate account in the action, called the "security for costs account," of the sum of £5, or such smaller or larger sum as may be ordered (h). An additional sum may be ordered subsequently, whenever the circumstances show that further security is required (i). Where security has been given on the application for interrogatories or for discovery of documents a further sum will not, as a rule, be required on a subsequent application for inspection of documents, unless there is an attempt at evasion of the rule as to deposit (k). Multiplicity of persons against whom discovery is ordered may be a ground for the exercise of the master's discretion in ordering an additional sum as security (l), but it has been stated that a second deposit of £5 could only be called for where the action was really two or more actions amalgamated in the same writ (m); and where separate

(b) *Newman v. London and South Western Rail. Co.* (1890), 24 Q. B. D. 454, disapproving *Boarder v. Lindsay Gracie & Co.* (1886), 34 W. R. 473.

(c) Under the old practice poverty was held a ground for dispensing with it (*Burr v. Hubbard*, [1883] W. N. 198; *Compagnie etc. du Pacifique v. Peruvian Guano Co.*, [1883] W. N. 166; *Henderson v. Ripley*, [1884] W. N. 85), or reducing it (*Davis v. Mellodew* (1886), 80 L. T. Jo. 283). See also *Webb v. Webb* (1890), 89 L. T. Jo. 81; *Re Smith, Smith v. Went* (1884), 50 L. T. 382). It has been held that security need not be dispensed with merely because the parties consent (*Aste v. Stumore* (1883), 13 Q. B. D. 326, C. A.).

(d) *Compagnie etc. du Pacifique v. Peruvian Guano Co.*, *supra*.

(e) *Brown v. Liell* (1885), 16 Q. B. D. 229, at p. 230.

(f) *Law and Lindsay v. Budd*, [1883] W. N. 166; and see p. 65, *post*.

(g) Compare R. S. C., Ord. 31, r. 16, with *ibid.*, r. 26; and see p. 69, *post*.

(h) R. S. C., Ord. 31, r. 26.

(i) *Ibid.*; and *Cooke v. Smith*, [1891] 1 Ch. 509, C. A.

(k) *Moore v. Peachey*, [1891] 2 Q. B. 707; *Pardy's Mozambique Syndicate, Ltd. v. Alexander*, [1903] 1 Ch. 191, at p. 195; but see *Jacobs v. Great Western Rail. Co.*, [1884] W. N. 33, 34. In *Brown v. Liell*, *supra*, decided under the old rule, MATHEW, J., appeared to doubt whether rr. 25 and 26 apply to inspection of documents at all, but it was assumed in the two cases cited *supra* that they do.

(l) *Joyce v. Beall*, [1891] 1 Q. B. 459, *per* VAUGHAN WILLIAMS, J., at p. 461.

(m) *Ibid.*, at pp. 461, 462.

copies of one set of interrogatories are delivered to several defendants or plaintiffs to be answered partly by some and partly by another or others, one deposit of £5 is sufficient (*n*). On the other hand, where the sets are separate a deposit of £5 for each set may be required (*o*), and where several defendants are ordered to make separate affidavits in answer to interrogatories, and also separate affidavits of documents, a deposit of £5 for the interrogatories and £5 for the discovery of documents may be required in respect of each defendant (*p*).

SECT. 4.
Security for
Costs of
Discovery.

92. If security is ordered the applicant must, with the interrogatories or order for discovery of documents, serve a copy of the receipt for the payment into court (*q*), and unless such payment has been made discovery need not be given (*a*). Non-payment is, however, not a ground for an application to strike out the interrogatories (*b*). Where the receipt is served, the time for delivering the affidavit in answer runs from the date of service (*c*).

Service of
receipt.

93. The money paid in as security is paid in as security for the costs of the action, and remains in court till the action is disposed of by trial, consent, or otherwise. Therefore, waiver of discovery does not entitle the party who has paid it in to have it repaid to him before the termination of the action (*d*). Where the action is disposed of by trial the party paying it in may, unless there is an order to the contrary, obtain payment out without a separate order, if he has been awarded the general costs of the action, but if the order as to costs is against him, the money is subject to a lien for the costs (*e*).

Payment out.

If the action is disposed of by consent, or otherwise than by trial, and no taxation of costs is necessary, the amount may be paid out on a certificate obtainable from a master (*f*).

(*n*) *Eder & Co. v. Attenborough* (1889), 23 Q. B. D. 130; *Campbell v. Poulett (Lord)*, [1884] W. N. 48. But this is subject to the usual charges for additional folios. See also *Ross v. Beerbohm* (1889), 5 T. L. R. 405, where £2 was ordered for additional folios; *The Whickham* (1885), 53 L. T. 236.

(*o*) *Smith v. Reed*, [1883] W. N. 196; but see *Joyce v. Beall*, [1891] 1 Q. B. 459, and *Campbell v. Poulett (Lord)*, *supra*.

(*p*) *Liverpool and Manchester Aërated Bread and Café Co. v. Firth*, [1891] 1 Ch. 367.

(*q*) Where additional security has been ordered the receipt for payment in must extend to the extra amount (*Cooke v. Smith*, [1891] 1 Ch. 509, 514, C. A.).

(*a*) R. S. O., Ord. 31, r. 26.

(*b*) *Eder & Co. v. Attenborough*, *supra*.

(*c*) R. S. O., Ord. 31, r. 26; *Jones v. Jones*, [1884] W. N. 17. This statement is not in exact accordance with the words of the rule, but represents the way it is interpreted in practice.

(*d*) *Jubb v. Bibbs and Hill*, [1883] W. N. 208; and see *Eder & Co. v. Attenborough*, *supra*, at p. 135.

(*e*) R. S. O., Ord. 31, r. 27. Where the solicitor for the party provides and pays the money he cannot charge the amount in his bill of costs, but may include it in his cash account (*Re Buckwell and Berkeley*, [1902] 2 Ch. 596, C. A.).

(*f*) R. S. O., Ord. 31, r. 27A. The evidence usually required by the master before he will grant his certificate is (1) office copy certificate of payment in, or bank receipt; (2) that the action is "finally disposed of" by consent or otherwise and no taxation is required; (3) the consent of the opposite party by

SECT. 5.

Costs.

General rule.

94. As a general rule the costs of discovery are costs in the cause, and are usually made so on any necessary application; but the costs of the discovery can only be allowed to the party obtaining it when the discovery appears either to the judge at the trial, or the master where the action is otherwise disposed of, or to the taxing master on a taxation of the costs, to have been reasonably asked

Where discovery sought is unreasonable etc.

A party exhibiting interrogatories or filing answers which are unreasonable, vexatious, or of inordinate length, is punished by having to pay the costs occasioned thereby. An order for such payment may be made by the judge, master, or taxing master, without any application for it (*h*).

Member of company.

Where a member of a company is examined on interrogatories he cannot refuse to file the affidavit in answer until he has been paid his costs of making it; nor will the court order payment of costs to him separately from the costs of the company (*i*).

Appeal.

Where on an application for discovery the costs are provided for in the order there is no appeal beyond one to the judge in chambers (*j*).

SECT. 6.—Effect of non-compliance with Order for Discovery.

Liability of party.

95. Where a party fails to comply with an order to answer interrogatories, or to disclose or give inspection of documents in respect of which no privilege exists, he is liable to (1) attachment (*k*); (2) if a plaintiff, to have his action dismissed for want of prosecution; (3) if a defendant, to have his defence struck out, on an application being made for an order to that effect (*l*).

attendance or in writing; (4) if the money is to be paid to the solicitor, the written authority of the client (only required when the amount is above £10) or a certificate that the money is the solicitor's money; (5) the production of a certificate of the fund where it is over £10.

(*g*) R. S. C., Ord. 31, r. 25. In *Re Sutcliffe, Alison v. Alison* (1881), 50 L. J. (CH.) 574, where plaintiff only succeeded in obtaining an order for further answers to two out of twelve interrogatories, the costs of an adjournment into court were ordered to be costs in the cause instead of being apportioned according to the relative success of the parties. There is power to order the costs occasioned by the fault of the party to be paid by him in any event (*Vicary v. Great Northern Rail. Co.* (1882), 51 L. J. (Q. B.) 462). See p. 90, *post*.

(*h*) R. S. C., Ord. 31, r. 3; Ord. 65, r. 27 (20).

(*i*) *Berkeley v. Standard Discount Co.* (1879), 13 Ch. D. 97, C. A.

(*j*) *Mitchell v. Darley Main Colliery Co.* (1883), 10 Q. B. D. 457. As to costs of inspection, see p. 90, *post*.

(*k*) R. S. C., Ord. 31, r. 21. As to attachment, see title CONTEMPT OF COURT, Vol. VII., p. 307. The power to order attachment will only be exercised with very great care (*Gay v. Hancock* (1887), 56 L. T. 726; *Wilson v. Raffalovich* (1881), 7 Q. B. D. 553, C. A., *per* COTTON, L.J., at p. 561. For instances where the application for the writ has been held justifiable see *ibid.*; *Price v. Price* (1879), 48 L. J. (CH.) 215; *Thomas v. Palin* (1882), 21 Ch. D. 360, C. A.).

(*l*) R. S. C., Ord. 31, r. 21. The provisions of this rule do not extend to disclosure of the names of partners in a firm under R. S. C., Ord. 48A (*Pike v. Keene and Byne* (1876), 35 L. T. 341). See also p. 44, note (*e*), *ante*. As to the consequence of non-production of documents for inspection, see p. 91, *post*.

96. Service of the order for discovery need not be personal, but may be effected upon the solicitor to the party who is to give the discovery (*m*), though where this is the only service effected it is open to the party sought to be attached to answer that he has had no notice or knowledge of it (*n*). A solicitor being thus served and failing without reasonable excuse to give notice to his client is himself liable to attachment (*o*).

It is necessary to indorse upon the order for discovery a notice warning the party bound by it of the consequences of his disobedience (*p*), and this applies to service upon the solicitor as well as to service on the party himself (*q*).

97. The power to dismiss an action is optional, not obligatory (*r*), and should not be exercised unless the court is satisfied that the plaintiff is endeavouring to avoid giving the discovery (*a*), and not merely where the omission or neglect to comply with the order is not a culpable one, *e.g.*, loss of memory or illness (*b*). The order for dismissal may extend to the whole action or may be limited to those parts of it to which the discovery which has not been given relates (*c*).

98. An order striking out a defence will not be made for light reasons (*d*), but only where there is wilful default or negligence on the part of the defendant (*e*). Where, however, such an order has been made, and judgment has been signed in default

SECT. 6.
Effect of
Non-com-
pliance with
Order for
Discovery.

Service of
order.
Indorsement
on order.

Dismissal of
action.

Striking out
defence.

(*m*) R. S. C., Ord. 31, r. 22; and *Joy v. Hadley* (1883), 22 Ch. D. 571; *Re Mulcaster, Dalston v. Nansom* (1878), 47 L. J. (CH.) 609; *Little v. Roberts* (1874), 30 L. T. 367.

(*n*) R. S. C., Ord. 31, rr. 22.

(*o*) *Ibid.*, r. 23.

(*p*) R. S. C., Ord. 41, r. 5.

(*q*) *Hampden v. Wallis* (1884), 26 Ch. D. 746, C. A. For the requirements generally on applications for a writ of attachment, see title CONTEMPT OF COURT, Vol. VII., pp. 307 *et seq.*

(*r*) *Hartley v. Owen* (1876), 34 L. T. 752; *Kennedy v. Lyell*, [1882] W. N. 137, C. A. See also *Liberia Republic v. Roye* (1876), 1 App. Cas. 139, *per* Lord CAIRNS, L.C., at p. 143, *per* Lord HATHERLEY, at p. 145; and see further *James Nelson & Sons, Ltd. v. Nelson Line (Liverpool), Ltd.*, [1906] 2 K. B. 217, C. A., *per* FARWELL, L.J., at p. 226.

(*a*) *Danvillier v. Myers*, [1883] W. N. 58, C. A.

(*b*) *Cardwell (Lord) v. Tomlinson* (1885), 54 L. J. (CH.) 957, 958; *Wilson v. Raffalovich* (1881), 7 Q. B. D. 553, C. A., *per* COTTON, L.J., at p. 561.

(*c*) *Danvillier v. Myers*, *supra*. If an order is made that the action be dismissed unless the discovery is given within a limited time on default of the plaintiff to give it within the prescribed time, the action is at an end (*Whistler v. Hancock* (1878), 3 Q. B. D. 83; *King v. Davenport* (1879), 4 Q. B. D. 402; *Re Macintosh and Dixon*, [1903] W. N. 95; see also *Farden v. Richter* (1889), 23 Q. B. D. 124; *Script Phonography Co. v. Gregg* (1890), 59 L. J. (CH.) 406). But the time for appealing against an order dismissing an action under this rule may be enlarged under R. S. C., Ord. 64, r. 7, notwithstanding that the order has taken effect and that the action stands dismissed thereby (*Carter v. Stubbs* (1880), 6 Q. B. D. 116, C. A.; *Burke v. Rooney* (1879), 4 O. P. D. 226).

(*d*) *Twycroft v. Grant*, [1875] W. N. 201; *Anon.*, [1875] W. N. 204.

(*e*) *Haigh v. Haigh* (1885), 31 Ch. D. 478, *per* PEARSON, J., at p. 482. See for cases where defence has been struck out, *Fisher v. Hughes* (1877), 25 W. R. 528; *Jenney v. Mackintosh* (1889), 61 L. T. 108, C. A.; and see also *Gibson v. Sykes* (1884), 28 Sol. Jo. 533, where defence was struck out but judgment signed was subsequently set aside.

SECT. 6.
Effect of
Non-com-
pliance with
Order for
Discovery.

of defence, the judgment will not be set aside, except where a good defence on the merits can be shown (*f*). A plaintiff may join with his motion to strike out the defence a further motion for judgment in default of defence (*g*).

Part III.—Discovery of Documents.

SECT. 1.—Nature and Extent.

Generally.

99. The right to obtain discovery of documents consists in the power, subject to the discretion of the master or judge, of one party to obtain on oath from the opposite party a statement of all documents (*h*) relating to (*i*) the matter in question (*k*) between them, which are or have been (*l*) in the possession or power of the latter (*m*), or of his agent for him (*n*).

The right to have the existence of a document disclosed in the affidavit of documents does not necessarily involve any right to have

(*f*) *Farden v. Richter* (1889), 23 Q. B. D. 124.

(*g*) *Salomon v. Holt* (1905), 53 W. R. 588. See also title PRACTICE AND PROCEDURE.

(*h*) As to what is a document, see *R. v. Dye*, [1908] 2 K. B. 333: "There is a document wherever there is writing or printing capable of being read, no matter what the material may be upon which it is impressed or inscribed" (*per* DARLING, J., S. C. 77 L. J. (K. B.) 659, at p. 661).

(*i*) "The documents to be produced are not confined to those which would be evidence either to prove or to disprove any matter in question in the action; it seems to me that every document relates to the matters in question in the action, . . . which it is reasonable to suppose contains information which *may*—not which *must*—either directly or indirectly enable the party requiring the affidavit either to advance his own case, or to damage the case of his adversary" (*Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q. B. D. 55, C. A., *per* BRETT, L.J., pp. 62, 63).

(*k*) The expression "matter in question" means a question or issue in dispute in the action, and not the thing about which such question or issue arises; that is to say, in an action to recover possession of land it means the plaintiff's alleged title and not the land (*per* LINDLEY, J., in *Philipps v. Philipps* (1879), 40 L. T. 915, 821).

(*l*) See p. 60, *post*.

(*m*) R. S. C., Ord. 31, r. 12. All documents must be included of which the party giving the discovery has corporeal possession, even if he has no property at all in them, but not documents which are not in his corporeal possession, unless he has some kind of property in them (*O'Shea v. Wood*, [1891] P. 286, C. A., *per* LINDLEY, L.J., at p. 288; and see *Norton & Co. v. Lamport, Holt & Co.* (1886), 2 T. L. R. 630). Careful search must be made for all relevant documents in his own possession, and proper inquiries and efforts made with regard to those which are not; see *Price v. Price* (1879), 48 L. J. (CH.) 215; *Swanton v. Lishman* (1881), 45 L. T. 360, C. A.

(*n*) *Murray v. Walter* (1839), Cr. & Ph. 114, 125; *Mortens v. Haigh* (1863), 3 De G. J. & Sm. 528, C. A.; *Lazarus v. Mozley* (1869), 5 Jur. (N. S.) 1119. Documents which are or have been in his possession or power jointly with or as agent for another or others are also to be included so far as disclosure of their existence is concerned (*Taylor v. Rundell* (1841), Cr. & Ph. 104; *Bovill v. Cowan* (1870), 5 Ch. App. 495). See also *Compagnie Financière du Pacifique v. Peruvian Guano Co.*, *supra*, at pp. 62, 63, C. A., and p. 71, —

it produced for inspection (o). On the other hand, the fact that a document is protected from production for inspection does not afford a sufficient reason for not disclosing its existence (p).

SECT. 1.
Nature and
Extent.

SECT. 2.—*The Application.*

100. The application for discovery of documents is made to a master in chambers on the summons for directions or on notice given under it, and need not be supported by affidavit (q). The master has power either to refuse or adjourn the application if satisfied that the discovery sought is not necessary at all or at that stage of the action, or to make such order, either generally or limited to certain classes of documents, as he may in his discretion think fit (r). In exercising his discretion he is guided by the pleadings and the nature of the action. Furthermore, he must refuse the discovery if he thinks it not necessary either for disposing fairly of the cause or matter or for saving costs (s). This gives the master discretion to refuse discovery where he sees that no good can reasonably be expected from ordering it (t). The master's decision is subject to an appeal to the judge in chambers, and, by leave only, from him to the Court of Appeal (u).

Practice.

The order, when made, should limit the time within which the affidavit of documents must be filed.

SECT. 3.—*The Affidavit of Documents.*

101. The person ordered to give discovery must state on oath (v) (1) what documents relating to the matters in question are in his possession or power; (2) whether he objects to produce for inspection any of these documents, and, if so, on what ground (w); (3) what

Contents.

(o) See p. 71, *post*.

(p) *Swanston v. Lishman* (1881), 45 L. T. 360, O. A., *per* JESSEL, M.R., at p. 361: "The rule as to discovery is the exact contrary of that as to production for inspection. You must set out every document you have in your possession whether you are bound to produce them or not"; *New British Mutual Investment Co., Ltd. v. Peed* (1878), 3 O. P. D. 196; and see p. 60, *post*.

(q) R. S. O., Ord. 31, r. 12; *Downing v. Falmouth United Sewerage Board* (1887), 37 Ch. D. 234, O. A., at pp. 241, 242. But affidavits already on the file may be referred to for the purpose of deciding whether the discovery is necessary (*ibid.*). As a general rule the order should not be made where there are any reasonable grounds for believing it would be illusory by reason of there being no documents in existence. But if there be *prima facie* evidence of their existence one party is entitled to appeal to the oath of the other as to such documents being in his possession or power (*Johnson v. Smith* (1877), 36 L. T. 741; *Powell v. Heffernan* (1879), 4 L. R. Ir. 703). As to the time for discovery, see p. 50, *ante*.

(r) R. S. O., Ord. 31, r. 12. He may give leave to interrogate (*A.-G. v. North Metropolitan Tramways Co.*, [1892] 3 Ch. 70).

(s) R. S. O., Ord. 31, r. 12.

(t) *Downing v. Falmouth United Sewerage Board*, *supra*, *per* COTTON, L.J., at p. 242; and see *Re Wills' Trade-marks*, [1892] 3 Ch. 201, O. A.

(u) *Williams v. Bird* (1890), 34 Sol. Jo. 847, O. A.

(v) R. S. O., Appendix B, Form 8; the form should be closely followed (*Anon.*, [1876] W. N. 39).

(w) As to how the objection must be stated, see p. 70, *post*.

SECT. 3. documents he has had in his possession or power relating to the matters in question and when they were last so, and what has become of them and in whose possession they now are; (4) that he has not and never had (x) any other documents relating to the matters in question in his possession or power or in the possession, custody, or power of any agent of his or of any person on his behalf (y).

Schedules. The documents must be set forth in two schedules. The first schedule must contain all the documents that are in the possession or power of the deponent, and must be sub-divided into two parts: (i.) containing all the documents he is willing to produce; (ii.) containing all the documents he objects to produce. The second schedule must contain all the documents that have been but are not then in his possession or power (y).

Description of the documents. The documents must be so described and identified as to enable an order for production of them, if made, to be enforced (z). The affidavit must not be of unnecessary length, nor oppressive, nor irrelevant, as otherwise it may be ordered to be taken off the file (a) and the party filing it ordered to pay the costs caused by it.

(x) The omission of these words is sufficient reason for ordering a further and better affidavit (*Wagstaffe v. Anderson, Moss and Michell* (1878), 39 L. T. 332; *Gardner v. Irvin* (1878), 4 Ex. D. 49, at p. 53, C. A.).

(y) See note (v), p. 59, *ante*.

(z) *Taylor v. Batten* (1878), 4 Q. B. D. 85, C. A.; *Bristol Corporation v. Cox* (1884), 26 Ch. D. 678, 681; *Budden v. Wilkinson*, [1893] 2 Q. B. 432, C. A.; *Price v. Price* (1879), 11 Ch. D. 163; *Fortescue v. Fortescue* (1876), 34 L. T. 847; *Gardner v. Irvin*, *supra*; *Ledwidge v. Mayne* (1877), 11 I. R. Eq. 463. Where the documents are numerous and of the same class or description, such as letters between the same parties, they are often allowed in the King's Bench Division to be described as "tied up in a bundle marked A and numbered from 1—50 and initialled by me" (*Taylor v. Batten*, *supra*; *Morris v. Edwards* (1890), 15 App. Cas. 309), or by some similar description (*Bewicke v. Graham* (1881), 7 Q. B. D. 400, C. A.; *Kain v. Farrer* (1877), 37 L. T. 469). "Certain letters tied up in a bundle marked A." is by itself an insufficient description (*Fortescue v. Fortescue*, *supra*). "Correspondence" is also not a sufficient description unless the number of the letters is stated (*Gardner v. Irvin*, *supra*; *Price v. Price*, *supra*). If the documents are not numerous the best course is to set out each separately and number them in the margin of the schedule. In the Chancery Division formerly a practice similar to that held to be good in *Taylor v. Batten*, *supra*, was allowed (*Christian v. Taylor* (1841), 11 Sim. 401), but now a stricter practice prevails, the documents being required to be set out in bundles, and scheduled and numbered in such a way that the opposite party may ask for those he wants to see, specifying them by their numbers (*Walker v. Poole* (1882), 2 Ch. D. 835, 836; *Hill v. Hart-Davis* (1884), 26 Ch. D. 470, C. A.; and see *Cooke v. Smith*, [1891] 1 Ch. 509, C. A., *per* KAY, L. J., at p. 522: "You must not only make up the documents in bundles, but you must describe what the documents are, e.g., a bundle of letters from A. to B., and you must identify each document by marking it specially . . . you must mark each one and identify it in such a way that the opposite party can say I require that particular document." On the other hand, in *Milbank v. Milbank*, [1900] 1 Ch. 376, C. A., LINDLEY, L. J., at pp. 383, 384, seems to consider that as the authorities at present stand a party may be able to claim privilege in the Chancery Division for a number of deeds which are simply described as a bundle of documents numbered and marked with some distinctive mark.

(a) *Walker v. Poole* (1882), 21 Ch. D. 835; *Bolton v. Natal Land and Colonization Co.*, [1887] W. N. 143, 178, C. A.

(b) *Ibid.*; *Hill v. Hart-Davis* (1884), 26 Ch. D. 470, C. A.

The copy of the affidavit delivered to the opposite party is sufficient for production in court, without an office copy being taken (c).

SECT. 8.
The
Affidavit of
Documents.

Where more
than one
party.

102. If discovery is ordered against more than one party each must make a separate affidavit or join in a joint one. In the latter case they must deal with the documents which they or either of them have or have had in their or his possession or power (d).

Where a plaintiff has already, at the instance of one of several defendants, been ordered to give discovery and has done so, he will not generally be ordered to make another affidavit on the application of another defendant (e).

103. If after the affidavit of documents has been filed a document is discovered of which the opposite party has a right to have inspection, it is the duty of the party filing the affidavit to give information to his opponent of the fact, either by supplementary affidavit or by notice (f).

Subsequent
discovery of
other
documents.

104. Subject to the exceptions mentioned below, the statements in the affidavit of documents are conclusive with regard to the documents that are or have been in the possession or power of the party giving the discovery (g), both as to their relevancy (h), and the grounds stated in support of a claim for privilege from production for inspection (i). The party seeking the discovery cannot bring evidence by affidavit or otherwise to show that the statements are untrue (j), nor, as a rule, will he be allowed to interrogate for that purpose (k).

How far
affidavit is
conclusive.

(c) *Leslie v. Cave* (1886), 31 Sol. Jo. 11; B. S. C., Ord. 65, r. 27 (54).

(d) *Fendall v. O'Connell* (1885), 29 Ch. D. 899, C. A. (husband and wife as co-plaintiffs).

(e) *Parad's Mozambique Syndicate v. Alexander*, [1903] 1 Ch. 191, 195, 196.

(f) *Mitchell v. Darley Main Colliery Co.* (1884), 1 Cab. & El. 215.

(g) *Gardner v. Irvin* (1878), 4 Ex. D. 49, C. A.; *Jones v. Monte Video Gas Co.* (1880), 5 Q. B. D. 556, C. A.; *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q. B. D. 55, C. A.; *Hall v. Truman, Hanbury & Co.* (1885), 29 Ch. D. 307, 319, C. A.; *Norton & Co. v. Lamport, Holt & Co.* (1886), 2 T. L. R. 630; *A.-G. v. Castleford Local Board* (1872), 27 L. T. 644; *Westminster Brymbo Coal and Coke Co. v. Clayton* (1864), 9 L. T. 534; *Imperial Land Co. of Marseilles v. Masterman* (1873), 29 L. T. 559, C. A.; *Welsh Steam Coal Collieries, Ltd. v. Gaskell* (1877), 36 L. T. 352, C. A.

(h) *Budden v. Wilkinson*, [1893] 2 Q. B. 432, 433, C. A.; *Mogul Steamship Co. v. M'Gregor, Gow & Co.* (1886), 2 T. L. R. 752. see also *Hastings Corporation v. Ivall* (1873), 8 Ch. App. 1017.

(i) *Bewicks v. Graham* (1881), 7 Q. B. D. 400, C. A.; *Bulman and Dixon v. Young, Ehlers & Co.* (1883), 49 L. T. 736, C. A.; *Lyell v. Kennedy* (1884), 27 Ch. D. 1, C. A., per COTTON, L.J., at p. 19; *Budden v. Wilkinson*, *supra*; *Frankenstein v. Gavin's Cycle Cleaning and Insurance Co.*, [1897] 2 Q. B. 62, C. A. As to what must be stated in the affidavit in support of a claim for privilege from production for inspection, see p. 70, *post*.

(j) *Gardner v. Irvin*, *supra*; *Jones v. Monte Video Gas Co.*, *supra*; *Compagnie Financière du Pacifique v. Peruvian Guano Co.*, *supra*; *Morris v. Edwards* (1889), 23 Q. B. D. 287, C. A.; (1890), 15 App. Cas. 309; *Taylor v. Batten* (1878), 4 Q. B. D. 85, C. A.; *Welsh Steam Coal Collieries, Ltd. v. Gaskell* (1877), 36 L. T. 352, C. A.

(k) *Nicholl v. Wheeler* (1886), 17 Q. B. D. 101, C. A.; *Hall v. Truman, Hanbury & Co.*, *supra*; and see p. 63, *ante*, and p. 102, *post*.

SECT. 2.

The
Affidavit of
Documents.

When further
affidavit may
be obtained.

105. An application for a further affidavit on the ground of the omission of relevant documents will only be granted if it can be shown either from the affidavit of documents or from documents referred to in it, or from admissions in the pleadings, that there is reasonable ground for supposing that the party making the discovery has or has had other relevant documents in his possession or power (l).

When production for inspection is sought, it will only be ordered where the court is reasonably certain from the affidavit itself, or from the nature of the case, or of the documents in question, or from admissions made by the party in his pleadings or in any other affidavit, that he has erroneously represented or misconceived their nature or effect. The court will accept the affidavit as conclusive unless it is made clear that the oath of the party cannot be relied on (m), and, as rule, before production will be ordered the party resisting the discovery will be allowed to make a further affidavit to protect the document if he can (n).

In some cases inconsistencies in other affidavits filed by the party (o), and, perhaps, any admissions contained in documents

(l) *Jones v. Monte Video Gas Co.* (1880), 5 Q. B. D. 556, O. A.; *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q. B. D. 55, O. A., at p. 63; *Hall v. Truman, Hanbury & Co.* (1885), 29 Ch. D. 307, O. A., at p. 319; *Welsh Steam Coal Collieries, Ltd. v. Gaskell* (1877), 36 L. T. 352, O. A.; *Lyell v. Kennedy* (1884), 27 Ch. D. 1, O. A., where COTTON, L.J., at p. 20, seems to hold that reference may be made to other documents produced; *Jones v. Andrews* (1888), 58 L. T. 601, O. A.; *Yorkshire Provident Life Assurance Co. v. Gilbert*, [1895] 2 Q. B. 148, 155, O. A.; *Noel v. Noel* (1863), 1 De G. J. & Sm. 468, O. A.; *Wright v. Pitt* (1868), 3 Ch. App. 809; *Saull v. Browne* (1874), L. B. 17 Eq. 402. See also *Sumson v. Pictor* (1886), 30 Sol. Jo. 468, O. A.; *Steele v. Savory* (1891), 36 Sol. Jo. 12, O. A.; *Weal v. Garnes* (1884), 28 Sol. Jo. 513; *Dinn v. Brandon* (1885), 1 T. L. R. 598; *Hennessy v. Wright* (1888), 4 T. L. R. 511; *Jenkins v. Bushby* (1866), 35 L. J. (CH.) 400; *Potts v. Adair* (1793), 3 Swan. 268, n.; *Earp v. Lloyd* (1857), 3 K. & J. 549; *Hastings Corporation v. Ivall* (1873), 8 Ch. App. 1017.

(m) *Coombe v. London Corporation* (1842), 6 Jur. 57 (affirmed (1845), 10 Jur. 57); *A.-G. v. Emerson* (1882), 10 Q. B. D. 191, 198, 203, 204, O. A., where the party's answers to interrogatories were looked at, and BRETT, L.J., held that other documents produced to the court might be referred to; *Roberts v. Oppenheim* (1884), 26 Ch. D. 724, O. A.; *Frankenstein v. Gavin's Cycle Cleaning and Insurance Co.*, [1897] 2 Q. B. 62, O. A.; *Hey v. De la Hey*, [1886] W. N. 101, O. A. See also *Bulman and Dixon v. Young, Ehlers & Co.* (1883), 49 L. T. 736, O. A.; and compare *Lyell v. Kennedy*, *supra*, at p. 22.

(n) *Minet v. Morgan* (1873), 8 Ch. App. 361; *Kain v. Farrer* (1877), 37 L. T. 469, 471; *Taylor v. Batten* (1878), 4 Q. B. D. 85, O. A.; *Kennedy v. Lyell* (1883), 8 App. Cas. 217, 229. In *A.-G. v. Lambe* (1848), 17 L. J. (CH.) 154, the court ordered production, as it appeared on the face of the answer that the contents of the document in question might prove material to plaintiff's case. In *Ponsonby v. Hartley*, [1883] W. N. 44, O. A., the court on inspection of one of the documents, which it was stated in the affidavit did not tend to support the plaintiff's case, held that the affidavit was to that extent manifestly inaccurate,

Felkin v. Herbert (Lord) (1861), 30 L. J. (CH.) 798, where production was ordered; *Mansell v. Feney* (1861), 4 L. T. 437.

(o) *A.-G. v. Castleford Local Board* (1872), 27 L. T. 644; *Westminster Brymbo Coal and Coke Co. v. Clayton* (1884), 9 L. T. 534; *Hastings Corporation v. Ivall* (1873), 8 Ch. App. 1017. See also *Morris v. Edwards* (1889), 23 Q. B. D. 287, O. A., *per* LINDLEY, L.J., at p. 293.

other than the pleadings, may possibly be sufficient material upon which to order a further affidavit, but as a general rule the grounds must be founded upon one or more of the reasons mentioned above. It may be that under special circumstances the court will allow an interrogatory to be put as to whether a particular document or particular documents is or are in the possession of the party giving the discovery, but a *prima facie* case must be shown before such an interrogatory will be permitted, and it should be made the subject of a special application (*p*). A general roving interrogatory will not be allowed (*q*).

SECT. 3.
The
Affidavit of
Documents.

Interrogatory
as to
documents.

106. Where the party seeking the discovery can swear that, in his belief, the opposite party has or has at some time had in his possession or power a specified document or documents relating to any matter in question between them, he may apply for an order requiring his opponent to state on oath whether it or they has or have at any time been in his possession or power, and if not so, then when he parted with its or their possession and what has become of it or them (*r*). A *prima facie* case of relevancy and possession is sufficient to entitle the applicant to the order (*s*).

Order as to
specific
documents.

The application is made by notice under the summons for directions to a master in chambers, and may be made whether or not an affidavit of documents has previously been ordered or made. It does not appear necessary that the grounds of the deponent's belief should be stated.

Application.

No order can be made unless the applicant can name and specify certain specific documents, and the order must be confined to those particular documents (*t*). It will not suffice to state that the opponent has in his possession a class of documents such as correspondence between particular parties or books or entries (*a*). Moreover, the affidavit must show that in the belief of the deponent such documents actually are, or have been, in the party's possession, and have a bearing on the point in dispute (*b*). A mere general affidavit based upon *à priori* reasoning asserting that the applicant has reason to believe that a correspondence must have passed, and that books and documents exist, will not suffice (*c*).

Contents of
affidavit.

For the purpose of such an application, if a letter scheduled to an affidavit of documents or produced by a party refers to another

(*p*) *Hall v. Truman, Hanbury & Co.* (1885), 29 Ch. D. 307, O. A., per COTTON, L.J., at pp. 320, 321; e.g., where there is an issue as to a particular document which *prima facie* ought to be in the possession of a defendant. And see *Jones v. Monte Video Gas Co.* (1880), 5 Q. B. D. 556, O. A., per COTTON, L.J., at p. 559.

(*q*) *Edison and Swan United Electric Light Co. v. Holland and Jablockhoff General Electricity Co.*, [1888] W. N. 31, O. A.

(*r*) R. S. C., Ord. 31, r. 19A (3); *White v. Spafford & Co.*, [1901] 2 K. B. 241, O. A.; *Graves v. Heinemann and Armstrong* (1901), 18 T. L. R. 115.

(*s*) *Ormerod, Grierson & Co. v. St. George's Ironworks* (1906), 95 L. T. 694, at p. 696.

(*t*) *White v. Spafford & Co.*, *supra*, where the application was refused without prejudice to any application for leave to interrogate; *Graves v. Heinemann and Armstrong*, *supra*.

(*a*) *Ibid.*

(*b*) *Graves v. Heinemann and Armstrong*, *supra*.

(*c*) *Ibid.*, which see for the application of these principles to an application under this rule in an action of copyright.

SECT. 3.
The
Affidavit of
Documents.

letter, that other letter is *prima facie* relevant, and the onus of showing that it is not relevant or is privileged lies on the party making the affidavit of documents or producing the letter (*d*).

By means of this rule a party can, therefore, in some cases attack his opponent's affidavit of documents, notwithstanding that it is sufficient in point of form, and may obtain a further affidavit, but limited to the particular documents specified in the application.

Insufficient
affidavit.

107. Again, wherever the affidavit of documents is insufficient in point of form, or omits to deal with any of the classes of documents required to be included in it, or the documents disclosed are not sufficiently described, the party who obtained the order for discovery may apply for a further and better affidavit. The application is made by notice, under the summons for directions, to a master in chambers. No affidavit can be used in support (*e*).

SECT. 4.—*Inspection by the Court.*

Inspection
when
privilege
claimed.

108. Where privilege from production for inspection is claimed for any document the master or judge may inspect it for the purpose of deciding as to the validity of the claim (*f*). To this extent the right mitigates against the general principle that the affidavit of documents is conclusive as to the claim of privilege (*g*). The document must be in the possession or under the control of the party from whom inspection is sought (*h*). The party applying for an order for inspection by the master should give notice to the opposite party to produce the documents for the inspection of the master at the hearing of the application. Under the former practice it was held that where the court or judge inspected the documents at the instance of the parties it was not competent to either party to afterwards question the decision (*i*). But it would seem that this does not apply where inspection takes place by virtue of the present rule.

SECT. 5.—*Grounds on which Disclosure can be resisted.*

Grounds for
resisting
disclosure.

109. Certain actions or matters in which the disclosure of the existence of documents will not be ordered have already been mentioned (*k*). But in addition to these, in actions where discovery in general may be ordered there exist grounds on which the disclosure of the existence of documents may be resisted. These grounds find

(*d*) *Ormerod, Grierson & Co. v. St. George's Ironworks* (1906), 95 L. T. 694, which see as to documents produced without being scheduled to any affidavit of documents.

(*e*) For form of notice and order, see Chitty's Forms, 225.

(*f*) R. S. C., Ord. 31, r. 19A (2); *Vetter v. Schreiber* (1888), 53 J. P. 39. See *Williams v. Quebrada Railway, Land, and Copper Co.*, [1895] 2 Ch. 761, 767; *Milbank v. Milbank*, [1900] 1 Ch. 376, C. A., per VAUGHAN WILLIAMS, L.J., at p. 385; *Lafone v. Falkland Islands Co.* (1867), 27 L. J. (CH.) 25.

(*g*) See p. 61, *ante*.

(*h*) *Wilkinson v. Wilkinson* (not reported), per CHANNELL, J., in chambers.

(*i*) *Bustros v. White* (1876), 1 Q. B. D. 423, 427, C. A.

(*k*) See pp. 40 *et seq.*, *ante*.

their chief application with reference to the production of documents for inspection, and are dealt with in that connection (l).

SECT. 5.
Grounds on
which
Disclosure
can be
Resisted.

SECT. 6.—*Disclosure in Particular Cases.*

SUB-SECT. 1.—*Actions for Recovery of Land.*

Recovery of
land.

110. In an ordinary action for recovery of land either party may be ordered to make disclosure of the documents in his possession relating to the cause, in the same way as and subject to the same rights to refuse inspection as in any other kind of action (a). But where the claim to recover possession is based upon an alleged forfeiture, discovery will not be ordered as against the defendant (b).

SUB-SECT. 2.—*Discovery of Ship's Papers in Actions on Policies of Marine Insurance.*

Actions on
marine
insurance
policies.

111. The practice which obtained before the Judicature Acts with regard to discovery in actions brought on policies of marine insurance has not been superseded by that obtaining under the rules made by virtue of those Acts, and discovery to a greater extent and with fewer restrictions than in other actions is still obtainable (c). These special rights of discovery apply to actions on policies on goods shipped as well as on the ship, and extend beyond the original parties to the insurance, reinsurers being also included (d). Further, they apply to an action brought by underwriters, who have paid claims under a policy in excess of the amount due, for the purpose of recovering the amount overpaid, at any rate where they did not resist the claims and were led to pay them by misstatement, since such an action is substantially one arising out of a policy of marine insurance (e). Provided the insurance is substantially a marine insurance the old rights apply, notwithstanding that the policy also covers a short transit by land (f). But they do not apply where the insurance is of an inland transit, though part of the transit is on inland waters (g), nor to a policy of insurance which is substantially one covering

(l) See p. 71, *post*.

(a) *Lyell v. Kennedy* (1883), 8 App. Cas. 217, overruling *Philipps v. Philipps* (1879), 40 L. T. 815, and *Daniel v. Ford* (1882), 47 L. T. 575 (defendant); *Wrentmore v. Hagley* (1882), 46 L. T. 741 (defendant); *Fortescue v. Fortescue* (1876), 34 L. T. 847 (defendant); *New British Mutual Investment Co. v. Peed* (1878), 3 C. P. D. 196; *Miller v. Kirwan*, [1903] 2 I. R. 118; *Eyre v. Rodgers* (1891), 40 W. R. 137.

(b) See p. 41, *ante*. As to interrogatories, see p. 104, *post*.

(c) *West of England Bank v. Canton Insurance Co.* (1877), 2 Ex. D. 472, 474; *China Steamship Co. v. Commercial Assurance Co.* (1881), 8 Q. B. D. 142, 145, C. A. See, for reasons for this practice, *ibid.*, at p. 148; *Rayner v. Ritsun* (1865), 35 L. J. (Q. B.) 59, *per* COCKBURN, C.J., at p. 61; *Goldschmidt v. Murryat* (1809), 1 Camp. 559; *China Traders' Insurance Co. v. Royal Exchange Assurance Corporation*, [1898] 2 Q. B. 187, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 193; *Harding v. Russell*, [1905] 2 K. B. 83, C. A., *per* MATHEW, L.J., at p. 85.

(d) *China Traders' Insurance Co. v. Royal Exchange Assurance Corporation*, *supra*, at pp. 191, 192, 193.

(e) *Boulton v. Houlder Brothers & Co.*, [1904] 1 K. B. 784, 789, C. A.

(f) *Harding v. Russell*, *supra*, questioning *Henderson v. Underwriting and Agency Association*, [1891] 1 Q. B. 557; *Village Main Reef Gold Mining Co. v. Stearns* (1900), 5 Com. Cas. 246.

(g) *Schloss v. Stevens* (1905), 10 Com. Cas. 224, C. A.

SECT. 6.
Disclosure
in
Particular
Cases.
Extent of
discovery.

risks on land, though the policy also contains a clause under which risks of transportation by ships are covered (*h*), at any rate where the action is not brought on that clause (*i*).

The underwriters who are being sued are entitled to disclosure on oath and production, or to reasons on oath explaining fully the inability to produce by the plaintiffs (the assured), of all documents relating to the insurance or the subject-matter thereof, and to the cargo, freight, and loss, in their own custody, or in their custody as agents for other persons, and the plaintiffs must do everything reasonable within their power to get production of documents not in their own custody, and give all information with respect to them (*k*). The underwriters may apply for, and are entitled as a matter of course to, an order staying all proceedings till this has been done (*l*).

The utmost good faith in elucidating the facts under which the underwriters' liability may arise must be exercised by the assured (*m*).

The order for production extends to the plaintiff and "all persons interested," that is, all persons on the same side as the plaintiffs, although they are not parties (*n*).

The application may be made at any time after appearance (*o*), and need not be supported by affidavit (*p*), nor is a deposit as security for costs necessary (*q*).

(*h*) *Tannenbaum & Co. v. Heath*, [1908] 1 K. B. 1032, C. A., per Lord ALVERSTONE, C.J., at p. 1037.

(*i*) *Ibid.*

(*k*) *Janson v. Solarte* (1837), 2 Y. & O. (EX.) 127, 136; *China Steamship Co. v. Commercial Assurance Co.* (1881), 8 Q. B. D. 142, C. A., per JESSEL, M.R., at p. 144, and per BRETT, L.J., at p. 146; *West of England Bank v. Canton Insurance Co.* (1877), 2 Ex. D. 472, p. 474, per KELLY, C.B., and at p. 475, per CLEASBY, B.; *China Traders' Insurance Co. v. Royal Exchange Assurance Corporation*, [1898] 2 Q. B. 187, C. A., per VAUGHAN WILLIAMS, L.J., at pp. 192, 193; *Boulton v. Houlder Brothers & Co.*, [1904] 1 K. B. 784, 791, C. A., per COLLINS, M.R., at p. 789, and per ROMER and MATHEW, L.J.J., at p. 791.

(*l*) *Harding v. Bussell*, [1905] 2 K. B. 83, C. A., per MATHEW, L.J., at p. 85.

(*m*) *Ibid.*

(*n*) *West of England Bank v. Canton Insurance Co.*, *supra*; *China Steamship Co. v. Commercial Assurance Co.*, *supra*, at p. 145; *London and Provincial Marine and General Insurance Co. v. Chambers* (1900), 5 Com. Cas. 241. These words do not include other underwriters, but only affect persons on the plaintiff's side (*China Steamship Co. v. Commercial Assurance Co.*, *supra*, p. 145; but where mortgagees are suing, they do include the mortgagor or his representatives, who had sailed the ship as managing owner (*West of England Bank v. Canton Insurance Co.*, *supra*). It has been held that they do not include a person, not a party to the action, who is out of the jurisdiction and is not under the plaintiff's control (*Fraser v. Burrows* (1877), 2 Q. B. D. 624, but the mere fact that the person from whom the discovery can be obtained is out of the jurisdiction will not prevent the action being stayed till he gives discovery if he be in reality, though not in name, the plaintiff (*Willis & Co. v. Baddeley*, [1892] 2 Q. B. 324, C. A.).

(*o*) *Harding v. Bussell*, *supra*.

(*p*) *China Steamship Co. v. Commercial Assurance Co.*, *supra*. It is made by ordinary summons or under the summons for directions to a master at chambers.

(*q*) *Law v. Budd*, [1883] W. N. 166.

Part IV.—Production of Documents for Inspection.

SECT. 1.—*Nature and Extent.*

SECT. 1. Nature and Extent.

112. A party is, subject to the exceptions mentioned hereafter (a), entitled to have produced for his inspection, or that of his solicitors or agents (b), for the purpose of the cause or matter (c), every document in the possession or power (d) of the opposite party, or of his agent, present or past, which relates to any matter in question (e) in the cause or matter (f) and is material or relevant to that cause (g). He is also entitled to take copies or have them made for him (h).

SECT. 2.—*Modes of Procuring Production.*

113. There are three possible ways of procuring the production of documents for the inspection of the party seeking the discovery.

Application
for
production.

A master, on an application being made to him for the purpose by a party to any cause or matter, may at any time during the pendency of any cause or matter, order the production by any other party thereto, upon oath, of such of the documents in his

(a) See p. 71, *post*, for the grounds on which production may be limited.

(b) *Williams v. Prince of Wales Life etc. Co.* (1857), 23 Beav. 338; *Costa Rica Republic v. Erlanger* (No. 2) (1875), 44 L. J. (CH.) 402, C. A. "Agents," *semble*, includes a land agent although he is a witness in the suit (*A.-G. v. Whitwood Local Board* (1871), 40 L. J. (CH.) 592), though usually inspection by witnesses is not allowed (*Boyd v. Petrie* (1868), 3 Ch. App. 818), but "agent" does not include a professional accountant appointed for the purpose (*Bonnardet v. Taylor* (1861), 1 John. & H. 383; *Draper v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1861), 7 Jur. (N. S.) 86, C. A.; *Coleman v. West Hartlepool Harbour and Rail. Co.* (1861), 5 L. T. 266). Yet where a proper case is made out, inspection by such a person or any other expert may be allowed (*Lindsay v. Gladstone* (1869), L. R. 9 Eq. 132; *Swansea Vale Rail. Co. v. Budd* (1866), L. R. 2 Eq. 274; see also *Peru Republic v. Weguelin* (1871), L. R. 20 Eq. 140 (inspection by several persons named by plaintiff); *Dadswell v. Jacobs* (1887), 34 Ch. D. 278, C. A.).

(c) Not for collateral purposes (*Richardson v. Hastings* (1844), 7 Beav. 354; and see *Williams v. Prince of Wales Life etc. Co.* (1857), 23 Beav. 338, and *Re Birmingham Banking Co., Ex parte Brinsley* (1866), 36 L. J. (CH.) 150).

(d) As to the meaning of possession or power, see p. 85, *post*.

(e) As to the meaning of "relating to any matter in question" see p. 58, *ante*.

(f) See p. 39, *ante*. In libel actions where justification is pleaded inspection of the plaintiff's books or documents can be obtained only in respect of such specific facts or instances which the defendant has stated in his defence or particulars and upon which he relies in order to prove his plea (*Arnold and Butler v. Bottomley*, [1908] 2 K. B. 151, C. A.).

(g) *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, C. A., at p. 656; R. S. C., Ord. 31, rr. 14, 15. This includes questions as to damages only (*Pape v. Lister* (1871), L. R. 6 Q. B. 242; *Ladde v. Walthew* (1884), 32 W. R. 1000). In an action for specific performance of an agreement to take a lease a mere general challenge of the plaintiff's title by the defendant does not entitle him to production of documents relating to title, but if defendant raises a particular issue challenging the title in any particular respect he is entitled to production of documents bearing on that issue (*Jones v. Watts* (1890), 43 Ch. D. 574, C. A.).

(h) See p. 91, *post*.

SMO. 2.
Modes of
Procuring
Production.

Power of
 court.

possession or power relating to any matter in question in the cause or matter as the master thinks right, and may deal with such documents, when produced, in such manner as shall appear just (i).

This rule is seldom resorted to, since nearly all the cases which arise now fall under one or both of the two other modes of obtaining inspection. Under it the court has power, in a case where one of several defendants obtains from the plaintiff an affidavit of documents, to order the production for inspection by any other defendant of documents, the possession and relevancy of which is admitted by the plaintiff in his affidavit of documents, without the necessity of an application by that defendant for an affidavit of documents. But the plaintiff may seal up those parts of any document which are not relevant to the question between him and that defendant (k).

Notice to
 produce
 documents
 mentioned in
 pleadings or
 affidavit.

114. Any party to a cause or matter (l) may (m) at any time (n) give notice in writing to any other party to produce for the former's inspection or that of his solicitor any documents (o) referred to (p) in the pleadings (q) or affidavits of his opponent (r).

(i) R. S. O., Ord. 31, r. 14; Ord. 54, r. 12. The power is discretionary, since the court is in no case bound to grant discovery (*Hope v. Brash*, [1897] 2 Q. B. 188, C. A.; *Crozat v. Brogden* (1895), 98 L. T. Jo. 474 (granted as to particular documents); *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord* (1898), 14 T. L. R. 403 (refused altogether)). In *Nobel Brothers Petroleum Production Co. v. Stewart & Co.* (1891), 35 Sol. Jo. 546, an application in the K. B. D. that the order should include production of documents for inspection at the trial, in accordance with the practice prevailing in the Ch. D., was refused.

(k) *Pardy's Mozambique Syndicate, Ltd. v. Alexander*, [1903] 1 Ch. 191. As to "sealing up," see p. 70, *post*.

(l) See p. 39, *ante*, for the meaning of these terms. A motion to set aside an award is a matter within the rule (*Re Fenner and Lord*, [1897] 1 Q. B. 367, C. A.). See title ARBITRATION, Vol. I., p. 476.

(m) R. S. C., Ord. 31, r. 15.

(n) *Smith v. Harris* (1883), 48 L. T. 869, 870; *Quilter v. Heatly* (1883), 23 Ch. D. 42, C. A.

(o) "Documents" includes exhibits to an affidavit (*Hunter v. Dublin, Wicklow and Wexford Rail. Co.* (1891), 28 L. R. Ir. 489, C. A.; *Re Hinchliffe*, [1895] 1 Ch. 117, C. A.); but not the case laid before counsel and his opinion thereon exhibited to an affidavit in support of an application to sue *in forma pauperis* (*Sloane v. Britain Steamship Co.*, [1897] 1 Q. B. 185, C. A.). It does not include copies of documents when copies are not referred to in the pleadings (*Quilter v. Heatly*, *supra*), nor does it extend to goods branded with a name or description (*Smith v. Harris*, *supra*).

(p) The documents need not be ones which are specifically described. A general reference or description to them is sufficient to entitle the opposite party to inspection (*Smith v. Harris*, *supra*; *Re Credit Co.* (1879), 11 Ch. D. 256).

(q) "Pleadings" includes particulars (*Cass v. Fitzgerald*, [1884] W. N. 18; *Milbank v. Milbank*, [1900] 1 Ch. 376, *per* VAUGHAN WILLIAMS, L.J., at p. 385).

(r) This includes an affidavit of documents (*Pardy's Mozambique Syndicate, Ltd. v. Alexander*, *supra*; *Wiedeman v. Walpole* (1890), 24 Q. B. D. 537, 542; *Hunter v. Dublin, Wicklow and Wexford Rail. Co.*, *supra*; R. S. C., Ord. 31, r. 17. In *Bray, Digest of Discovery*, art. 66, some doubt is expressed on this point, but in practice the rule is construed as stated. Compare R. S. C., Ord. 31, rr. 13, 17, 18. It also includes an affidavit in answer to interrogatories (*Moore v. Peachey*, [1891] 2 Q. B. 707; *Pardy's Mozambique Syndicate v. Alexander*, *supra*); and an affidavit not filed, but intended to be used and shown to the other party (*Re Fenner and Lord*, *supra*).

As incidental to the right to inspection there is also the right to take copies (s).

This is the mode of procuring inspection most usually adopted. An order is usually first obtained for an affidavit of documents (t), and on the affidavit being filed notice is given to produce the documents referred to in it or in any pleading or any other affidavit of the party against whom inspection is sought (u). In the High Court the form of notice provided (a) should be followed as closely as possible, though it is not essential to use its very words (b).

The party to whom the notice is given must produce the documents specified in it, unless he can show good cause why he should not do so (c), the onus being on him to justify the refusal (d).

Where the party to whom the notice is given refuses to produce the documents for inspection on the ground of privilege where none exists, an application may be made to a master to compel the production (e). The master's power to grant the order is limited in that he can only allow it, if at all, so far as he considers it necessary either for disposing fairly of the cause or matter or for saving costs (f). The matter is one for his discretion subject to this (g), and he may even refuse inspection of material and unprivileged documents (h).

Where privilege is alleged to exist, but is insufficiently claimed or stated in the affidavit of documents, the party refusing inspection will as a rule be given the opportunity of filing a further affidavit to supplement the first before the order for production is granted (i).

115. Where inspection is sought of any specific documents not referred to in the pleadings, particulars, or affidavits of the party against whom it is required (k), it may be obtained by means of an application to a master in chambers for an order for their production, supported by an affidavit showing—(a) of what specific documents inspection is sought; (b) that the applicant is entitled to inspect them; and (c) that they are in the possession or power

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Procuring
Production.

Master's
order.

Claim of
privilege.

Application
for produc-
tion of
specific
documents
not men-
tioned in
pleadings etc.

(s) See p. 90, *post*.

(t) R. S. C., Ord. 31, r. 12; see p. 59, *ante*.

(u) *Quilter v. Healty* (1883), 23 Ch. D. 42, 51, C. A. In this case, however, the court were not dealing with documents referred to in the affidavit of documents, but with documents referred to in the pleadings.

(a) R. S. C., Appendix B, Form 9.

(b) R. S. C., Ord. 31, r. 16; *Re Credit Co.* (1879), 11 Ch. D. 256, 260.

(c) For grounds for refusing to produce for inspection, see p. 71, *post*.

(d) *Quilter v. Healty*, *supra*. As to inspection, see p. 89, *post*.

(e) R. S. C., Ord. 31, r. 18 (1). The application is made by notice under the summons for directions and to a master in chambers.

(f) *Ibid*.

(g) *Roberts v. Oppenheim* (1884), 26 Ch. D. 724, 735, C. A.; *Re Fenner and Lord*, [1897] 1 Q. B. 667, C. A., *per* CHITTY, L.J., at p. 670; *Hope v. Brash*, [1897] 2 Q. B. 188, 190, 192, C. A., superseding *Dustros v. White* (1876), 1 Q. B. D. 423, C. A., so far as it is contrary.

(h) *Hope v. Brash*, *supra*.

(i) *Kain v. Farrer* (1877), 37 L. T. 469, 471; *Taylor v. Batten* (1878), 4 Q. B. D. 85, 89, C. A.; *Bulman v. Young, Ehlers & Co.* (1883), 31 W. R. 766; *Kennedy v. Lyell* (1883), 8 App. Cas. 217, 229; *Roberts v. Oppenheim*, *supra*, at p. 733. As to the claim of privilege, see p. 70, *post*.

(k) R. S. C., Ord. 31, r. 18 (2).

SECT. 2.
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Procuring
Production.

of the party against whom the order is sought (*l*). Copies may be obtained of the documents produced for inspection under the order (*m*).

SECT. 3.—When Production can be Resisted.

SUB-SECT. 1.—Statement of Objections to Produce.

Notice of
objection.

116. The party served with an order for discovery of documents must state in his affidavit in answer (*n*), or, where served with a notice to produce for inspection, must state in the notice in answer thereto (*o*), amongst other things, whether he objects to produce any of the documents relating to the matters in question which are in his possession or power, and, if so, on what grounds (*p*). The documents he objects to produce are disclosed in the second part of the first schedule to the affidavit. As in the case of documents of which inspection is not refused, they must be sufficiently described and identified in the affidavit or notice so that production can be enforced if ordered (*q*), but they need not be described with greater particularity than this (*r*). Particulars of the grounds of objection to produce any document must be given, and the grounds must be verified. It is not enough simply to state that the document is privileged from production (*s*).

SUB-SECT. 2.—Claim to Seal up.

Sealing up.

117. Where part of a document or some of the entries in a book are irrelevant or privileged, the relevant or unprivileged part alone

(*l*) For form of affidavit, see Chitty's Forms, 261. See remarks of VAUGHAN WILLIAMS, J., on R. S. C., Ord. 31, r. 18 (2), in *Wiedeman v. Walpole* (1890), 24 Q. B. D. 537, at p. 542: "The proper course is to entertain the application . . . and then to allow the other party to make an affidavit in answer . . . and such affidavit when made is conclusive in the same way as his affidavit of documents is conclusive on the subject of discovery."

(*m*) See p. 90, *post*.

(*n*) See also p. 60, *ante*.

(*o*) R. S. C., Ord. 31, r. 17; see p. 89, *post*.

(*p*) As to what are good grounds see p. 72, *post*.

(*q*) *Taylor v. Batten* (1878), 4 Q. B. D. 85, C. A.

(*r*) Possibly a less degree of particularity will suffice; compare *Taylor v. Batten*, *supra*, *Budden v. Wilkinson*, [1893] 2 Q. B. 432, and *Gardner v. Irvin* (1878), 4 Ex. D. 49, C. A. (where privilege was claimed), with *Hill v. Hart-Davis* (1884), 26 Ch. D. 470, C. A., and *Cooke v. Smith*, [1891] 1 Ch. 509, 522, C. A. (where it was not). It is not necessary to give such a description as will enable the other party to discover indirectly their contents (*Gardner v. Irvin*, *supra*; *Taylor v. Oliver* (1876), 34 L. T. 902; *Kain v. Farrer* (1877), 37 L. T. 469, 470), or to test the truth of the claim for privilege.

(*s*) *Gardner v. Irvin*, *supra*; *Webb v. East* (1880), 5 Ex. D. 108, C. A., at pp. 112, 113; *Kain v. Farrer*, *supra* (but see as to this case *Hennessey v. Wright* (1888), 21 Q. B. D. 509, 522, 523; *Forman v. Nevill* (1844), 14 L. J. (CH.) 33). If, e.g., the ground relied on is confidential professional privilege the affidavit may state that the document is a privileged communication of a confidential character passing between the deponent and his solicitor (or as the case may be) for the purpose of procuring legal advice (*O'Shea v. Wood*, [1891] P. 286, C. A.; and see *Kearsley v. Phillips* (1883), 10 Q. B. D. 465, C. A., and *Bovill v. Cowan* (1870), 5 Ch. App. 495 (joint possession of documents); *Desborough v. Rawlins* (1838), 3 My. & Cr. 515). In the case of documents tending to criminate it is sufficient to state that they may have that effect (*Lamb v. Munster* (1882), 10 Q. B. D. 1, 10; and see, generally, pp. 72 *et seq.*, *post*).

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need be disclosed in the affidavit, or the whole may be disclosed, the deponent stating his belief that such and such parts only are relevant, or that certain parts are irrelevant or privileged, and claiming to seal up the rest of the book or those parts (a). The affidavit should state what has been done in the way of examination of the document or book, who has made the investigation, or upon whose investigation the deponent is relying, and if he has not conducted it himself he ought to pledge his oath to the belief that nothing sealed up is relevant or unprivileged (b). The court has power to unseal documents in respect of which the objection to discovery is based on the ground of irrelevancy in order to determine whether the objection is well founded (c). Where actual sealing up would interfere with the party's business or be oppressive, covering up, upon oath, of the irrelevant or privileged parts is sufficient (d). In actions for infringement of patents or of a trade mark where there is an inquiry as to damages (e) or an account of profits is ordered (f), the defendants are not entitled to seal up the parts of their books containing the names and addresses of their customers. In cases of this kind, where the court is dealing with a wrongdoer, the defendant will not be excused from giving full discovery, because some consequences may flow from that discovery which has been necessitated by his own wrongful act (g).

SUB-SECT. 3.—Grounds for Resisting Production.

118. Some relevant documents, although their existence must be disclosed in the affidavit of documents, are, nevertheless, protected from production. The right to the production of documents for inspection is much more restricted than the right to have their existence disclosed. The chief grounds on which such protection

Protected
documents.

(a) *Kettlewell v. Darstow* (1872), 7 Ch. App. 686; *Re Pickering, Pickering v. Pickering* (1883), 25 Ch. D. 247, C. A.; *Jones v. Andrews* (1888), 58 L. T. 601, C. A.; *Forshaw v. Lewis* (1855), 10 Exch. 712. The claim to seal up may be made in a subsequent affidavit when not made in the original (*Talbot v. Marshfield* (1865), L. R. 1 Eq. 6). In the case of *Re Pickering, Pickering v. Pickering, supra*, where the defendant was the trustee of the plaintiff, the defendant was held not to be entitled to seal up what he might swear to be irrelevant, but only entries which he could swear related to certain private matters. Where sealing up is impossible it has been held on the one hand that the party must produce the whole (*Carew v. White* (1842), 5 Beav. 172), and on the other that there need be no production (*Churton v. Frewen* (1865), 12 L. T. 105).

(b) *Jones v. Andrews, supra*, at p. 605, per FRY, L.J.

(c) *Ehrmann v. Ehrmann*, [1896] 2 Ch. 826.

(d) *Graham v. Sutton, Curden & Co.*, [1897] 1 Ch. 761, C. A. The fact that some portions of a book or document have been wrongly sealed does not justify an order for general unsealing (*Jones v. Andrews, supra*).

(e) *Leather Cloth Co. v. Hirschfeld* (1863), 1 Hem. & M. 295; *Murray v. Clayton* (1872), L. R. 15 Eq. 115; *American Braided Wire Co. v. Thompson & Co.* (2) (1888), 5 R. P. C. 375.

(f) *Powell v. Birmingham Vinegar Brewery Co.* (1896), 14 R. P. C. 1 (trade name); *Saccharin Corporation v. Chemicals and Drugs Co.*, [1900] 2 Ch. 556, C. A.

(g) *Murray v. Clayton, supra*, approved in *Saccharin Corporation v. Chemicals and Drugs Co., supra*. As to disclosure of names and addresses of customers in answer to interrogatories, see p. 93, *post*.

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Grounds for
resisting
production.

can be claimed are legal professional privilege (*h*), that the documents in question may tend to criminate the party (*i*), or to expose him to forfeiture (*k*), that the production is contrary to public policy (*l*), that the documents are not in the sole possession of the party giving discovery (*m*), or that they are in his possession only as agent or on behalf of another or others who are not parties to the action (*n*), and that the documents relate solely to the case of the party giving the discovery (*o*). Some of these grounds are not confined to inspection of documents, but apply also to other discovery (*p*). They must not be confused with those cases in which no discovery at all is allowed (*q*).

(1) *Legal Professional Privilege.*

What
communica-
tions are
privileged.

119. The unrestricted communication between parties and their legal professional advisers has been considered to be of such importance as to make it advisable to protect it, even by the concealment of matter without the discovery of which the truth cannot be ascertained. The protection has never gone beyond communications for the purpose of obtaining legal advice and assistance, and all things reasonably necessary in the shape of communications to the legal adviser in order that the legal advice may be obtained safely and sufficiently (*a*). The privilege is wider for this reason

(*h*) See *infra*.

(*i*) See p. 82, *post*.

(*k*) See p. 41, *ante*.

(*l*) See p. 84, *post*.

(*m*) See p. 85, *post*.

(*n*) See p. 86, *post*.

(*o*) See p. 87, *post*.

(*p*) See p. 110, *post*.

(*q*) See p. 41, *ante*.

(*a*) *Greenough v. Gaskell* (1833), 1 My. & K. 98, *per* Lord BROUGHAM, L. C., at pp. 102 *seq.*: "If touching matters that come within the ordinary scope of professional employment they" (legal advisers) "receive a communication in their official capacity either from a client or on his account and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness . . . The foundation of this rule is not difficult to discover . . . It is out of regard to the interests of justice which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous." See also *Reid v. Langlois* (1849), 1 Mac. & G. 627, *per* Lord COTTENHAM; *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, 649, C. A.; and *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675, C. A., *per* JESSEL, M.R., at pp. 681, 682; *Southwark Water Co. v. Quick* (1878), 3 Q. B. D. 315, C. A., *per* COTTON, L.J., at pp. 321, 322; *Re Strachan*, [1895] 1 Ch. 439, C. A., *per* LINDLEY, L.J., at p. 444; *Ainsworth v. Wilding*,

where litigation is pending or anticipated than where it is not. Some communications are privileged whether there be any such litigation or not, others only where it exists or is contemplated. The law has only gradually reached its present broad and reasonable footing (b).

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When
Production
can be
Resisted.

120. Any communications, verbal or written, passing between a party or his predecessors in title (c) and his or their solicitors (d) or other legal professional adviser (e) are privileged from production, provided they are confidential, and spoken or written to or by the solicitor in his professional capacity and for the purpose of getting or giving legal advice or assistance (f), but not otherwise (g). A

Communica-
tions between
client and
legal adviser
directly.

[1900] 2 Ch. 315, *per* STIRLING, J., at p. 321; *Bullivant v. A.-G. for Victoria*, [1901] A. C. 196, *per* Lord HALSBURY, L.C., at p. 200.

(b) *Minet v. Morgan* (1873), 8 Ch. App. 361, *per* Lord SELBORNE, at p. 366. This must be borne in mind in consulting older Chancery cases. Further, the common law cases on the subject decided under the Common Law Procedure Acts are not authorities so far as they differ from the practice which existed in the Court of Chancery. The common law judges exercised a wide discretionary power; the present practice is governed by the more rigid rules of the Court of Chancery.

(c) This does not apply in cases of testamentary disposition by the client as between different parties all of whom claim under him, e.g., the privilege does not belong to executors as against the next of kin (*Russell v. Jackson* (1852), 9 Hare, 387).

(d) This includes a person who has been a solicitor, but who at the time of the communications had ceased to be one but not to the knowledge of the client (*Calley v. Richards* (1854), 2 W. R. 614).

(e) This includes counsel, conveyancing counsel, solicitors, their clerks, and any legal agent, acting professionally, and a foreign legal adviser (*Wheeler v. Le Marchant* (1881), 17 Ch. D. 675, 679, C. A. (Scotch); *Lawrence v. Campbell* (1859), 4 Drew. 485; *Macfarlan v. Rolt* (1872), L. R. 14 Eq. 580, 583 (French); *Bunbury v. Bunbury* (1839), 2 Beav. 173 (Dutch); see also p. 80, *post*).

(f) *Minet v. Morgan*, *supra*; *Gardner v. Irvin* (1878), 4 Ex. D. 49, 53, C. A.; *Wheeler v. Le Marchant*, *supra*; *Kennedy v. Lyell* (1883), 23 Ch. D. 387, 400, C. A.; *Gort (Viscount) v. Rowney* (1884), 28 Sol. Jo. 533; *O'Shea v. Wood*, [1891] P. 286, C. A.; *Collins v. London General Omnibus Co.* (1893), 68 L. T. 831; *Smith v. Daniell* (1874), L. R. 18 Eq. 649; *Mostyn v. West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145; *Bristol Corporation v. Cox* (1884), 26 Ch. D. 678. See also *Knight v. Waterford (Marquis)* (1836), 2 Y. & C. Ch. Cas. 22, 42; *Clagett v. Phillips* (1842), *ibid.* 82, 86; *Warde v. Warde* (1851), 3 Mac. & G. 363, 366; *Nias v. Northern and Eastern Rail. Co.* (1838), 7 L. J. (CH.) 170; *Willson v. Leonard* (1838), 7 L. J. (CH.) 242; *Pearse v. Pearse* (1846), 1 De G. & Sm. 12; *Walsingham (Earl) v. Goodricke* (1843), 3 Hare, 122; *Jenkins v. Bushby* (No. 2) (1866), 35 L. J. (CH.) 820; *Enthoven v. Cobb* (1852), 2 De G. M. & G. 632, C. A. (case for opinion of counsel, counsel's brief, notes etc.); *Garland v. Scott* (1830), 3 Sim. 396; *Flight v. Robinson* (1844), 8 Beav. 22; *Wilson v. Northampton and Banbury Junction Rail. Co.* (1872), L. R. 14 Eq. 477; *Walsingham (Earl) v. Goodricke*, *supra*; *Friend v. London, Chatham and Dover Rail. Co.* (1877), 2 Ex. D. 437, C. A. (communications between solicitor and client); *Thomas v. Rawlings* (1859), 27 Beav. 140; *Marsh v. Keith* (1860), 1 Drew. & Sm. 342. The privilege does not apply where the residence of a ward in Chancery is concealed from the court, and the information must be disclosed by the solicitor though communicated to him by his client in the course of his professional employment (*Ramsbotham v. Senior* (1869), L. R. 8 Eq. 575). As to privilege when the discovery is sought to be obtained from the town clerk of a corporation in his capacity as such, and he is also solicitor to the corporation, see *Swansea Corporation v. Quirk* (1879), 5 C. P. D. 106, and *Salford Corporation v. Lever* (1890), 24 Q. B. D. 695, cited note (o), p. 109, *post*.

(g) *Moseley v. Victoria Rubber Co.* (1886), 55 L. T. 482; *Smith v. Daniell*

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Resisted.

document coming into existence under the above conditions is privileged even though it is not in fact communicated (*h*). The fact that a letter within the privilege contains statements of facts as to matters *publici juris* does not take it out of the privilege (*i*).

Communications are not privileged, however, where the legal adviser is consulted merely as a friend and not professionally, even though a desire to obtain the benefit of his professional knowledge prompted the communication (*j*).

Communica-
tions through
agent.

121. The same privilege obtains with regard to communications made through a clerk or agent in the employment of the client (*k*) or of the solicitor (*l*), and with regard to communications between a solicitor and his partner (*m*) or professional agent (*n*) or counsel (*o*). Communications between the solicitors for opposite parties, or between the solicitor for one party and the opposite party, are not privileged, as they are not confidential (*p*).

Communica-
tions with
counsel.

122. The privilege extends to instructions and briefs to counsel, and cases for counsel's opinion, together with his opinion thereon, drafts and notes made by counsel, and documents settled by him (*q*); memoranda or minutes made by the client of the communications between himself and the solicitor (*r*), or entries in a solicitor's diary of similar communications (*s*); a statement of facts drawn up by the

(1874), L. R. 18 Eq. 649; *Walker v. Wildman* (1821), Madd. & G. 47; *Wilson v. Rastall* (1792), 4 Term Rep. 754, 758.

(*h*) *Southwark Water Co. v. Quick* (1878), 3 Q. B. D. 315, 323, C. A.

(*i*) *Ainsworth v. Wilding*, [1900] 2 Ch. 315, 322; and see p. 77, *post*.

(*j*) *Wilson v. Rastall*, *supra*; *Greenlaw v. King* (1838), 1 Beav. 137; *Smith v. Daniell* (1874), L. R. 18 Eq. 649; *Greenough v. Gaskell* (1883), 1 My. & K. 98, *per* Lord BROUGHAM, L.C., at p. 104; *Doe d. Pritchard v. Juincey* (1837), 8 C. & P. 99; *Blenkinsopp v. Blenkinsopp* (1846), 10 Beav. 277, 282.

(*k*) *Reid v. Langlois* (1849), 1 Mac. & G. 627; *Hooper v. Gumm* (1862), 2 John. & H. 602; *Bunbury v. Bunbury* (1839), 2 Beav. 173; *Russell v. Jackson* (1851), 9 Hare, 387; *Macfarlan v. Rolt* (1872), L. R. 14 Eq. 580; *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, 649, C. A.; *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675, 682, 684, C. A.; *Lafone v. Falkland Islands Co.* (No. 1) (1857), 4 K. & J. 34.

(*l*) *Wheeler v. Le Marchant*, *supra*.

(*m*) *Mostyn v. West Mostyn Coal and Iron Co.* (1876), 34 L. T. 531.

(*n*) *E.g.*, country or town agent (*Hughes v. Biddulph* (1827), 4 Russ. 190; *Bolton v. Liverpool Corporation* (1833), 1 My. & K. 88, 96; *Catt v. Tourle* (1870), 23 L. T. 485, 486); or agent to act in Mayor's Court (*Goodall v. Little* (1851), 1 Sim. (N. S.) 155); or agent abroad (*Macfarlan v. Rolt*, *supra*).

(*o*) *Mostyn v. West Mostyn Coal and Iron Co.*, *supra*; *Bristol Corporation v. Cox* (1884), 26 Ch. D. 678; *Lowden v. Blakey* (1889), 23 Q. B. D. 332; *Knight v. Waterford (Marquis)* (1836), 2 Y. & C. Ch. Cas. 22, 36; *Pearse v. Pearse* (1846), 1 De G. & Sm. 12; *Bolton v. Liverpool Corporation*, *supra*; *Enthoven v. Cobb* (1852), 2 De G. M. & G. 632, C. A.; *Warde v. Warde* (1851), 3 Mac. & G. 363, 366; *Manser v. Dix* (1855), 1 K. & J. 451; *Lambe v. Orton* (1853), 1 W. R. 207; *Greenlaw v. King*, *supra*.

(*p*) *Gore v. Harris* (1851), 15 Jur. 1168; *Ford v. Tennant* (1863), 32 Beav. 162; *Kennedy v. Lyell* (1883), 23 Ch. D. 387, C. A., *per* COLLINS, L.J., at p. 405, and cases there cited. Where a solicitor has acted for both parties before litigation, communications made to him by one party are privileged from discovery to the other (*Eadie v. Addison* (1882), 52 L. J. (CH.) 80; see also *Re Ubadell, Ex parte Assignees etc.* (1872), 27 L. T. 460. But in *Macfarlan v. Rolt*, *supra*, at p. 585, the communication was ordered to be disclosed.

(*q*) See cases cited in note (*o*), *supra*.

(*r*) *Woolley v. North London Rail. Co.* (1869), L. R. 4 C. P. 602.

(*s*) *Ward v. Marshall* (1887), 3 T. L. R. 578.

client or at his direction for submission to his solicitor (*t*), but not indorsements on counsel's brief of the result of an application or trial (*u*).

SECT. 3.
When
Production
can be
Resisted.

Documents
privileged.

123. Bills of costs relating to litigation, actual or in contemplation, are also privileged (*a*), so far as they do not extend to (1) what took place in the presence of the opposite party; (2) communications with the opposite party; (3) matters of fact which are *publici juris* (*b*).

The privilege does not extend to statements or documents which are *publici juris* (*c*), such as shorthand or other notes of proceedings in open court (*d*), or at chambers (*e*), or before an arbitrator (*f*), or depositions filed in the course of an action (*g*). But a collection of copies or extracts of public records or documents which is made or obtained by a solicitor for the purposes of a defence, and is the result of his professional knowledge, research, and skill, may be privileged (*h*).

Documents
not privileged.

124. Any communications passing, directly or through an agent (*i*), between a solicitor and a non-professional agent or a third party (*k*) which come into existence after litigation is contemplated or commenced, and which are made with a view to such litigation, either for the purpose of obtaining advice as to such litigation or of obtaining evidence to be used in it, or of obtaining information which might lead to the obtaining of such evidence, are privileged (*l*). So are documents obtained or prepared, confidentially,

Communica-
tions passing
between
solicitor and
non-pro-
fessional
agent or
third party.

(*t*) *Southwark Water Co. v. Quick* (1878), 3 Q. B. D. 315, C. A.

(*u*) *Walsham v. Stainton* (1863), 2 Hem. & M. 1; *Nicholl v. Jones* (1865), 2 Hem. & M. 588.

(*a*) *Chant v. Brown* (1852), 9 Hare, 790; *Turton v. Barber* (1874), L. R. 17 Eq. 329; but see *Burton v. Dodd* (1890, 35 Sol. Jo. 39, where production of a bill of costs was ordered on the ground that it would throw light on the question whether the client had, as she alleged, no independent advice.

(*b*) *Ainsworth v. Wilding*, [1900] 2 Ch. 315, at pp. 322—325.

(*c*) *Nicholl v. Jones* (1865), 2 Hem. & M. 588; *Goldstone v. Williams Deacon & Co.*, [1899] 1 Ch. 47, 52.

(*d*) *Re Worswick, Robson v. Worswick* (1888), 38 Ch. D. 370. In *Nordon v. Defries* (1882), 8 Q. B. D. 508, it was held that shorthand notes of the proceedings in court on the trial of a prior action taken by the defendant for the purpose of the action in which inspection of them is sought were privileged, but the case does not appear to have been properly argued. See the comments on it of NORTH, J., in *Re Worswick, Robson v. Worswick*, *supra*, at p. 372.

(*e*) *Ainsworth v. Wilding*, *supra*, at p. 320.

(*f*) *Rawstone v. Preston Corporation* (1885), 30 Ch. D. 116.

(*g*) *Goldstone v. Williams Deacon & Co.*, *supra*. As to proceedings under s. 27 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), see *Leaoyd v. Halifax Joint Stock Banking Co.*, [1893] 1 Ch. 686, where shorthand notes were held to be privileged; see also *Fenton v. Queen's Ferry Wire Rope Co.* (No. 2) (1869), 38 L. J. (CH.) 263.

(*h*) *Lyell v. Kennedy* (1884), 27 Ch. D. 1, C. A., at pp. 25, 26, 31.

(*i*) *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, C. A., *per JESSEL, M.R.*, at pp. 649, 650.

(*k*) Where the agent or third party is merely the medium of communication between the solicitor and his client the communications are privileged whether there be pending litigation or not; see p. 74, *ante*.

(*l*) *Anderson v. Bank of British Columbia*, *supra*; *Steele v. Stewart* (1843), 13 Sim. 533, affirmed (1844) 1 Ph. 471; *Walsham v. Stainton*, *supra*; *Original Hartlepool Collieries Co. v. Moon* (1874), 30 L. T. 585, C. A.; *McCorquodale*

SECT. 8.
When
Production
can be
Resisted.

Communica-
 tions between
 party and
 non-profes-
 sional agent
 or third party.

under like circumstances (*m*), other than copies of unprivileged documents (*n*). It is sufficient if the communication is made in the *bonâ fide* belief or under a reasonable apprehension that litigation may ensue, and for that purpose, but a mere vague apprehension of litigation is not sufficient (*o*).

125. But communications between a party and a non-professional agent or third party are only privileged if they are made both (1) in answer to inquiries made by the party as the agent for or at the request or suggestion of his solicitor (*p*), or without any such request, but for the purpose of being laid before a solicitor or counsel for the purpose of obtaining his advice or of enabling him to prosecute or defend an action (*q*), or prepare a brief (*r*); and (2) for the purposes of litigation existing or contemplated at the time (*s*). Both these conditions must be fulfilled in order that the privilege may exist (*t*).

v. Bell (1876), 45 L. J. (Q. B.) 329; *Simpson v. Brown* (1864), 33 Beav. 482; *Wilson v. Northampton and Banbury Junction Rail. Co.* (1872), L. R. 14 Eq. 477, at p. 484; *Chartered Bank of India, Australia and China v. Rich* (1863), 4 B. & S. 73; *Learoyd v. Halifax Joint Stock Banking Co.*, [1893] 1 Ch. 686, *per* STIRLING, J., at p. 691; *Kennedy v. Lyell* (1883), 23 Ch. D. 387, 407, C. A., *per* COTTON, L.J.; *Lowden v. Blakey* (1889), 23 Q. B. D. 232, 334, *per* DENMAN, J.; *Calcraft v. Guest*, [1898] 1 Q. B. 759, 762, C. A., *per* LINDLEY, M.R.; compare *Page v. Ward* (1869), 20 L. T. 518.

(*m*) *Learoyd v. Halifax Joint Stock Banking Co.*, *supra*, at p. 690 (compare *North Australian Territory Co. v. Goldsborough, Mort & Co.* [1893] 2 Ch. 381, C.A.); *Southwark Water Co. v. Quick* (1878), 3 Q. B. D. 315, 320, C. A.; *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, C. A.; *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675, C. A., *per* COTTON, L.J., at pp. 684, 685; *Sammon v. Bennett* (1892), 8 T. L. R. 235; *The Palermo* (1883), 9 P. D. 6, C. A.; *Re Thomas Holloway, Young v. Holloway* (1887), 12 P. D. 167, C. A., *per* COTTON, L.J., at p. 170 (anonymous letters sent to counsel and solicitor).

(*n*) *Chadwick v. Bowman* (1886), 16 Q. B. D. 561; *Lyell v. Kennedy* (1884), 27 Ch. D. 1, C. A.

(*o*) Letters written two years before the institution of a suit by a country solicitor to a member of the firm acting as his town agents was held not privileged, though the firm afterwards acted as the solicitors in a suit which involved the subject-matter of the letters (*Hampson v. Hampson* (1857), 26 L. J. (CH.) 132). So also letters written eighteen years before a suit was commenced, but brought into existence in case a certain transaction then entered into should subsequently be impeached and passing between a legal adviser and his client, were held not privileged when the suit was brought subsequently against a third party (*Greenlaw v. King* (1838), 1 Beav. 137).

(*p*) *Anderson v. Bank of British Columbia*, *supra*; *Friend v. London, Chatham and Dover Rail. Co.* (1877), 2 Ex. D. 437, C. A.; *Lafone v. Falkland Islands Co.* (No. 1) (1857), 4 K. & J. 34; *Wheeler v. Le Marchant*, *supra*, at p. 682.

(*q*) *Southwark Water Co. v. Quick*, *supra*, at p. 322; *Anderson v. Bank of British Columbia*, *supra*, at p. 648; *The Theodor Körner* (1878), 3 P. D. 162; *Bunbury v. Bunbury* (1839), 2 Beav. 173; *Reece v. Trye* (1846), 9 Beav. 316; *Coombe v. London Corporation* (1842), 6 Jur. 571; *Penrudduck v. Hammond* (1847), 11 Beav. 59; *Willson v. Leonard* (1838), 7 L. J. (CH.) 242; *Phillips v. Routh* (1872), 41 L. J. (C. P.) 111.

(*r*) *Anderson v. Bank of British Columbia*, *supra*, at pp. 656, 658; *Southwark Water Co. v. Quick*, *supra*, at p. 320.

(*s*) *Wheeler v. Le Marchant*, *supra*, at p. 682; *Collins v. London General Omnibus Co.* (1893), 68 L. T. 831.

(*t*) *Paddon v. Winch* (1870), L. R. 9 Eq. 666; *Westinghouse v. Midland Rail. Co.* (1883), 48 L. T. 98; *Cook v. North Metropolitan Tramway Co.* (1889), 6 T. L. R. 22; *Webb v. East* (1880), 5 Ex. D. 108, C. A.; *Bustros v. White* (1876), 1 Q. B. D. 423, C. A.; *English v. Tottie* (1875), 1 Q. B. D. 141; *Ross v. Gibbs* (1869), L. R. 8 Eq. 522 (explained in *Anderson v. Bank of British Columbia*

SECT. 3.
When
Production
can be
Resisted.

So also documents prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged, provided they are prepared with a *bonâ fide* intention of being laid before him for the purpose of taking his advice (*u*); but where documents are already in evidence *aliunde* the mere fact of their being handed to the solicitor for the purposes of litigation does not create a privilege (*v*).

126. Even though a document may be privileged, in some cases the information contained in it may have to be disclosed in answer to interrogatories properly administered. For instance, information communicated to the directors of a company by an officer of the company may have to be revealed in answer to interrogatories, even though the document containing the communication is privileged (*w*).

When
information
may be
obtained by
inter-
rogatories.

127. In an action by an owner of cargo against the shipowner for damage to the cargo occasioned by a collision between the defendant's vessel and another vessel, which was alleged to have been caused by the defendant's negligence, the plaintiff may be entitled to have inspection of a compromise entered into between the defendant and the owner of the other ship, which had put an end to cross-suits brought in the Admiralty Division for damage both to ship and cargo (*x*). But where in an action by freehold tenants of a manor against the lords of the manor inspection is desired by the plaintiffs of correspondence between the defendants

Compromise
of former
action or
dispute.

(1876), 2 Ch. D. 644); *McLeun Bros. and Rigg, Ltd. v. Jones & Co.* (1892), 66 L. T. 653; *Friend v. London, Chatham and Dover Rail. Co.* (1877), 2 Ex. D. 437, C. A.; *Pacey v. London Tramways Co.* (1876), 2 Ex. D. 440, n., C. A.; *Phillips v. Routh* (1872), 41 L. J. (c. p.) 111. The following cases, decided under the Common Law Procedure Acts, are not now authorities:—*Woolley v. North London Rail. Co.* (1869), L. R. 4 C. P. 602; *Fenner v. London and South Eastern Rail. Co.* (1872), L. R. 7 Q. B. 767; *Parr v. London, Chatham and Dover Rail. Co.* (1871), 24 L. T. 558; but see *Cossey v. London, Brighton and South Coast Rail. Co.* (1870), 39 L. J. (c. p.) 174; *Skinner v. Great Northern Rail. Co.* (1874), 43 L. J. (ex.) 150; *Baker v. London and South Western Rail. Co.* (1867), L. R. 3 Q. B. 91. Older Chancery cases where the privilege was less extensive are *Walsingham (Earl) v. Goodricks* (1843), 3 Hare, 122; *Glyn v. Caulfield* (1851), 3 Mac. & G. 463; *Kerr v. Gillespie* (1844), 7 Beav. 572. Where the communications are made to a society with a view to obtaining its help in litigation they are not privileged, though they are laid by the society before its solicitor for his advice (*Jones v. Great Central Rail. Co.*, [1910] A. C. 4).

(*u*) *Southwark Water Co. v. Quick* (1878), 3 Q. B. D. 315, C. A., at pp. 321, 323; *Collins v. London General Omnibus Co.* (1893), 68 L. T. 831; *Ross v. Gibbs* (1869), L. R. 8 Eq. 522; *Haslam Engineering Co. v. Hall* (1887), 3 T. L. R. 776. In the case of *Re Thomas Holloway, Young v. Holloway* (1887), 12 P. D. 167, C. A., anonymous letters addressed to the solicitor and counsel engaged in the suit were held to be privileged, but not those sent to the party, there being nothing to show that they were sent for communication to the solicitor. As to confidential reports, see p. 78, *post*.

(*v*) *Pearce v. Foster* (1885), 15 Q. B. D. 114, C. A., *per* BRETT, M.R., at pp. 118, 119; *Chadwick v. Bowman* (1886), 16 Q. B. D. 561; *Land Corporation of Canada v. Puleston*, [1884] W. N. 1.

(*w*) *Southwark Water Co. v. Quick*, *supra*, *per* COTTON, L.J., at p. 321; see also p. 109, *post*.

(*x*) *Hutchinson v. Glover* (1875), 1 Q. B. D. 138; affirmed (1876), 33 L. T. 834, C. A. See observations on this case in *Kearsley v. Phillips* (1893), 10 Q. B. D. 36, at p. 40; *ibid.* 465, C. A., at p. 467.

SECT. 2.
When
Production
can be
Resisted.

and a third person, not a party to the suit, relating to the compromise of a dispute relating to the rights of the lords of the manor over part of the land in question in this suit (there having been no litigation between them), it is probable that the court will not enforce its production (a).

Reports made
by agents or
servants of
employer to
employer.

128. The question as to whether reports made by servants to their employer or by agents to their principals are or are not privileged has been discussed in several actions for injuries to the person caused by the negligence of the defendants, some of which were decided before and some since the Judicature Acts, and, in some of the cases decided under the Common Law Procedure Acts (which as already stated are no longer authorities), the principle was laid down that where the reports or communications were made by the agents or servants of the defendants in the ordinary course of their duty for the purpose of conveying to the defendants information upon the subject, they were not privileged from production, but where they were outside this category, and consisted of opinions obtained confidentially with a view to litigation, they were privileged, whether obtained before or after litigation had actually been commenced, although it does not appear from the reports that they were obtained for the purpose of being laid before the party's legal adviser (b). Thus reports made by guards, engine drivers, signalmen, porters, locomotive superintendents, station masters, employed by railway companies, to their principals as to the accident were held not to be privileged, and were ordered to be produced for inspection, while on the other hand, reports made by scientists to agents of the company, consisting partly of facts and partly of opinions as to the cause of the accident, were to be privileged as they were only made because litigation was contemplated, and for the purpose of enabling the company to resist the claim about to be made, or already made (b).

Old rule.

So also reports made by medical men sent by the defendants to examine the persons injured were in several cases held to come within the latter category, and to be privileged as being confidential communications obtained with a view to litigation impending or

(a) *Warwick v. Queen's College, Oxford* (No. 2) (1867), L. R. 4 Eq. 254. The real ground of the decision in this case was not that the document was privileged, but that the third party not before the court had an interest in the correspondence. As to this, see p. 85, *post*.

(b) *Woolley v. North London Rail. Co.* (1869), L. R. 4 C. P. 602; *Parr v. London, Chatham and Dover Rail. Co.* (1871), 24 L. T. 558. In *Fenner v. London and South Eastern Rail. Co.* (1872), L. R. 7 Q. B. 767, BLACKBURN, J., seems to doubt whether this principle is right (see at p. 771); but this case was not one of personal injuries, and the documents sought to be inspected were very numerous and varied, and it was not followed in *Skinner v. Great Northern Rail. Co.* (1874), L. R. 9 Exch. 298. Cases since the Judicature Acts are *London, Tilbury and Southend Rail. Co. v. Kirk and Randall* (1884), 51 L. T. 599; *Worthington v. Dublin, Wicklow and Wexford Rail. Co.* (1888), 22 L. R. Ir. 310; *Kerry County Council v. Liverpool Salvage Association*, [1905] 2 I. R. 38, 42, C. A. In the last cited case the documents in question were held not to be privileged since they were not made in contemplation of litigation. See also *Westinghouse v. Midland Rail. Co.* (1883), 48 L. T. 98 (action for infringement of patent, where letters from officials of the company to their principals, and letters between officials and third parties, were held not privileged).

SECT. 3.
When
Production
can be
Resisted.

already commenced (c). But where an inspector of the defendants, a tramway company, called upon the person injured three days after the accident, took down his statement in writing and obtained his signature to it, it was held that the document must be produced by the defendants (d). And in an action against an insurance company where fraudulent concealment and misrepresentation of material facts is pleaded, the plaintiff is entitled to inspect the private and confidential reports made by two of his friends to the company with regard to his health and habits (e). So, also, in a foreclosure suit by an insurance company, where insanity is pleaded, the production of the report of the company's medical officer as to the state of the health of the party may be ordered (f).

It must be borne in mind that cases decided under the Common Law Procedure Acts are not now authorities. The stricter rules which formerly obtained in the Court of Chancery now prevail, and the documents in question are not privileged unless they satisfy, and are privileged if they do satisfy, the conditions laid down above, that is to say, they must be reports specially made for the purpose of being laid before the party's legal adviser for the purpose of his advice in reference to the anticipated or pending litigation (g). Present rule.

In the case of a collision at sea, reports of two surveys sworn to have been made solely for the purpose of guiding the plaintiff and to relate solely to his case, one made before and one after action brought, have been held not to be privileged from production for inspection (h).

In an omnibus case, the report of the conductor made when litigation was reasonably apprehended, for the purpose of being laid before the defendants' solicitor, to be used by him for the purpose of defending any action which might be brought, was held to be privileged (i).

129. Communications between co-plaintiffs or co-defendants stand on the same footing as communications between a party and Communications between parties.

(c) *Cossey v. London, Brighton and South Coast Rail. Co.* (1870), 39 L. J. (O. P.) 174; *Skinner v. Great Northern Rail. Co.* (1874), L. R. 9 Exch. 298. In *Baker v. London and South Western Rail. Co.* (1867), L. R. 3 Q. B. 91, it was held that a report made by a doctor to the company after interviewing the injured person and a subsequent report by a secretary of the company as to arrangements for compensation made between the company and the injured person were not privileged. Cases since the Judicature Act and which are authorities are *Friend v. London, Chatham and Dover Rail. Co.* (1877), 2 Ex. D. 437, O. A.; *Pacey v. London Tramways Co.*, *ibid.*, p. 440, n.

(d) *Tobakin v. Dublin Southern Districts Tramways Co.*, [1905] 2 I. R. 58, O. A.

(e) *Mahony v. National Widows' Life Assurance Fund* (1871), 40 L. J. (O. P.) 203.

(f) *Lee v. Hammerton* (1864), 10 L. T. 730.

(g) See p. 75, *ante*.

(h) *Martin v. Butchard* (1877), 36 L. T. 732, following *Bustros v. White* (1876), 1 Q. B. D. 423, O. A. See, *contra*, *Theodor Körner* (1878), 38 L. T. 818, where the objection to produce was similar, but where it was held that the documents were privileged. It is submitted that this case cannot now be supported, except on the ground that the documents in question were in fact obtained for the purpose of being laid before the party's legal adviser for the purpose of obtaining his advice in litigation, actual or contemplated at the time.

(i) *Collins v. London General Omnibus Co.* (1893), 63 L. J. (Q. B.) 428.

SECT. 3.
When
Production
can be
Resisted.

Privilege
 limited to
 legal
 profession.

Communica-
 tions for
 fraudulent
 or illegal
 purpose.

non-professional agents, and are privileged only under the same circumstances (*k*).

The privilege is confined to the legal profession, and does not extend to communications between a party and his medical (*l*) or spiritual (*m*) adviser, or non-professional friend or adviser (*n*), or a patent agent (*o*), or a pursuivant of the Herald's College (*p*), or a society whose aid in the litigation is sought, and by whom the communications are laid before its solicitor for advice (*q*).

130. Where fraud or illegality is definitely alleged on the pleadings or in the affidavits, the privilege does not extend to communications relevant to that issue which have passed between the client and his legal adviser for the furtherance of the fraudulent or illegal purpose or act, whether it be of a criminal or civil nature (*r*). In order that the protection may obtain there must be both professional confidence and professional employment. There can be no professional confidence as to the disclosure of communications of this nature, neither is the furtherance of a fraud or assistance given for the purpose of wrongfully evading the law part of the duty of a legal adviser towards his client (*s*). It has also been held that the protection does not apply where the communications relate to the subject-matter of the fraud alleged and the advice is being sought for the client's guidance in the commission of the fraud, even though the solicitor is ignorant of that fact (*t*). The extent to which this rule applies is doubtful. It appears to be limited in application to communications between the client and his legal adviser, made for the purpose of committing or furthering the

(*k*) *Hutt v. Haileybury College (Governors)* (1888), 4 T. L. R. 277, C. A.; *Hamilton v. Nott* (1873), L. R. 16 Eq. 112; *Jenkyns v. Bushby* (1866), L. R. 2 Eq. 547; *Betts v. Menzies* (1857), 3 Jur. (N. S.) 885; *Goodall v. Little* (1851), 1 Sim. (N. S.) 155. See also *Whitbread v. Gurney* (1832), You. 541; *Sankey v. Alexander* (1874), 8 L. R. Eq. 241.

(*l*) *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675, 681, C. A.; *Reid v. Langlois* (1849), 1 Mac. & G. 627, per Lord COTTENHAM, at p. 638; *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, 650, C. A.

(*m*) See cases cited in note (*l*), *supra*.

(*n*) *Smith v. Daniell* (1874), L. R. 18 Eq. 649, at p. 654. This includes the opinion of a lawyer, but given as a friend and not given professionally (*ibid.*). And see p. 76, *ante*.

(*o*) *Moseley v. Victoria Rubber Co.* (1886), 55 L. T. 482, 485.

(*p*) *Slade v. Tucker* (1880), 14 Ch. D. 824.

(*q*) *Jones v. Great Central Rail. Co.*, [1910] A. C. 4.

(*r*) *Follett v. Jefferyes* (1850), 1 Sim. 3, per Lord CRANWORTH, at pp. 15, 16; *Russell v. Jackson* (1851), 9 Hare, 387, 392, per TURNER, V.-C.; *Gartside v. Outram* (1856), 3 Jur. (N. S.) 39; *R. v. Cox and Railton* (1884), 14 Q. B. D. 153, C. O. R. (where the former cases are reviewed); *Re Postlethwaite, Re Rickman, Postlethwaite v. Rickman* (1887), 35 Ch. D. 722; *Williams v. Quebrada Rail., Land and Copper Co.*, [1895] 2 Ch. 751; *R. v. Bullivant*, [1900] 2 Q. B. 163, C. A., per ROMER, L.J., at pp. 168, 169, reversed in H. L. *sub nom. Bullivant v. A.-G. for Victoria*, [1901] A. C. 196, but on a ground that there was no allegation of fraud or illegality (see per Lord HALSBURY, L.C., at p. 201); compare *Greenough v. Gaskell* (1833), 1 My. & K. 98, 103; *Charlton v. Coombes* (1863), 4 Giff. 372.

(*s*) *R. v. Cox and Railton*, *supra*, at p. 168; *Russell v. Jackson*, *supra*; *Gartside v. Outram*, *supra*.

(*t*) *Williams v. Quebrada Rail., Land and Copper Co.*, *supra*; see, *contra*, *Charlton v. Coombes*, *supra*.

commission of some illegal or wrongful act. The rule does not apply merely because fraud, fraudulent misrepresentation, or the like is alleged in an action (*u*).

Where a fiduciary relationship exists, such as between a trustee and *cestui que trust* (*x*), or any analogous position (*a*), the privilege cannot be claimed by the trustee, except in respect of communications and documents brought into existence by the trustee for the purpose of litigation against him by the *cestui que trust* (*b*).

131. Where the privilege exists it may be waived by the client (*c*) (whose privilege it is) (*d*), but not by the solicitor or other legal adviser (*e*). The death of the client does not put an end to the privilege (*f*), nor, in the case of documents for which privilege can be claimed and which are brought into existence for the purpose of an

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Trustees.

Waiver of
privilege.

(*u*) *E.g., Leitch v. Abbott* (1886), 31 Ch. D. 374, O. A.; *Edelston v. Russell* (1888), 57 L. T. 927; *Sachs v. Spielman* (1887), 37 Ch. D. 295; *Whyte v. Ahrens* (1884), 26 Ch. D. 717, O. A., actions by principals against agents (fraud or fraudulent representation alleged); *Great Western Colliery Co. v. Tucker* (1874), 43 L. J. (CH.) 518, O. A.; *Waynes Merthyr Co. v. D. Radford & Co.*, [1896] 1 Ch. 29; *Mahony v. National Widows' Life Assurance Fund* (1871), 40 L. J. (O. P.) 293.

(*x*) *Re Mason, Mason v. Cattley* (1883), 22 Ch. D. 609; *Re Postlethwaite, Re Rickman, Postlethwaite v. Rickman* (1887), 35 Ch. D. 722; *Talbot v. Marshfield* (1865), 2 Drew. & Sm. 549; *Wynne v. Humberston* (1858), 27 Beav. 421; *Devaynes v. Robinson* (1855), 20 Beav. 42.

(*a*) *Gouraud v. Edison Telephone Co.* (1888), 57 L. J. (CH.) 498; compare *Bristol Corporation v. Cox* (1884), 26 Ch. D. 678, 683, *per* PEARSON, J. (member of a corporate body suing or being sued by the body, so far as regards inspection of documents which have been obtained by means of payment of money out of its funds).

(*b*) *Talbot v. Marshfield, supra*; *Wynne v. Humberston, supra*; *Re Mason, Mason v. Cattley, supra*; *Thomas v. Secretary of State for India* (1870), 18 W. R. 312. See also *Farrer v. Hutchinson* (1839), 9 Ad. & El. 641, where the trustee was ordered to produce certain leaves abstracted from an account book relating to trust matters which were stated to have been abstracted because they related only to private affairs; and also documents relating to a purchase of an estate by him alleged to have been purchased out of trust moneys, which documents the trustees stated proved that the purchase had been made out of private moneys. Where there was a like dispute between two *cestuis que trustent* in respect of the trust matters, and the trustee acted as solicitor to one of them, it was held that communications between such solicitor and one *cestui que trust* were not privileged as against the other (*Tugwell v. Hooper* (1847), 10 Beav. 348). It was formerly the rule that a mortgagee was entitled to refuse production of his title deeds for the inspection of a mortgagor, the plaintiff in an action for redemption, without payment to him of his principal, interest, and costs (*Chichester v. Donegal (Marquis)* (1870), 39 L. J. (CH.) 694), but this has been altered by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 16.

(*c*) *Calcraft v. Guest*, [1898] 1 Q. B. 759, 761, O. A. Waiver may be total or partial (*Lyell v. Kennedy* (1884), 27 Ch. D. 1, 24, O. A.).

(*d*) *Knight v. Waterford (Marquis)* (1836), 2 Y. & C. Ch. Cas. 22, 41; *Herring v. Cloberry* (1842), 11 L. J. (CH.) 149; *Gorsley v. Mousley* (1855), 2 K. & J. 288; *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, 649, O. A., *per* JESSEL, M.R.; *Proctor v. Smiles* (1886), 55 L. J. (Q. B.) 467, 527, O. A., *per* Lord Esher, M.R., at p. 528.

(*e*) *Anderson v. Bank of British Columbia, supra*; *Proctor v. Smiles, supra*; *Greenough v. Gaskell* (1833), 1 My. & K. 98, 102. See, as to what constitutes waiver, *Goldstone v. Williams Deacon & Co.*, [1899] 1 Ch. 47; *Roberts v. Oppenheim* (1884), 26 Ch. D. 725, O. A.; *Lyell v. Kennedy, supra*. As to how refusal by client to allow solicitor to disclose professional communications is to be treated, see *Wentworth v. Lloyd* (1864), 10 H. L. Cas. 589.

(*f*) *Bullivant v. A.-G. for Victoria*, [1901] A. O. 196, *per* Lord LINDLEY, at p. 206.

- SECT. 3.**
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Joint consultations.
Litigation in person.
Incriminating documents.
- action which is ultimately not proceeded with, does the privilege cease. It can be claimed in a subsequent action (*g*), for the general principle is that a document once privileged is always privileged (*h*). The mere fact that documents used in a previous litigation are preserved and not destroyed does not amount to a waiver of the privilege (*i*).
- 132.** What is stated at joint consultations between parties having a common interest in view of litigation, their legal advisers being present, is privileged from being divulged in evidence at the subsequent trial of the action (*k*).
- 133.** When the litigation is conducted by the litigant in person it appears to be very doubtful whether there is any privilege for documents coming into existence as materials for or relating to the evidence of intended witnesses or otherwise for the purpose of the action (*l*).
- (2) Crimination.**
- 134.** The fact that a document contains matter which would or might tend to incriminate the party giving discovery does not entitle him to refuse to include the document in the affidavit of documents (*m*). The proper course is to disclose the document in the affidavit and therein raise the ground of objection to produce it (*n*). Subject to certain statutory exceptions (*a*) a party cannot be
- (*g*) *Walsham v. Stainton* (1863), 2 Hem. & M. 1; *Hughes v. Garnons* (1843), 6 Beav. 352; *Holmes v. Baddelery* (1844), 1 Ph. 476; *Pearce v. Foster* (1885), 15 Q. B. D. 114, O. A., following *Bullock v. Corry* (1878), 3 Q. B. D. 356; *Goldstone v. Williams Deacon & Co.*, [1899] 1 Ch. 47.
- (*h*) *Calcraft v. Guest*, [1898] 1 Q. B. 759, O. A., per LINDLEY, M.R., at p. 761; *Goldstone v. Williams Deacon & Co.*, *supra*, at p. 52; *Bullock v. Corry* (1878), 3 Q. B. D. 356.
- (*i*) *Calcraft v. Guest*, *supra*.
- (*k*) *Rochevoucauld v. Boustead* (1896), 65 L. J. (OH.) 794, per KEKEWICH, J., at p. 796.
- (*l*) In *Kyshe v. Holt, Childs and Brotherton*, [1888] W. N. 128, which came before a divisional court consisting of CAVE and A. L. SMITH, JJ., the judges differed. CAVE, J., considered that there was no privilege, relying on *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675, O. A., per JESSSEL, M.R., at p. 681; SMITH, J., considered that the privilege might obtain, relying on the judgment of MELLISH, L.J., in *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, O. A. But see per COTTON, L.J., in *Young v. Holloway* (1887), 12 P. D. 167.
- (*m*) *Allhusen v. Labouchere* (1878), 3 Q. B. D. 654; *Fisher v. Owen* (1878), 8 Ch. D. 645, C. A.; *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, 132, O. A.; *National Association of Operative Plasterers v. Smithies*, [1906] A. C. 434, 437; *Paxton v. Douglas* (1812), 19 Ves. 225; *Ex parte Symes* (1805), 11 Ves. 521, 523; *Claridge v. Hoare* (1807), 14 Ves. 59, 65; *Lee v. Read* (1842), 5 Beav. 381; *Lichfield (Earl) v. Bond* (1843), 12 L. J. (OH.) 329; *Glyn v. Houston* (1836), 6 L. J. (OH.) 129; compare *Dummer v. Chippenham Corporation* (1807), 14 Ves. 245; *Two Sicilies (King) v. Willcox* (1851), 1 Sim. (N. S.) 301, 329; *French v. Macale* (1842), 4 I. Eq. R. 568; *Jones v. Green* (1829), 3 Y. & J. 298; *Harvey v. Lovekin* (1884), 10 P. D. 122, O. A.; and see *Hill v. Campbell* (1875), L. R. 10 O. P. 222.
- (*n*) *Ibid.*
- (*a*) Some statutes provide that the liability to criminal prosecution shall not constitute an objection to giving discovery in civil proceedings, but that the discovery so obtained is not to be used in any such criminal proceeding against the party giving it—e.g., Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24) (publication of libels in newspapers); and see *Ramsden v. Brearley* (1875), 33 L. T. 322; *Lefroy v. Burnside* (1879), 41 L. T. 199; *Carter v. Leeds Daily News Co.*, [1876] W. N. 11; *Wilton v. Brignell*, [1875] W. N. 239. Other statutes depriving a party of this ground of objection are the Gaming Act, 1710 (9 Ann. c. 19), and the Larceny Act, 1861 (24 & 25 Vict. c. 96).

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Production
can be
Resisted.

When pro-
tection does
not apply.

compelled to give discovery or to answer interrogatories (b) which will expose him to the risk of any kind of legal punishment, whether by way of criminal prosecution (c), the payment of penalties, or forfeiture (d) in this or a foreign country (e), and the rule applies even if a negative answer will not imperil him (f). A party is not necessarily obliged to state his belief that the production would criminate him. It is sufficient to swear that it may tend to do so (g). But discovery must be given if by reason of pardon (h), lapse of time (i), or waiver (k), all danger of punishment has passed. Further, where there is an admission that the penalties have been incurred, discovery as to the matters referred to in the admission cannot be resisted (l). Danger of exposure to a civil suit is no ground for resisting discovery (m). The right of refusing discovery does not extend to cases where the forfeiture is of securities coming

(b) *Thorpe v. Macauley* (1820), 5 Madd. 218, 229, and cases collected there, p. 231 (n.); *Maccallum v. Turton* (1828), 2 Y. & J. 183; *Lee v. Read* (1842), 5 Beav. 381; *Alabaster v. Harness* (1894), 70 L. T. 375; *Hill v. Campbell* (1875), L. R. 10 O. P. 222, per BRETT, J., at p. 238; *Re Reynolds* (1882), 20 Ch. D. 294, C. A.; and see p. 92, *post*.

(c) The privilege has been held to apply where the possible charge was one of theft (*Cartwright v. Green* (1803), 8 Ves. 405); incest (*Claridge v. Hoare* (1807), 14 Ves. 59, 65); subornation of perjury (*Baker v. Pritchard* (1742), 2 Atk. 387; *Selby v. Crew* (1794), 2 Anst. 504); assault and false imprisonment (*Glyn v. Houston* (1836), 1 Keen, 320, 337); forgery (*Lloyd v. Passingham* (1809), 16 Ves. 58); embezzlement (*Waters v. Shaftesbury (Earl)* (1865), 14 W. R. 259); fraud (*Maccallum v. Turton*, *supra*; *Re Mexican and South American Co.* (1859), 27 Beav. 474), but not in every case (see *Chadwick v. Chadwick* (1852), 16 Jur. 1060; *Stickland v. Aldridge* (1804), 9 Ves. 516, 519; *Dixon v. Olmius* (1787), 1 Cox, Eq. Cas. 414); conspiracy (*Lee v. Read*, *supra*; *Re Reynolds*, *supra*), but not in every case (see *Dummer v. Chippenham Corporation* (1807), 14 Ves. 245). It has been held not to apply where the possible charge was one of perjury committed in the cause (*Rice v. Gordon* (1843), 13 L. J. (CH.) 104; see also *Chadwick v. Chadwick*, *supra*).

(d) *Brownsword v. Edwards* (1751), 2 Ves. Sen. 243; *Glyn v. Houston*, *supra*; *Chetwynd v. Lindon* (1752), 2 Ves. Sen. 450; *Smith v. Read* (1737), 1 Atk. 526; *Scott v. Miller* (No. 2) (1859), John. 328, 332. In *Webb v. East* (1880), 5 Ex. D. 108, C. A., some doubt was expressed on this point, where the right to protection of a letter containing an alleged libel, which it was sought to protect as a privileged communication, was considered; but it is clear that there is no distinction in this respect between production and answers to interrogatories, as to which see *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, and p. 96, *post*. As to forfeiture, see also p. 41, *ante*.

(e) *United States of America v. McRae* (1867), 3 Ch. App. 79.

(f) *East India Co. v. Campbell* (1749), 1 Ves. Sen. 246; *Mitchell v. Koecker* (1849), 11 Beav. 380.

(g) *Lamb v. Munster* (1882), 10 Q. B. D. 110. See also *Webb v. East*, *supra*, and *Harrison v. Southcote* (1751), 1 Atk. 528, 539.

(h) *R. v. Boyes* (1861), 1 B. & S. 311, 328; *Uxbridge (Lord) v. Staveland* (1747), 1 Ves. Sen. 56; *Parkhurst v. Lowten* (1816), 1 Mer. 391, 400. In *Stewart v. Smith* (1867), L. R. 2 O. P. 293, an action for malicious prosecution for larceny of books, after the plaintiff had been tried and acquitted, the defendant was allowed to interrogate him as to whether some of the books were not in his possession, and when, where, and from whom he bought them, and the price he paid for them.

(i) *A.-G. v. Cunard Steamship Co.* (1887), 4 T. L. R. 177; *Williams v. Farrington* (1789), 2 Cox, Eq. Cas. 202; *Trinity House Corporation v. Burge* (1826), 2 Sim. 411; *Davis v. Reid* (1832), 5 Sim. 443.

(k) Mitford on Pleadings, 195, 307; Hare on Discovery, 1st ed., 137; *East India Co. v. Atkins* (1720), 1 Com. 347.

(l) *Ewing v. Osbaldiston* (1834), 6 Sim. 608. See also *Fisher v. Price* (1848), 11 Beav. 194.

(m) Witnesses Act, 1806 (46 Geo. 3, c. 37).

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When
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Resisted.

within the Gaming Act, 1710 (*n*), given for moneys lent at play, nor, where deeds are sought to be impeached under the Fraudulent Conveyances Acts, 1571 and 1585 (*o*), can the penalty and forfeiture clauses of these statutes be used by parties to the deeds as exempting them from giving discovery, even though among the documents to be disclosed are the deeds sought to be impeached (*p*). Again, where deeds exist in which, in the event of the court deciding one way, the plaintiff would have no interest, but if decided another he would, the defendant cannot refuse discovery on the ground that it may have the effect of making an estate go away from him (*q*).

Nor does a mere danger of disgrace or opprobrium enable a party to escape from the obligation of giving discovery (*r*), though where discovery is calculated to discredit the party it may, if irrelevant, be resisted as being scandalous (*s*).

Extent of
privilege.

135. The protection only extends to the party, and his or her wife or husband in the case of a criminal charge or penal proceedings (*t*), and not to any other person (*u*); thus, an agent cannot resist discovery on the ground that it will criminate his principal, except in so far as it would also affect him personally (*v*).

Character of
servant.

136. Letters written in answer to inquiries about the character of a servant are not privileged from production where their production is material to the question at issue in the particular case, unless possibly the party from whom discovery is sought in his affidavit in answer swears that their production would tend to criminate him (*w*).

(3) *Public Policy.*

State
documents.

137. Documents need not be produced for inspection where an objection is taken in the affidavit of documents by the head of a public department or other like State official, or by any responsible officer acting under the instructions of or with the consent of such head of the department, that the disclosure of the information is contrary to public policy or detrimental to the public interest or service (*x*). Official correspondence is not privileged

(*n*) 9 Ann. c. 19, s. 1; *Sloman v. Kelly* (1839), 3 Y. & C. (Ex.) 673; *Sidebottom v. Adkins* (1857), 5 W. R. 743.

(*o*) 13 Eliz. c. 5; 27 Eliz. c. 4.

(*p*) *Bunn v. Bunn* (1864), 4 De G. J. & Sm. 316, C. A.; *Wich v. Parker* (1856), 22 Beav. 59.

(*q*) *Hambrook v. Smith* (1852), 17 Sim. 209.

(*r*) See *Chetwynd v. Lindon* (1752), 2 Ves. Sen. 450; *Parkhurst v. Lowten* (1816), 1 Mer. 391, 400; *Williams v. Trye* (1854), 18 Beav. 366; *Benyon v. Nettelfold* (1850), 3 Mac. & G. 94.

(*s*) This point generally arises in connection with interrogatories (see p. 97, *post*).

(*t*) *Cartwright v. Green* (1803), 8 Ves. 405.

(*u*) *Two Scillies (King) v. Willcox* (1851), 1 Sim. (N. S.) 301, 329; *Parkhurst v. Lowten*, *supra*; *Gibbons v. Waterloo Bridge Co.* (1818), 5 Price, 491, 493.

(*v*) *McFadzen v. Liverpool Corporation* (1868), L. R. 3 Exch. 279.

(*w*) *Webb v. East* (1880), 5 Ex. D. 108, C. A.

(*x*) *Beatson v. Skene* (1860), 5 H. & N. 838; *Hennessy v. Wright* (1888), 21 Q. B. D. 509; see the judgments at pp. 512, 513, 517, 519 *et seq.*, and the cases cited there (in this case *Beatson v. Skene*, *supra*, was discussed and *Kain v. Farrer* (1877), 37 L. T. 469, questioned); *Hughes v. Vargas* (1893), 9 T. L. R. 551, C. A., following *Beatson v. Skene*, *supra*; *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q. B. 189, 195; *Wright & Co. v. Mills* (1890), 62 L. T. 558; *Re Joseph Hargreaves, Ltd.*, [1900] 1 Ch. 347, C. A.; *Ford v. Bleat* (1890), 6 T. L. R. 295; *Williams v. Star Newspaper Co.* (1908), 24

per se (y); there must be a definite statement to the above effect by the required person (z), and the communication must have been made in pursuance of a public duty (a), but if the objection is taken by the proper person the court will not go behind it (b).

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When
Production
can be
Resisted.

(4) *Documents not in the Sole Possession of the Party.*

138. The rules as to disclosure of the existence of documents and the production of documents for inspection are quite different with regard to documents alleged not to be in the sole possession of the party giving the discovery (c). For the purpose of production for inspection possession includes possession by an agent of the party giving the inspection (d), as it does in the case of disclosure, but it is limited to sole legal possession (e) or sole property in the documents (f), as opposed to corporeal possession, and does not extend to a joint possession with another person not a party to the action (g).

Meaning of
"sole possession."

T. L. R. 297, approving *Latter v. Goolden*, unreported (1894), C. A.; compare *Marks v. Beyfus* (1890), 6 T. L. R. 350, 406, C. A.; *H.M.S. Bellerophon* (1874), 44 L. J. (ADM.) 5; *Coorg (Rajah) v. East India Co.* (1856), 8 De G. M. & G. 182; *Wudeer v. East India Co.* (1856), 8 De G. M. & G. 182, 191, C. A. The court has refused to order production of a letter written to a senior military officer by his subordinate (*Ford v. Blest*, *supra*), and of documents deposited with a surveyor of income tax which the Board of Inland Revenue objected to produce (*Re Joseph Hargreaves, Ltd.*, [1900] 1 Ch. 347, C. A.; *Fitzgibbon v. Green* (1875), 9 I. R. C. L. 294; *Moodalay v. Morton* (1785), 1 Bro. C. C. 469). All these cases relate to the production of documents, but it is submitted that the principle involved applies also to interrogatories, and that in a proper case an objection to answer an interrogatory on similar grounds contained in the affidavit in answer and made by the head of the department or other like State official would be good. See the judgment of FIELD, J., in *Hennessey v. Wright* (1888), 21 Q. B. D. 509, at p. 512, and the judgment of DALLAS, C.J., in *Horne v. Bentinck* (1820), 2 Brod. & Bing. 130, Ex. Ch., cited in *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q. B. 189, at pp. 193-4.

(y) *Smith v. East India Co.* (1841), 1 Ph. 50, 54.

(z) *H.M.S. Bellerophon*, *supra*; *Beatson v. Skene* (1860), 5 H. & N. 838.

(a) *Beake v. Pilfold* (1832), 1 Mood. & R. 198. But the reports of a private doctor to the governor are not privileged (*Leigh v. Gladstone* (1909), 26 T. L. R. 139).

(b) *Hughes v. Vargas* (1893), 9 T. L. R. 551, C. A., following *Beatson v. Skene*, *supra*; see also *Williams v. Star Newspaper Co.*, *supra*, approving *Latter v. Goolden*, *supra*, and *per A. L. SMITH, L.J.*, in *Chatterton v. Secretary of State for India in Council*, *supra*, and cases there cited. Even though the objecting department is a party to the action (*Admiralty Commissioners v. Aberdeen Trawling Co.*, [1909] S. C. 335, Ct. of Sess.).

(c) *Swanston v. Lishman* (1881), 45 L. T. 360, C. A., *per JESSEL, M.R.*, at p. 361, and see p. 58, *ante*, as to disclosure of documents.

(d) *Murray v. Walter* (1839), Cr. & Ph. 114, 125; *Swanston v. Lishman*, *supra*; *Mertens v. Haigh* (1863), 3 De G. J. & Sm. 528, C. A.; *Beresford (Lady) v. Driver* (1852), 16 Beav. 134; *Bligh v. Berson* (1819), 7 Price, 205; see also *Two Sicilies (King) v. Willcox* (1851), 1 Sim. (N. S.) 301, where parties, if agents at all, were held to be agents for party seeking discovery.

(e) *Reid v. Langlois* (1849), 1 Mac. & G. 627, 636; *Kearsley v. Philips* (1883), 10 Q. B. D. 36, 40; *ibid.* 465, C. A., at p. 467. A defendant who has before the commencement of the action pawned letters together with other goods enclosed in a portmanteau will not be ordered to produce them (*Liddell v. Norton* (1853), 2 Eq. Rep. 668).

(f) *Murray v. Walter*, *supra*; *Kearsley v. Philips*, *supra*; *Gowan v. Briggs* (1895), 39 Sol. Jo. 330, C. A.; *London and Yorkshire Bank v. Cooper* (1885), 15 Q. B. D. 473, C. A.

(g) *Kearsley v. Philips*, *supra*; *Murray v. Walter*, *supra*; *Taylor v. Rundell* (1841), Cr. & Ph. 104; *Reid v. Langlois*, *supra*; *Gowan v. Briggs*, *supra*; *Kettlewell v. Barstow* (1872), 7 Ch. App. 686, 693. Where the possession is that

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When
Production
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Resisted.

Possession as
agent for non-
party.

(5) *Documents in Possession of Agent.*

139. A party will not be compelled to produce documents of which he is not the owner, but of which he holds possession merely as an agent on behalf of a person who is not a party to the action or proceeding (*h*).

This protection covers the case where the documents are in the possession of, but are also the property of, the solicitor to the party against whom inspection is sought (*i*). But where the documents are in the hands of a former solicitor who claims a lien on them the order for production will be made, reserving liberty to apply in case the documents really cannot be obtained (*k*). The fact that a third party, not before the court, has an interest in a document in the possession of a party is no objection if he has no property in the document (*l*), nor is it material that the party has given an

of a partner (*Reid v. Langlois* (1849), 1 Mac. & G. 627, 636; *Hadley v. McDougall* (1872), 7 Ch. App. 312; *Lazarus v. Muzley* (1859), 5 Jur. (N. S.) 1119; *Stuart v. Bute* (1841), 11 Sim. 442, affirmed (1842), 12 L. J. (CH.) 140; see also *Mackintosh v. Booker* (1837), 6 L. J. (CH.) 233 (possession of representatives of deceased partner)), or co-executor (*Morrell v. Wootten* (1850), 13 Beav. 105), or a defendant whose co-defendant has died (*Robertson v. Shevell* (1851), 15 Beav. 277), or is not a party to the application (*Reynolds v. Godlee* (1858), 4 K. & J. 88; *Burbidge v. Robinson* (1850), 2 Mac. & G. 244), or a solicitor or agent for the party and another not a party (*Murray v. Walter* (1839), Cr. & Ph. 114; *Reid v. Langlois*, *supra*; *Morrell v. Wootten*, *supra*; *Edmonds v. Foley* (Lord) (1862), 30 Beav. 282; *Lopez v. Deacon* (1843), 6 Beav. 254; *Cridland v. De Mauley* (Lord) (1849), 13 Jur. 442), production may be refused. See, however, *Walburne v. Ingilby* (1833), 3 L. J. (CH.) 21 (possession by agent for parties and non-parties jointly, production enforced against consent of non-parties), and *Hutchinson v. Glover* (1875), 33 L. T. 605, affirmed (1876), *ibid.*, 834, O. A.; but as to *Walburne v. Ingilby*, *supra*, see *Murray v. Walter*, *supra*, and as to *Hutchinson v. Glover*, *supra*, see *Kearsley v. Philips* (1883), 10 Q. B. D. 36, 465, O. A. The affidavit claiming exemption from production must state the nature of the joint possession (*Bovill v. Cowan* (1870), 5 Ch. App. 495), but it need not show that the party has endeavoured to get the consent of the joint possessor to the production (*Kearsley v. Philips*, *supra*, at p. 40).

(*h*) *Few v. Guppy* (1836), 13 Beav. 457. This applies where he holds it as trustee (*ibid.*); solicitor (*ibid.*); mortgagee, as regards the mortgagor's title deeds, but see *Gough v. Offley* (1852), 5 De G. & Sm. 653; *Lambert v. Rogers* (1817), 2 Mer. 489; committee of a lunatic whose title deeds are in the custody of the court (*Vivian v. Little* (1883), 11 Q. B. D. 370; see also *Re H. IV. Strachan* [1895] 1 Ch. 439, O. A.); *Re Smyth* (1880), 15 Ch. D. 286, O. A.; an official, as regards official documents held by him in his official capacity and of which production is objected to by his responsible superiors (*Wright & Co. v. Mills* (1890), 62 L. T. 558); and see further, p. 84, *ante*). So also where two of the directors of a company were defendants to an action in which the company itself was not joined, the court refused to order production of the company's papers without the company's consent (*Williams v. Ingram* (1900), 18 T. L. L. 434, affirmed, *ibid.*, 451, O. A.). It may be otherwise where the company is a co-defendant (*Clinch v. Financial Corporation* (1866), L. R. 2 Eq. 271). In *London and Yorkshire Bank v. Cooper* (1885), 15 Q. B. D. 473, O. A., it was held that a voluntary liquidator of a company dissolved before the application for discovery was made held the documents absolutely and therefore must produce them. Where an executor has mixed up the accounts of the estate he is administering with his own accounts he cannot thereby protect himself from producing his books in which any part of accounts relating to the estate may be inserted (*Freeman v. Fairlie* (1817), 3 Mer. 24, 43, and see *Vyse v. Foster*, L. R. 13 Eq. 602).

(*i*) *O'Shea v. Wood*, [1891] P. 286, O. A.; *Colyer v. Colyer* (1861), 9 W. R. 452.

(*k*) *Lewis v. Powell*, [1897] 1 Ch. 678; *Vale v. Oppert* (1875), 10 Ch. App. 340. As to solicitor's lien, see *Re Hawkes*, *Ackerman v. Lockhart*, [1898] 2 Ch. 1, and title SOLICITORS.

(*l*) *Richardson v. Hastings* (1844), 13 L. J. (CH.) 416; *Walburn v. Ingilby*

undertaking to a person not a party that he will not part with possession (*m*).

(6) *Documents relating solely to the Case of the Party.*

SNOR. 3.
When
Production
can be
Resisted.

Documents
relating to
party's case.

140. A further objection frequently met with is that the documents sought to be inspected relate solely to the case of the party giving the discovery (*n*). In any action where the deponent can swear that a document relates only to his own case (*o*), does not relate to nor tend to prove or support his opponent's case (*p*), and does not, to the best of his knowledge, information, and belief, contain anything impeaching his own case (*q*), and that he objects on these grounds to produce the document, subject to the exceptions already mentioned (*r*), he will not be compelled to produce it (*s*).

(1833), 1 My. & K. 61; *Kettlewell v. Barstow* (1872), 7 Ch. App. 686, 693; *Hopkinson v. Burghley (Lord)* (1867), 2 Ch. App. 447 (private letters from a non-party who objected to their production); see also *Plant v. Kendrick* (1875), L. R. 10 C. P. 692; *Webb v. East* (1880), 5 Ex. D. 108, O. A.; *Gough v. Offley*, 5 De G. & Sm. 653 (production by trustees of title deeds of mortgage securities, the mortgagors objecting). See, however, *Warwick v. Queen's College, Oxford* (1867), L. R. 4 Eq. 254 (cited p. 78, *ante*), as to production of a compromise of a prior dispute entered into between a party and a non-party to the action in which the production is sought. So far as this case was decided on the ground that because the third party not before the court had an interest other than a proprietary one in the documents they were protected, it is no longer an authority.

(*m*) *Penkethman v. White* (1854), 2 W. R. 380.

(*n*) As to interrogatories, see p. 93, *post*.

(*o*) The affidavit should still use the word "case," and not "title," though the action relates to land the title to which is in question (*A.-G. v. Newcastle Corporation*, [1899] 2 Q. B. 478, 485, C. A., *per* A. L. SMITH AND VAUGHAN WILLIAMS, L.JJ.).

(*p*) *Combe v. London Corporation* (1842), 1 Y. & C. Ch. Cas. 631, affirmed 1845, 10 Jur. 57; *Wilson v. Forster* (1831), You. 280; *Sutherland v. Sutherland* 1853, 17 Beav. 209; *Collins v. Gresley* (1828), 2 Y. & J. 490; *Ingilby v. Shafto* 1863, 33 Beav. 31; *Minet v. Morgan* (1873), 8 Ch. App. 361; *Taylor v. Batten* 1878, 4 Q. B. D. 85, O. A.; *Bewicke v. Graham* (1881), 7 Q. B. D. 400, C. A.; *Bulman and Dixon v. Young, Ehlers & Co.* (1883), 49 L. T. 736, C. A.; *Roberts v. Oppenheim* (1884), 26 Ch. D. 724, C. A.; *Budden v. Wilkinson*, [1893] 2 Q. B. 432, C. A. (showing that *Macleay Bros. and Rigg, Ltd. v. Jones & Co.* (1892), 66 L. T. 653, is wrong on this point); *Frankenstein v. Gavin's Cycle Cleaning and Insurance Co.*, [1897] 2 Q. B. 62, C. A.; *Milbank v. Milbank*, [1900] 1 Ch. 376, C. A., at pp. 378, 384; *Owen v. Wynn* (1878), 9 Ch. D. 29, O. A. See also *Knight v. Waterford (Marquis)* (1835), 2 Y. & C. Ch. Cas. 22, 28, 35.

(*q*) This last clause is not essential in actions for recovery of land so far as the defendant is concerned (*Morris v. Edwards* (1890), 15 App. Cas. 309, 314; *Emmerson v. Ind, Coope & Co.* (1886), 33 Ch. D. 323, 329, O. A.; (1887) 12 App. Cas. 300), and probably not in any other case (see *Budden v. Wilkinson*, *supra*; *A.-G. v. Newcastle Corporation*, *supra*; *Johnson v. Whitaker* (1904), 90 L. T. 535), but it is always safer to insert it if possible (*ibid.*, *per* KEKEWICH, J., at p. 537). In *Farrer v. Hutchinson* (1839), 3 Y. & C. (ex.) 692, a trustee was ordered, under the circumstances, to produce the title deeds of an estate charged in the bill to have been purchased with trust moneys, though the answer alleged that it was purchased with his own money and that the deeds constituted his own title.

(*r*) See p. 62, *ante*.

(*s*) As regards documents the rule is stated by KNIGHT BRUCE, V.-C., in *Combe v. London Corporation*, *supra*, approved by the Court of Appeal in *A.-G. v. Emerson* (1882), 10 Q. B. D. 191, O. A., at pp. 197, 198, 203—205, as follows: "To protect a defendant from the production or discovery of a document relating to the subject of dispute it is not sufficient that it should be evidence of his title or contain evidence that he intends and is entitled to use in support of his case. It may be also of a similar nature with regard to the plaintiff's case either in a directly affirmative manner or

SECT. 3.

When
Production
can be
Resisted.

What is
oppression.

(7) *Oppression.*

141. In addition to the grounds upon which discovery may be resisted, an order for production for inspection may sometimes be refused on the ground that it is unduly oppressive to the party giving discovery. What is unduly oppressive must depend upon the particular circumstances of each case. Regard must be had both to the value of the discovery to the person asking for it and the burden imposed upon the party giving it (a).

SECT. 4.—*The Inspection.*

Notice.

142. The party upon whom the notice to produce the documents for inspection has been served must within two days

by exhibiting matter at variance with the defence or tending to impeach it. . . . If it be with distinctiveness and positiveness stated in an answer that a document forms or supports the defendant's title and is intended to be or may be used by him in evidence accordingly, and does not contain anything impeaching his defence or forming or supporting the plaintiff's title or the plaintiff's case, that document is, I conceive, protected from production unless the court sees upon the answer itself that the defendant erroneously misrepresents or misconceives its nature. . . . But where it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter supporting the plaintiff's title or the plaintiff's case or may contain matter impeaching the defence, then, I apprehend, the document is not protected; nor, I apprehend, is it protected if the character ascribed to it by the defendant is not answered by him with a reasonable and sufficient degree of positiveness and distinctness." See further as to conclusiveness of the affidavit, p. 61, *ante*.

(a) In *Hall v. London and North Western Rail. Co.* (1877), 35 L. T. 848, discovery by a railway company of books in the possession of themselves and their agents extending over a series of years was ordered to show receipt of goods, specifically described, delivered to them for carriage. In *Macintosh v. Great Western Rail. Co.* (1852), 22 L. J. (CH.) 72, 182, O. A. (action by contractor against the company), where discovery was sought of certain written communications, account books, documents and papers relating to the contract in question in possession of plaintiff, who pleaded as ground in answer great expense and inconvenience owing to the enormous bulk of the documents and consequent difficulty of deciding which came within the discovery sought, it was decided that an affidavit must be made of all the documents etc. in his possession. In *A.-G. v. North Metropolitan Tramways Co.*, [1892] 3 Ch. 70, the Attorney-General, who was acting upon the relation of companies rival in trade to the defendants, asked for a general inspection of all the defendants' books relating to the matters in question, including all their books relating to the traffic they had carried on and the stock they had manufactured and sold. NORTH, J., refused this, but allowed interrogatories as to the capital and moneys which had been applied for the purpose of carrying on the business. The defendant company delivered answers to interrogatories accordingly, but the plaintiffs being dissatisfied, again applied for inspection of the defendants' books. This was refused by NORTH, J., whose refusal was upheld by the C. A. (S. C. (1895), 72 L. T. 340, C. A.), on the ground that undue oppression would be inflicted upon the defendants. In *Petre v. Sutherland* (1887), 3 T. L. R. 275, C. A., in an action against a stockbroker by a client, an application by the client for inspection of the broker's books extending over a period of fifteen years was refused on the ground that it would be useless, unnecessary, and oppressive. In *Carver v. Pinto Leite* (1871), 41 L. J. (CH.) 92, O. A., an action to restrain infringement of trade marks, the defendants were held not bound to disclose the names of their customers and prices at which the articles had been sold, as it might be prejudicial to them in their trade and was not likely to assist the plaintiffs in making out their case at the hearing. See also *Heugh v. Garrett* (1875), 44 L. J. (CH.) 305, O. A. (a similar case to *Carver v. Pinto Leite*, *supra*); *Macintosh v. Great Western Rail. Co.*, *supra*; *Mansell v. Feeney* (No. 2) (1861), 4 L. T. 437. See, further, p. 70, *ante*; and p. 97, *post*.

SECT. 4.
The
Inspection.

from its receipt in the case of documents mentioned in the affidavit of documents (where there has been one), and within four days in the case of documents mentioned in other affidavits or the pleadings (b), deliver to the party giving the notice a notice stating the time (within three days from its delivery), and the place, for inspection of such of the documents as he does not object to produce, and stating also which, if any, of the documents he does object to produce and on what grounds (c).

Where production is procured by means of an order (d) as opposed to a notice the time should be fixed by the order.

143. The place for the inspection of the documents is *prima facie* the office of the solicitor of the party producing them (e), or, in the case of books of account or other books in constant use for the purpose of any trade or business (f), their usual place of custody. There is power, however, to allow inspection to be had elsewhere (g), or to order the documents to be deposited in court and inspected there, as was the old practice in the Court of Chancery (h). There is also power to order them to be photographed in the presence of an officer of the court (i). The matter is one for the discretion of the master and judge, and the latter's decision will not be interfered with by the Court of Appeal except in a very strong case (k).

Place of
inspection.

Where production of the documents for inspection is brought about by means of a notice to produce (l), and in answer to the notice inspection is offered elsewhere than at the office of the party's solicitor, the party seeking the inspection can apply to the master (m), who has power to order inspection in such place as he thinks fit (n). Where inspection is procured by an order as distinct from a notice the place for production should be inserted in the

(b) *Re Fenner and Lord*, [1897] 1 Q. B. 667, C. A.; and see *Weideman v. Walpole* (1890), 24 Q. B. D. 537, *per* VAUGHAN WILLIAMS, J., at p. 542, where the opinion is stated that R. S. C., Ord. 31, r. 17, extends to documents not mentioned in the affidavit of documents or any other affidavit, or in the pleadings: *sed quare*. It is submitted that r. 17 must be read with r. 15 and, like that rule, is confined to the documents referred to in the affidavits or pleadings. R. 15 is clearly so confined, and r. 17 only comes into operation after a notice under r. 15 has been given.

(c) R. S. C., Ord. 31, rr. 15, 17. As to the grounds for refusal, see p. 72, *ante*. For forms, see R. S. C., Appendix B, Forms 10, 10a.

(d) See pp. 67, 69, *ante*.

(e) R. S. C., Ord. 31, r. 17.

(f) *Ibid*.

(g) R. S. O., Ord. 31, r. 18 (1); *Lloyd's Bank v. Luck*, [1901] W. N. 130. In *Whyte v. Ahrens* (1884), 50 L. T. 344, C. A., inspection in Japan was ordered; and in *Bustros v. Bustros* (1882), 30 W. R. 374, C. A., partly in Beyrout and partly in Alexandria.

(h) *Leslie v. Cave*, [1886] W. N. 162.

(i) *Lewis v. Londesborough (Earl)*, [1893] 2 Q. B. 191; compare *Davey v. Pemberton* (1862), 11 C. B. (N. S.) 628.

(k) *Prestney v. Colchester Corporation* (1883), 24 Ch. D. 376, C. A.; *Bustros v. Bustros*, *supra*. But the judge himself has jurisdiction to change the place for inspection previously ordered, the party applying for the change paying the costs of the application (*Prestney v. Colchester Corporation*, *supra*, at pp. 384, 385).

(l) See p. 68, *ante*.

(m) The application is made by notice under the summons for directions, and need not be supported by affidavit, but the pleadings, notices, and affidavits already filed must be produced at the hearing.

(n) R. S. C., Ord. 31, r. 18 (1).

SECT. 4.

The
Inspection.

By whom.

order, and inspection must be had there unless the court's order is varied on an application for that purpose (o).

144. Inspection may be by the party himself or by his solicitor or agent (p). The term "agent" does not ordinarily include a professional accountant appointed for the purpose (q), but where a proper case is made out, inspection by an accountant or other expert may be allowed (r). As a general rule inspection by a witness is not allowed (s), but it may be in a special case (t).

Costs of
production.

145. The costs of the solicitor producing and the solicitor inspecting the documents are in the discretion of the taxing master (a), but no allowance is to be made for any inspection unless it is shown to the satisfaction of the taxing master that there were good and sufficient reasons for making the inspection. Where copies are made by the solicitor producing them the party requiring such copies must pay for them at the rate of 4d. per folio (b).

SECT. 5.—Right to Copies.

Who may
take copies.

146. A party entitled to inspect documents is also entitled to take copies or have them made for him. This right is incidental to the right to inspect (c). But the right to the copies may sometimes be more limited than the right to inspect. The right to inspection may, in special cases, extend to the whole of a book or document to find out what part of it really concerns the party exercising the

(o) *Lloyd's Bank v. Luck*, [1901] W. N. 130.

(p) A plaintiff who has obtained the usual order for production against the defendant will not be permitted to take with him another defendant to assist him in his inspection (*Bartley v. Bartley* (1852), 1 Drew. 233).

(q) *Bonnardet v. Taylor* (1861), 1 John. & H. 383; *Draper v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1861), 30 L. J. (CH.) 236; *Coleman v. West Hartlepool Harbour and Rail. Co.* (1861), 5 L. T. 236. Nor does it include a non-professional relative of the plaintiff though alleged to be the only person conversant with the accounts (*Summerfield v. Pritchard* (1853), 17 Beav. 9).

(r) *Lindsay v. Gladstone* (1869), L. R. 9 Eq. 132; *Swansea Vale Rail. Co. v. Budd* (1866), L. R. 2 Eq. 274. See also *Peru Republic v. Weguelin* (1871), 41 L. J. (CH.) 165 (inspection by several persons named by plaintiff); *Dadswell v. Jacobs* (1887), 56 L. J. (CH.) 233, C. A.; *Coleman v. West Hartlepool Harbour and Rail. Co.*, *supra*; *Groves v. Groves* (1853), 23 L. J. (CH.) 199 (forgery alleged). In *Head v. Willey* (1853), 25 Sol. Jo. 943, inspection was ordered by a person to be agreed upon or appointed by the master. A solicitor's clerk may represent his principal (*Lindsay v. Gladstone*, *supra*). An application to subject a document to chemical tests was refused in *Twentyman v. Barnes* (1848), 2 De G. & Sm. 225.

(s) *Boyd v. Petrie* (1868), 3 Ch. App. 818.

(t) *A.-G. v. Whitwood Local Board* (1871), 40 L. J. (CH.) 592.

(a) R. S. C., Ord. 65, r. 27 (17 (a)). This regulation renders *Wicksteed v. Biggs* (1885), 54 L. J. (CH.) 967, *Brown v. Sewell* (1880), 16 Ch. D. 517, C. A., *Woodroffe v. Daniel* (1839), 10 Sim. 126, and *Flockton v. Peake* (1864), 12 W. R. 1023, obsolete.

(b) R. S. C., Ord. 65, r. 27 (18). But this does not affect a party's right to make the copies himself where the inspection is obtained by means of a notice under Ord. 31, r. 15 (*Ormerod, Grierson & Co. v. St. George's Ironworks, Ltd.*, [1905] 1 Ch. 505, C. A., *per VAUGHAN WILLIAMS, L.J.*, at pp. 512, 513). See also p. 91, *post*.

(c) *Hide v. Holmes* (1825), 2 Mol. 372; *Coleman v. West Hartlepool Harbour and Rail. Co.*, *supra*; *Pratt v. Pratt* (1882), 51 L. J. (CH.) 838; *Mutter v. Eastern and Midlands Rail. Co.* (1888), 38 Ch. D. 92, C. A.; *Ormerod, Grierson & Co. v. St. George's Ironworks, Ltd.*, *supra*; *Bevan v. Webb*, [1901] 2 Ch. 59, 74, C. A.

right, but in such a case the party inspecting is only entitled to take copies of those parts which are relevant to the issue (*d*).

SECT. 5.
Right to
Copies.

Primâ facie the party inspecting the document may make the copy himself (*e*). Where, however, inspection of documents not mentioned in the party's affidavits or pleadings is obtained by means of an order made on an application for production of specific documents (*f*), it would seem from the form of the order prescribed (*g*) that a party must bespeak the copies and is not entitled as of right to make them himself (*h*), as he is where, as usually happens, inspection is obtained by means of a notice (*i*).

Who may
make copy.

SECT. 6.—Copies of Entries instead of Inspection.

147. Where inspection of any business books is applied for, the master may, if he thinks fit, instead of ordering production of the books order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and who must also state in the affidavit whether or not there are in the original book any and what erasures, interlineations, or alterations (*k*). This applies particularly to bankers' books (*l*). But notwithstanding that such an order has been made and the copy supplied, the master can still in a proper case order inspection of the book (*m*).

Copies of
entries in
lieu of
inspection.

SECT. 7.—Consequences of Failure to Produce for Inspection.

148. Where the party upon whom the notice to produce has been served fails to comply with the notice he is debarred from putting in evidence on his behalf at the trial any document of which production is refused, unless he satisfies the court or judge that the document relates only to his own title (*n*), he being a defendant (*o*) to the cause or matter, or that he had some other cause or excuse which is deemed sufficient (*p*).

Consequences
of failure to
produce.

(*d*) *Mutter v. Eastern and Midlands Rail. Co.* (1888), 38 Ch. D. 92, C. A., *per* LINDLEY, L.J., at pp. 105, 106, and cases cited there; *Nelson v. Anglo-American Land Mortgage Agency Co.*, [1897] 1 Ch. 130; *Boord v. African Consolidated Land and Trading Co.*, [1898] 1 Ch. 596 (cases under the Companies Acts).

(*e*) *Ormerod, Grierson & Co. v. St. George's Ironworks, Ltd.*, [1905] 1 Ch. 505, C. A.; *Pratt v. Pratt* (1882), 51 L. J. (C. H.) 838.

(*f*) R. S. C., Ord. 31, r. 18 (2). See p. 69, *ante*.

(*g*) R. S. C., July, 1903, r. 11; Form 18, Appendix K, Yearly Supreme Court Practice, Vol. II., 1933.

(*h*) The form was published without any rule to explain or prescribe its use. But it only applies where inspection is obtained under the order referred to, and it is not often necessary to resort to that procedure.

(*i*) R. S. C., Ord. 31, r. 15. See p. 68, *ante*.

(*k*) R. S. C., Ord. 31, r. 19A (1).

(*l*) As to inspection of books of a company by a shareholder or creditor, see title COMPANIES, Vol. V.; of books of a corporation, see title CORPORATIONS, Vol. VIII., p. 323; of bankers' books, see title BANKERS AND BANKING, Vol. I., p. 644. As to the Bank of England, see *Heslop v. The Bank of England* (1833), 6 Sim. 192.

(*m*) R. S. C., Ord. 31, r. 19A (1).

(*n*) See p. 87, *ante*.

(*o*) This does not apply to a plaintiff (*Smith v. Harris* (1883), 48 L. T. 869, 870; and see *Roberts v. Oppenheim* (1884), 26 Ch. D. 724, 731, C. A.).

(*p*) R. S. C., Ord. 31, r. 15. The cases throw very little light on the question what would be considered a sufficient cause or excuse. In *Webster v. Whewall*

SECT. 8.
Inspection
of Court
Rolls.
Court rolls.

SECT. 8.—*Inspection of Court Rolls.*

149. A lord of a manor who has refused inspection of the court rolls to a tenant of the manor may be ordered to allow him limited inspection of them. The application of the tenant must be supported by an affidavit as to the application to the lord of the manor for liberty to inspect and the latter's refusal to allow it (*q*).

Part V.—Interrogatories.

SECT. 1.—*The Nature and Extent of Interrogatories.*

Nature.

150. The right to administer interrogatories consists in the power of a party to require his opponent to answer on oath such questions, framed by the former, relating to the matters in question in the cause or matter between them, as the court or judge may allow (*r*) as being necessary for disposing fairly of the cause or matter or for saving costs (*s*), regard being had to any offer by the party sought to be interrogated to deliver particulars or make admissions (*a*).

To what
inter-
rogatories
may extend.

151. The party interrogating is entitled to put questions for the purpose of extracting from his opponent information as to the facts material to the questions between them which he has to prove on any issue raised between them (*b*), or for the purpose of

(1880), 15 Ch. D. 120, where the plaintiff had refused to give inspection of a deed referred to in his statement of claim until after defence had been delivered, DENMAN, J., allowed him to put it in evidence on the ground that the plaintiff was right in refusing production before defence. The decision, but not the ground for it, was approved in *Quilter v. Heutly* (1883), 23 Ch. D. 42, C. A., as it was considered clear that the defendant did not really want to see the documents. In this case the Court of Appeal ordered production before defence of such of the letters referred to in the plaintiff's statement of claim as were in his possession, but not those which were not in his possession. In *Roberts v. Oppenheim* (1884), 26 Ch. D. 724, C. A., it was held that the rule did not deprive the party of his right to protect a document referred to in his pleading from production if he could, but only subjected him to the possible penalty of not being able to put it in evidence. In this case KAY, J., justly questioned the distinction drawn by the rule between the plaintiff and defendant. Assuming "affidavits" includes an affidavit of documents, it is submitted that these cases show that there is a distinction between documents referred to in pleadings and documents disclosed in an affidavit of documents, and that what might be a sufficient cause or excuse in the latter case would not be so in the former case. See also *Lowden v. Blakey* (1889), 61 L. T. 251; and compare *G. W. Young & Co., Ltd. v. Scottish Union and National Insurance Co.* (1907), 24 T. L. R. 73, C. A., per BUCKLEY, L.J., at p. 74.

(*q*) R. S. C., Ord. 31, r. 19; see, further, title COPYHOLDS, Vol. VIII., p. 16.

(*r*) The matter is one within the discretion of the master or judge (*Codd v. Delap*, [1906] W. N. 57, 78, C. A.).

(*s*) R. S. C., Ord. 31, rr. 1, 2; *Cochrane v. Smith* (1895), 12 T. L. R. 78.

(*a*) R. S. C., Ord. 31, r. 2; *Cochrane v. Smith*, *supra*.

(*b*) *A.-G. v. Gaskill* (1882), 20 Ch. D. 519, C. A.; Wigram, *Law of Discovery*, pp. 23, 65; *Lever Brothers v. Associated Newspapers*, [1907] 2 K. B. 626, C. A. For instance, where the action is one for damages caused by negligence the plaintiff may ask as to the circumstances under which the damage occurred, as to reports made by the defendant's servants with reference to it (*Jones v. London Road Car*

securing admissions as to such facts in order that expense and delay may be saved (c), or to find out whether particular statements of fact contained in the pleadings of the party interrogating as to where the onus of proof is upon him are true or untrue (d), or to ascertain what case he has to meet or what really is in issue (e), so as to prevent his being taken by surprise at the trial (f), or to destroy his opponent's case (g), or to support his own case (h).

SECT. 1.
Nature and
Extent of
Interroga-
tories.

152. In accordance with the general rules as to discovery, interrogatories may not extend to the evidence wherewith the opposite party intends to support his case at the trial, or to the contents of his opponent's brief, or to the names of his witnesses (i) (unless their names are in themselves relevant facts) (j), nor to the facts which

To what
inter-
rogatories
may not
extend.

Co., [1883] W. N. 196; *Frost v. Brook* (1875), 23 W. R. 260, and as to the nature of the injuries or loss (*Frost v. Brook*, *supra*), but not as to who did cause the damage if the defendant or his servants did not (*Meek v. Witherington* (1892), 67 L. T. 122; and see *Hooton v. Dalby*, [1907] 2 K. B. 18, C. A., an action for seduction, the defendant denying paternity of the child, where an interrogatory as to whether the defendant alleged carnal intercourse with the plaintiff by other persons, and if so, by whom, was disallowed). For further illustrations, see pp. 98 *et seq.*, *post*.

(c) *A.-G. v. Gaskill* (1882), 20 Ch. D. 519, 527, 528, C. A.; *Kennedy v. Dodson*, [1895] 1 Ch. 334, 341, C. A., *per* A. L. SMITH, L.J.; *Hall v. London and North Western Rail. Co.* (1877), 35 L. T. 848.

(d) *A.-G. v. Gaskill*, *supra*, *per* JESSEL, M.R., at p. 525, 527. But interrogatories will not as a rule be allowed to be put as to the truth generally of the statements in the pleadings of the party interrogated (*Johns v. James* (1879), 13 Ch. D. 370, 374; *Re Howel Morgan, Owen v. Morgan* (1888), 39 Ch. D. 316, COTTON, L.J., dissenting).

(e) *Saunders v. Jones* (1877), 7 Ch. D. 435, C. A.; *Ashley v. Taylor* (1878), 38 L. T. 44, C. A., *per* THESIGER, L.J., at p. 45; *Lyon v. Tweddell* (1879), 13 Ch. D. 375, 378; *Benbow v. Low* (1880), 16 Ch. D. 93, 97, C. A.

(f) *Eade v. Jacobs* (1877), 37 L. T. 621, C. A.

(g) *Hoffmann v. Postill* (1869), 4 Ch. App. 673; *Sewers Commissioners of the City of London v. Glasse* (1873), L. R. 15 Eq. 302 (but see *Bidder v. Bridges* (1885), 29 Ch. D. 29, C. A., *per* KAY, J., at p. 41); *Hennessy v. Wright* (No. 2) (1888), 24 Q. B. D. 445, n. 447, n.; *Grumbrecht v. Parry* (1884), 32 W. R. 558; *Plymouth Mutual Co-operative and Industrial Society v. Traders' Publishing Association*, [1906] 1 K. B. 403, C. A., *per* STIRLING, L.J., at p. 417; *Re Howel Morgan, Owen v. Morgan*, *supra*, *per* COTTON, L.J., at p. 320.

(h) *Lyell v. Kennedy* (1883), 8 App. Cas. 217, *per* Lord SELBORNE, L.C., at p. 225; *Bidder v. Bridges*, *supra*; *Hooton v. Dalby*, *supra*; *Wigram, Law of Discovery*, pp. 23, 29.

(i) *Wigram, Law of Discovery*, 2nd proposition, p. 90; *A.-G. v. London Corporation* (1850), 19 L. J. (CH.) 314; *Moor v. Roberts* (1857), 2 C. B. (N. S.) 671; *Bidder v. Bridges*, *supra*; *Benbow v. Low* (1880), 16 Ch. D. 93, C. A. (explaining *Saunders v. Jones*, *supra*; *Marriott v. Chamberlain* (1886), 17 Q. B. D. 154, C. A., at pp. 163, 164; *Eade v. Jacobs*, *supra*, explained in *A.-G. v. Gaskill*, *supra*, at p. 529, and in *Bidder v. Bridges*, *supra*; *Johns v. James*, *supra*; *Lyon v. Tweddell*, *supra*; *Lyell v. Kennedy* (No. 2) (1883), 9 App. Cas. 81, 86; *McColla v. Jones* (1887), 4 T. L. R. 12; *Ridgway v. Smith & Son* (1890), 6 T. L. R. 275; *Marshall v. Metropolitan District Rail. Co.* (1890), 7 T. L. R. 49, C. A.; *Potter v. Metropolitan District Rail. Co.* (1873), 28 L. T. 231; *Re H. W. Strachan*, [1895] 1 Ch. 439, 445, C. A.; *Codd v. Delap*, [1906] W. N. 57; *Hooton v. Dalby*, *supra*, at p. 20.

(j) If the name and address of a person is itself a relevant fact an interrogatory as to that name and address is not rendered inadmissible merely by the fact that the answer will disclose a witness's name (*Marriott v. Chamberlain*, *supra*, at pp. 164, 166, following *Storey v. Lennox* (Lord George) (1836), 1 Keen, 341; see also *Lyon v. Tweddell*, *supra*, and compare *Humphries & Co. v. Taylor Drug Co.* (1888), 39 Ch. D. 693); and interrogatories for the purpose of discovering

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merely support the case of the party interrogated (*k*); and the mere fact that the questions would be admissible in cross-examination of a witness does not make them good as interrogatories (*l*). Thus, interrogatories to credit only will not be allowed (*m*).

In actions for infringement of patents or trade marks, the names and addresses of customers of either party may have to be disclosed as being relevant to the issue (*n*), or where an inquiry as to damages or an account as to profits has been ordered (*o*).

facts which will inform the party interrogating as to the evidence to be obtained by him are permissible (*A.-G. v. Gaskill* (1882), 20 Ch. D. 519, 528, O. A., *per* JESSEL, M.R.; and see *J. and E. Hall v. Liardet* (No. 2), [1883] W. N. 175), or for the purpose of finding out whom to proceed against (*Eyre v. Rodgers* (1891), 40 W. R. 137, 138; *Union Bank of London v. Manby* (1879), 13 Ch. D. 239, O. A.; *Hancocks v. Lablache* (1878), 3 C. P. D. 197, 202). As to whether names and addresses of customers ought to be ordered to be given in the particulars, see *Duke & Sons v. Wisden & Co.* (1897), 77 L. T. 67, O. A.

(*k*) *Ingilby v. Shafto* (1863), 33 Beav. 31; *Lyell v. Kennedy* (1883), 8 App. Cas. 217, *per* Lord SELBORNE, L.C., at p. 225; *Bidder v. Bridges* (1885), 29 Ch. D. 29, O. A.; *Sewers Commissioners of the City of London v. Glasse* (1873), L. R. 15 Eq. 302; *Hooton v. Dalby*, [1907] 2 K. B. 18, O. A., *per* COZENS-HARDY, M.R., and BUCKLEY, L.J., at pp. 20, 21. See also *Stewart v. Smith* (1867), L. R. 2 C. P. 293, 295, a case under the Common Law Procedure Acts, where this principle is cited with approval. But if the matters interrogated upon are relevant to the interrogator's case the fact that they may indirectly have the effect of disclosing the case of the party interrogated does not prevent their being put (*Miller v. Kirwan*, [1903] 2 I. R. 118; *Whateley v. Crawler* (1855), 5 E. & B. 709; and see *Burrell v. Nicholson* (1833), 1 My. & K. 680, and cases there cited (discovery of documents); *A.-G. v. Newcastle Corporation*, [1897] 2 Q. B. 384, O. A.

(*l*) R. S. C., Ord. 31, r. 1; *Kennedy v. Dodson*, [1895] 1 Ch. 334, 338, 341, O. A.; *Re Howel Morgan, Owen v. Morgan* (1888), 39 Ch. D. 316, 321, O. A.; *Sheppard v. Lonsdale (Lord)* (1879), 5 C. P. D. 47; *Parker v. Wells* (1881), 18 Ch. D. 477, O. A.; *Allhusen v. Labouchere* (1878), 3 Q. B. D. 654, at p. 661, O. A.

(*m*) *Allhusen v. Labouchere*, *supra*, and *per* COCKBURN, C.J., in *Labouchere v. Shaw* (1877), 41 J. P. 788.

(*n*) Where the defendant alleges in his particulars of objections to the patent a general user of the plaintiff's alleged invention previous to the date of the letters patent, he may be compelled to answer interrogatories asking the names and addresses of persons so using it as alleged, as well as the places where the prior user has taken place (*Alliance Pure White Lead Syndicate v. MacIvor's Patents* (1891), 39 W. R. 487, following *Birch v. Mather* (1883), 22 Ch. D. 629; *Flower v. Lloyd* (1876), 20 Sol. Jo. 860). So also in *Humphries & Co. v. Taylor Drug Co.* (1888), 39 Ch. D. 693, where, in an action for infringement of a trade mark, the plaintiff alleged that the user of his trade mark by defendant had deceived divers persons and induced them to buy defendant's goods as and for plaintiff's goods, and the defendant was held entitled to discovery of the names and addresses of those persons. In *Davenport v. Rylands* (1865), L. R. 1 Eq. 302, 308, it was held that for the purpose of the inquiry as to damages interrogatories might extend to the sales by the defendants of articles manufactured by them within six years before the filing of the bill. In *Swinborne v. Nelson* (1853), 16 Beav. 416, 418, the defendant was compelled to set out the names and addresses of the persons to whom he had sold an article manufactured by him alleged to be an infringement of plaintiff's article and the prices at which the articles had been sold. So also in *Crosley v. Stewart* (1863), 1 New Rep. 426, where some of the persons resided abroad, and in *Telley v. Euston* (1856), 18 O. B. 643. Discovery is not prevented by the fact that the answers may expose the defendant's customers to actions (*Telley v. Euston*, *supra*; *Howe v. M'Kernan* (1862), 30 Beav. 547; *Bovill v. Cowan* (1867), 15 W. R. 608). In an action for an account against a licensee of the plaintiff's process the licensee may *seem* be compelled to disclose the names of a few of the customers of the licensee (*Ashworth v. Roberts* (1890), 45 Ch. D. 623).

(*o*) In *Saccharin Corporation v. Chemicals and Drugs Co.*, [1900] 2 Ch. 556,

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153. Interrogatories must be confined to matters which are in issue or sufficiently material at the particular stage of the action at which they are sought to be delivered (*p*), or to the relief claimed (*q*), including the amount of the damages (*r*), or other relief (*s*), and, as a general rule, perhaps to matters which are relevant to the facts directly in issue (*t*), but under some circumstances they may extend to facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue (*a*).

C. A., where the defendants were ordered to account for profits, it was held that they must disclose the names and addresses of their customers, and the principle laid down in *Murray v. Clayton* (1872), L. R. 15 Eq. 115, that where a wrongdoer is being dealt with the court must not be very astute to prevent him from giving full discovery because some consequences may flow from that discovery which has been occasioned by his own wrongful act, was approved. The same principle applies equally well with regard to an infringer of a trade mark (*Powell v. Birmingham Vinegar Brewery Co.* (1896), 14 R. P. O. 1, C. A.); see Patents and Designs Act, 1907 (7 Edw. 7 c. 29), under which R. S. C., Ord. 53A, rr. 9—21 have been made as to particulars in patent actions; and title PATENTS AND DESIGNS. As to sealing up parts of books containing names of customers, see p. 71, *ante*; *Finnegan v. James* (1874), L. R. 19 Eq. 72; *Crossley v. Tomey* (1876), 2 Ch. D. 533.

(*p*) *Parker v. Wells* (1881), 18 Ch. D. 477, 483, 486, C. A. The court has a discretionary power to disallow interrogatories the answers to which will only assist the plaintiff if he wins, especially when they involve much labour or are oppressive, or may be injurious to the party interrogated (*Fennessy v. Clark* (1887), 37 Ch. D. 184, C. A., *per* COTTON, L.J., at p. 187; R. S. C., Ord. 31, r. 2; and see p. 51, *ante*).

(*q*) *Parker v. Wells* (1881), 18 Ch. D. 477, C. A., *per* COTTON, L.J., at p. 486; *Fennessy v. Clark* (1887), 37 Ch. D. 184, C. A.; and see Mitford on Pleadings, pp. 191, 306; Wigram, *Law of Discovery*, p. 65.

(*r*) *Horne v. Hough* (1874), L. R. 9 C. P. 135; *Wright v. Goodlake* (1865), 3 H. & C. 540; *Dobson v. Richardson* (1868), 9 B. & S. 516; *Frost v. Brooke* (1875), 32 L. T. 312; *Marriott v. Chamberlain* (1886), 17 Q. B. D. 154, *per* BOWEN, L.J., at p. 164; *Scaife v. Kemp & Co.*, [1892] 2 Q. B. 319. In *Bennett v. Clarke* (1884), 32 W. R. 550, vexatious and irrelevant interrogatories as to the profits of a business and income tax returns were disallowed.

(*s*) *Re Howel Morgan, Owen v. Morgan* (1888), 39 Ch. D. 316, C. A.; *Saunders v. Jones* (1877), 7 Ch. D. 435, 449, 453, C. A.

(*t*) *Kennedy v. Dodson*, [1895] 1 Ch. 334, 338, 341, C. A.; *Re Howel Morgan, Owen v. Morgan*, *supra*, *per* COTTON, L.J., at p. 320; *Allhusen v. Labouchere* (1878), 3 Q. B. D. 654, 661, C. A., *per* JAMES, L.J.; *Parker v. Wells*, *supra*; *Mansfield v. Childerhouse* (1876), 4 Ch. D. 82; *Re Thomas Holloway, Young v. Holloway* (1887), 12 P. D. 167, C. A. The interrogatories must relate to the matters in question in the cause or matter (R. S. C., Ord. 31, r. 1). Other instances are *Great Western Colliery Co. v. Tucker* (1874), 43 L. J. (CH.) 518, C. A. (issue whether a fiduciary relationship existed between the parties at time of purchase of a colliery by defendants; interrogatories as to cheques drawn by defendants on banking account opened for purchase of colliery and as to profits of sale held irrelevant); *Jourdain v. Palmer* (1865), 35 L. J. (EX.) 69 (action for breach of agreement to pay stamp duty on letters patent; interrogatory to show letters patent of no value not allowed); *Langdale's Chemical Manure Co. v. Knill and Grant* (1890), 6 T. L. R. 236 (interrogatory as to whether a partner had signed a representation under Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), for the firm held irrelevant, as the cases showed the person would not be bound in such a case).

(*a*) In *Marriott v. Chamberlain*, *supra*, an action for libel where the defendant pleaded that the statement made was true, the court allowed interrogatories to be administered to the plaintiff as to the person in whose hands he had seen a certain letter which the plaintiff alleged had been

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154. It is not a good objection to allowing an interrogatory that the party interrogating has other means of proving the facts in question (b), since one legitimate purpose of interrogatories is to obtain admissions. Where the information sought can be better obtained by means of an order for particulars the interrogatories may be disallowed (c), though in practice matter in the nature of particulars is often allowed to be ascertained by means of interrogatories (d).

Crimination.

155. The fact that the answer to an interrogatory may tend to criminate the party interrogated does not prevent the interrogatory being put (e), though it does afford ground for objecting to answer it (f). But interrogatories are not allowed to be put

signed by the defendant, but which the defendant alleged to have been fabricated by the plaintiff, and the names and addresses of the persons to whom the letter had been sent. It was a fact in dispute as to whether such letter ever existed, and Lord ESHER, M.R., held that the interrogatories were permissible as relating to matters which, though not directly in issue, were material to the issue; that the right to interrogate was not confined to the facts directly in issue, but extended to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue; see at pp. 162, 163. In *Hooton v. Dalby*, [1907] 2 K. B. 18, C. A., where this dictum was considered, BUCKLEY, L.J., at p. 21, held that though it is true that interrogatories may extend beyond facts directly in issue, one party is not entitled to ask his opponent upon what line of facts he is going to rely as relevant to the existence or non-existence of the facts directly in issue. Again, it has been stated that inquiries as to facts which tend to show that the defence set up is unfounded ought not to be excluded because the matters inquired after are not directly relevant to the issue in the case, but only tend to show that the defence set up is not a real one (*Re Howel Morgan, Owen v. Morgun* (1888), 39 Ch. D. 316, C. A., per COTTON, L.J., at p. 320). But the majority of the court in the last cited case differed from this view, and held that interrogatories must be confined to matters at issue in the action, and disallowed the particular interrogatory as relating to a matter not at issue (see judgments of FRAY and LOPES, L.JJ., at p. 321). Further, in *Kennedy v. Dodson*, [1895] 1 Ch. 334, Lord HERSCHELL, L.C., at p. 338, considered that interrogatories upon matters which might form the subject of questions in cross-examination, if not strictly relevant to the question at issue in the action, ought to be rigorously excluded; and A. L. SMITH, L.J., at p. 341, considered that interrogatories should be confined to obtaining from the party interrogated admissions of facts which it is necessary for the party interrogating to prove, in order to establish his case, and that if the party interrogating goes further and seeks by his interrogatories to get from the other party matters which it is not incumbent on him to prove, although such matters may indirectly assist his case, the interrogatories ought not to be admitted. This last statement is clearly too limited.

(b) *Lyell v. Kennedy* (1883), 8 App. Cas. 217, 228.

(c) *O'Meara v. Stone*, [1884] W. N. 72.

(d) See *Saunders v. Jones* (1877), 7 Ch. D. 435, 448, C. A.; *Johns v. James* (1879), 13 Ch. D. 370; *Lyon v. Tweddell* (1879), 13 Ch. D. 375; *Ashley v. Taylor* (1878), 38 L. T. 44, C. A.; *Cooper v. Blackmore* (1886), 2 T. L. R. 746; *Bidder v. Bridges* (1885), 29 Ch. D. 29, C. A.; *Augustinus v. Nerinckx* (1880), 16 Ch. D. 13, 18, C. A. By R. S. C., Ord. 31, r. 2, in allowing interrogatories an offer to give particulars or make admissions must be taken into account.

(e) *Osborn v. London Dock Co.* (1855), 10 Exch. 698; *Bartlett v. Lewis* (1862), 12 C. B. (N. S.) 249; *Chester v. Wortley* (1856), 17 C. B. 410; *Allhusen v. Labouchere* (1878), 3 Q. B. D. 654, C. A.; *Fisher v. Owen* (1878), 8 Ch. D. 645, C. A.; *Harvey v. Lovekin* (1884), 10 P. D. 122, C. A.; *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, C. A.; *National Association of Operative Plasterers v. Smithies*, [1906] A. C. 434, 437; and see p. 82, ante,

(f) See p. 82, ante; p. 110, post.

in actions to enforce a penalty or forfeiture, for the purpose of proving that the person interrogated has incurred the penalty or forfeiture (g).

156. Furthermore, they must not be exhibited unreasonably or vexatiously, nor be prolix, oppressive, unnecessary, or scandalous (h).

What is unreasonable or vexatious or oppressive depends not so much on the interrogatory itself as on the nature and state of the action and its ripeness for the discovery. There may be interrogatories which in form are unobjectionable, but which under the circumstances of the particular case it may be unreasonable or vexatious to exhibit (i), or which exceed the legitimate requirements of the particular occasion (k). But if the discovery is material at the stage of the action at which the interrogatory is put, and the information cannot be obtained in a more convenient way, the interrogatory cannot be oppressive, but mere relevancy will not excuse oppressiveness (l).

It is likewise impossible to define what interrogatories are unnecessary or scandalous (m), since the answer depends upon the

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(g) See p. 41, *ante*.

(h) R. S. C., Ord. 31, r. 7.

(i) *Oppenheim & Co. v. Sheffield*, [1893] 1 Q. B. 5, C. A., *per* Lord ESHER, M.R., at p. 8.

(k) *White & Co. v. Credit Reform Association and Credit Index, Ltd.*, [1905] 1 K. B. 653, 659, C. A., *per* COLLINS, M.R. For instances, see also *Grumbrecht v. Parry* (1884), 32 W. R. 558, C. A.; *Oppenheim & Co. v. Sheffield*, *supra*; *A.-G. v. North Metropolitan Tramways Co.*, [1892] 3 Ch. 70; *ibid.* (1895), 72 L. T. 340, C. A. (discovery of documents to a rival in trade); compare *Howe v. M'Kernan* (1862), 30 Beav. 547; *Ashworth v. Roberts* (1890), 45 Ch. D. 623; compare *Mistovski v. Mandelberg & Co.* (1890), 6 T. L. R. 207 (interrogatories as to a secret manufacturing process); *Parker v. Wells* (1881), 18 Ch. D. 477, C. A. (interrogatories as to profits requiring search through business books of several years); *Petre v. Sutherland* (1887), 3 T. L. R. 275, C. A. (inspection of stock-brokers' books); *Kennedy v. Dodson*, [1895] 1 Ch. 334, 338, 341, C. A. (interrogatories by plaintiff claiming partnership in a particular matter as to partnership in respect of other matters held irrelevant and oppressive); *Sheward v. Lonsdale (Lord)* (1879), 5 C. P. D. 47; (1879) 42 L. T. 172, C. A. (dates when horses purchased by plaintiff and prices); *Great Western Colliery Co. v. Tucker* (1874), 9 Ch. App. 374, where JAMES, L.J., said, at p. 378: "It would be monstrous that a man by merely alleging that he had a share in a concern, which allegation was denied and had not been established, and whilst it was doubtful whether it would be established, could get the accounts of a defendant's private business and of his dealings with other people." See also *Hemery v. Worssam* (1882), 26 Sol. Jo. 296, C. A.; *Verminck v. Edwards* (1880), 29 W. R. 189; *Whitham v. Whitham* (1884), 28 Sol. Jo. 456, C. A. As to accounts, see p. 98, *post*, and as to disclosure of names and addresses of defendants' customers in actions for infringement of patents, see p. 94, *ante*.

(l) See *Plymouth Mutual Co-operative and Industrial Society, Ltd. v. Traders' Publishing Association, Ltd.*, [1906] 1 K. B. 403, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 414.

(m) For an instance of interrogatories held scandalous, see *Kemble v. Hope* (1894), 10 T. L. R. 254, affirmed, *ibid.*, 371, C. A., where interrogatories administered to the defendants in an action for false representation as to a proposed tenant for a house as to whether a lady introduced by them as a fit purchaser was not the mistress of one of them, and as to whether she was a woman of good moral character, were disallowed. But nothing that is relevant can be scandalous (*Fisher v. Owen* (1878), 8 Ch. D. 645, C. A., *per* COTTON, L.J., at p. 652). In a divorce suit an interrogatory as to the communication of a venereal disease has

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circumstances of each case, and indeed all the above-mentioned heads overlap and many cases fall under several of them (*n*).

157. Where there is any ground for suspicion that the information is sought for other and ulterior objects than the trial of the action the interrogatories may be disallowed, or answers may be refused, even though the questions are as to facts relevant to the action (*o*).

158. Where the interrogatories delivered come within the terms unreasonable, vexatious, or prolix, the party in fault may be ordered to pay the costs occasioned thereby in any event (*p*).

SECT. 2.—Interrogatories in Particular Cases.

Particular
cases.

159. The principles as to what interrogatories are or are not admissible find their application in a great variety of cases. Some illustrations taken from cases which seem to be of importance are here given.

Accounts.

160. Where an account is claimed as part of the claim in an action, or questions of account arise in the action, interrogatories as to the details of the accounts may be allowed, provided they are of sufficient importance to the party interrogating, *e.g.*, enabling him to obtain an immediate decree or order at the trial, and cause comparatively little trouble to the party interrogated (*q*), but not where the interrogatory would be oppressive (*r*). An executor will generally be compelled to make a full discovery of the assets at the instance of a beneficiary, provided the interrogatory is not vexatious (*s*). So also a mortgagee in possession who is defendant to a redemption

been disallowed (*E. v. E.* (1907), 24 T. L. R. 78); and see title HUSBAND AND WIFE.

(*n*) In *Kennedy v. Dodson*, [1895] 1 Ch. 334, C. A., the same interrogatories were disapproved of by Lord HERSHELL as irrelevant, and by LINDLEY, L.J., as vexatious and oppressive. See also *Oppenheim & Co. v. Sheffield*, [1893] 1 Q. B. 5, C. A., at p. 6, *n*.

(*o*) *Allhusen v. Labouchere* (1878), 3 Q. B. D. 654, 664, C. A., *per* COLLINS, L.J.; *White & Co. v. Credit Reform Association and Credit Index, Ltd.*, [1905] 1 K. B. 653, C. A.; *Edmondson v. Birch & Co., Ltd.*, [1905] 2 K. B. 523, 526, C. A.; *Plymouth Mutual Co-operative and Industrial Society, Ltd. v. Traders' Publishing Association, Ltd.*, [1906] 1 K. B. 403, 414, C. A.; *Heugh v. Gurrett* (1875), 44 L. J. (CH.) 305, C. A.; *Carver v. Pinto Leite* (1871), 41 L. J. (CH.) 92, C. A.

(*p*) R. S. C., Ord. 31, r. 3.

(*q*) *Benbow v. Low* (1880), 16 Ch. D. 93, C. A., *per* JESSEL, M.R., at p. 98. In this case an interrogatory as to the quantities of goods sold each year since 1861 was refused as, on the whole, being directed to the details of the evidence of the party interrogated. On the other hand, in *Saunders v. Jones* (1877), 7 Ch. D. 435, C. A., an account of the aggregate amount of the accounts for a little more than two years was allowed as enabling the party interrogating to obtain a decree at the trial, and as not being oppressive to the party interrogated; see *per* JAMES, L.J., at p. 449.

(*r*) *Parker v. Wells* (1881), 18 Ch. D. 477, C. A. In this case interrogatories as to dates and particulars of payments made by the party interrogated, and an account of all moneys paid to certain persons since 1854, were disallowed as being oppressive. See also *Hemery v. Worssam* (1882), 26 Sol. Jo. 296, C. A. As to what stage of the action interrogatories relating to accounts will be allowed, see p. 52, *ante*.

(*s*) *Re Sutcliffe, Alison v. Alison* (1881), 50 L. J. (CH.) 574.

suit must set out in his answer to interrogatories an account of the rent and profits of the mortgaged property received by him (*t*).

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Interrogatories in Particular Cases.
Bailment.

161. In an action by a bailor against a bailee for wrongful detention of the things bailed, the bailee will not be allowed to interrogate the bailor with a view to showing that he has parted with his title to the thing bailed to a third party, unless the bailee is defending under the authority of such third party (*a*).

162. Where a company sued an alleged shareholder for calls and the defence was a denial that the defendant was a shareholder, interrogatories as to whether the alleged shareholder had executed the subscription contract of the company were allowed (*b*).

Calls against shareholder.

163. Interrogatories as to the damages claimed are allowed for the purpose of ascertaining the amount to pay into court (*c*) or after money has been paid into court (*d*), or apart from any such consideration, since interrogatories as to the relief claimed, including the amount of damages, are admissible (*e*). But where the interrogatories are vexatious or irrelevant they will not be allowed (*f*).

As to amount of damages.

164. In actions for slander interrogatories are allowed as to whether and when the words complained of or words to that effect were spoken (*g*), or what were the exact words spoken (*h*), whether they were not spoken in the presence of certain named persons (*i*), and, possibly, of what other persons (*k*). If the defendant pleads that the words were spoken at the plaintiff's invitation interrogatories as to when and how the invitation was given are legitimate (*l*).

Slander.

165. So also in actions for libel the plaintiff may interrogate the defendant as to whether he did not write and publish the words

Libel;

(*t*) *Elmer v. Creasy* (1873), 9 Ch. App. 69.

(*a*) *Rogers & Co. v. Lambert & Co.* (1890), 24 Q. B. D. 573; compare *Rogers, Sons & Co. v. Lambert & Co.*, [1891] 1 Q. B. 318, C. A.

(*b*) *Wolverhampton New Waterworks Co. v. Hawksford* (1859), 28 L. J. (C. P.) 198. In this case it was made part of the order that the answers were not to be used at the trial unless the loss sustained by the company was proved.

(*c*) *Horne v. Hough* (1874), L. R. 9 C. P. 135; *Frost v. Brooke* (1875), 32 L. T. 312; *Wright v. Goodlake* (1865), 34 L. J. (EX.) 82; *Clarke v. Bennett* (1884), 32 W. R. 550.

(*d*) *Dobson v. Richardson* (1868), L. R. 3 Q. B. 778. In this case the court refused to act on *Jourdain v. Palmer* (1866), L. R. 1 Exch. 102.

(*e*) *Marriott v. Chamberlain* (1886), 17 Q. B. D. 154, 162, C. A.; *Parker v. Wells* (1881), 18 Ch. D. 477, C. A.; *Fennessy v. Clark* (1887), 37 Ch. D. 184, C. A.

(*f*) *Clarke v. Bennett*, *supra* (interrogatories as to the profits of a business and income tax returns disallowed as being vexatious and irrelevant). As to interrogatories in libel actions where particulars have been given by the defendant of matters he intends to rely upon in mitigation of damages, see p. 101, *post*.

(*g*) *Dalgleish v. Lowther*, [1899] 2 Q. B. 590, C. A.; *Saunderson v. Van Radeck (Baron)* (1905), 119 L. T. Jo. 33, H. L.

(*h*) *Atkinson v. Fosbrooke* (1866), L. R. 1 Q. B. 628.

(*i*) *Ibid.*

(*k*) In *Saunderson v. Van Radeck (Baron)*, *supra*, an interrogatory to this effect was abandoned in the H. L.

(*l*) *Barratt v. Kearns*, [1905] 1 K. B. 504, C. A.

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complained of, but the defendant may object to answer on the ground that it might tend to criminate him (*m*); whether he was not the printer and publisher or both of a newspaper containing the libel (*n*); whether he did not publish it to a named person (*o*); and whether the words complained of were not intended to refer to the plaintiff (*p*).

Malice.

166. When privilege or fair comment are set up as defences interrogatories for the purpose of proving malice are permissible, since the fairness or unfairness of the libel is directly in issue (*q*). Therefore, questions as to the information that the defendant had at the time of publishing the libel, the inquiries made by him for finding out its truth before publication, or any similar inquiries directed to showing his state of mind at the time, are legitimate interrogatories (*r*). But an interrogatory by a plaintiff may not extend to other statements about him which do not bear indications of malice on their face, at any rate where fair comment only is pleaded (*s*), and, *vice versâ*, a defendant may not ask whether other similar libels have not been published and have remained uncontradicted, even where the defendant pleads justification (*t*), nor as to the truth of similar libels (*a*).

(*m*) *Fisher v. Owen* (1878), 8 Ch. D. 645, C. A., overruling *Atherley v. Harvey* (1877), 2 Q. B. D. 524; *Allhusen v. Labouchere* (1878), 3 Q. B. D. 654, C. A.; and see p. 82, *ante*. In order to prove that the words complained of are not in the defendant's handwriting he may be interrogated as to whether or not he was the writer of another letter addressed to a third person (*Jones v. Richards* (1885), 15 Q. B. D. 439).

(*n*) *Ramsden v. Brearley* (1875), 33 L. T. 322; compare stat. (1836) 6 & 7 Will. 4, c. 76, s. 19, re-enacted Newspapers, Printers and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), Sched. II.

(*o*) Compare *Atkinson v. Fosbrooke* (1866), L. R. 1 Q. B. 628. But an interrogatory requiring the defendants to give, by reference to their books or otherwise, the names of the persons to whom a book containing the alleged libel had been supplied or shown by or through them or their agents will generally be disallowed as being oppressive (*White & Co. v. Credit Reform Association and Credit Index, Ltd.*, [1905] 1 K. B. 653, C. A.); and similarly where the action is against a newspaper proprietor interrogatories as to the number of copies containing the alleged libel which were printed will not usually be allowed (except in the case of a paper about the circulation of which nothing is known), and, if allowed to be put, are sufficiently answered by the statement that a considerable number were printed (*Whittaker v. Scarborough Post Newspaper Co.*, [1896] 2 Q. B. 148, C. A., overruling *Parnell v. Walter* (1890), 24 Q. B. D. 441; see also *Rumney v. Walter* (1891), 61 L. J. (Q. B.) 149; and *James v. Carr* (1890), 7 T. L. R. 4, in which that decision was followed).

(*p*) *Wilton v. Brignell*, [1875] W. N. 239. But an interrogatory "if not then to whom did they refer" will not be allowed, as being irrelevant (*ibid.*).

(*q*) *Martin v. British Museum Trustees* (1893), 10 T. L. R. 215; *Plymouth Mutual Co-operative and Industrial Society, Ltd. v. Traders' Publishing Association, Ltd.*, [1906] 1 K. B. 403, 412, C. A.; compare *Digby v. Financial News, Ltd.*, [1907] 1 K. B. 502, C. A.

(*r*) *Elliott v. Garrett*, [1902] 1 K. B. 870, C. A.; *Saunderson v. Van Radeck (Baron)* (1905), 119 L. T. Jo. 33, H. L.; *White & Co. v. Credit Reform Association and Credit Index, Ltd.*, *supra*; *Edmondson v. Birch & Co., Ltd.*, [1905] 2 K. B. 523, C. A.; *Plymouth Mutual Co-operative and Industrial Society, Ltd. v. Traders' Publishing Association, Ltd.*, *supra*.

(*s*) *Caryll v. Daily Mail Publishing Co.* (1904), 90 L. T. 307.

(*t*) *Pankhurst v. Hamilton* (1886), 2 T. L. R. 682.

(*a*) *Hindlip (Lord) v. Mudford* (1890), 6 T. L. R. 367. At any rate, where fair comment only is pleaded (*ibid.*).

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As to author of libel.

167. As a rule interrogatories as to the name of the author of an alleged libel published by the defendant will not be allowed (*b*), unless his identity is a fact material to some particular issue raised in the action (*c*), nor as to who supplied the information on which the alleged libel is founded (*d*), especially where there is reason to believe the interrogatory is not put *bonâ fide* for the purposes of the action (*e*). Neither will interrogatories as to the possession or contents of the original manuscript of the alleged libel be allowed (*f*). Most of the cases reported refer to actions against newspaper proprietors, but the rule is not limited to this class of action (*g*).

As to evidence.

168. The defendant in such actions, as in other actions, is not entitled to interrogate as to the plaintiff's evidence, or how he intends to shape his case, *e.g.*, where justification and fair comment are pleaded the defendant may not ask whether the plaintiff intends to rely on express malice, and if so to set out the facts and circumstances on which he relies as showing malice (*h*); nor for the purpose of enabling him to give particulars of justification where he has so pleaded (*i*). The plaintiff cannot interrogate with a view to finding out how the defendant intends to make out his defence (*j*). Where the defendant has given particulars of justification (*k*) or of the matters as to which he intends to give evidence in mitigation of damages (*l*), he can interrogate so far as relates to the particulars given, but not beyond (*m*). Where fair comment alone is pleaded the defendant is still entitled to put interrogatories directed to proving by admissions the truth of the statements of fact contained in the matter complained of if the truth is material

(*b*) *Gibson v. Evans* (1889), 23 Q. B. D. 384; *Hennessy v. Wright* (1888), 24 Q. B. D. 445, n.; *Parnell v. Walter* (1890), 24 Q. B. D. 441; *Plymouth Mutual Co-operative and Industrial Society, Ltd. v. Traders' Publishing Association, Ltd.*, [1906] 1 K. B. 403, 415, O. A.

(*c*) *Gibson v. Evans*, *supra*; *Marriott v. Chamberlain* (1886), 17 Q. B. D. 154.

(*d*) *Blanc v. Burrows* (1896), 12 T. L. R. 521, O. A.; *Plymouth Mutual Co-operative and Industrial Society, Ltd. v. Traders' Publishing Association, Ltd.*, *supra*, at pp. 403, 414, 418; *Mackenzie v. Steinkoff* (1890), 54 J. P. 327.

(*e*) *Edmondson v. Birch & Co., Ltd.* [1905] 2 K. B. 523, O. A. But such an interrogatory may be allowed under special circumstances (*ibid.*; and *White & Co. v. Credit Reform Association and Credit Index, Ltd.*, [1905] 1 K. B. 653, 658, O. A.).

(*f*) See *Hope v. Brash*, [1897] 2 Q. B. 188, O. A.; *British and Foreign Contract Co. v. Wright* (1884), 32 W. R. 413; *Blanc v. Burrows*, *supra*; *Hennessy v. Wright*, *supra*.

(*g*) See *Mackenzie v. Steinkoff* (1890), 6 T. L. R. 141; *Marriott v. Chamberlain*, *supra*; *Blanc v. Burrows*, *supra*.

(*h*) *Lever Brothers v. Associated Newspapers*, [1907] 2 K. B. 626, O. A. (not following *Cooper v. Blackmore* (1886), 2 T. L. R. 746).

(*i*) *Zierenberg v. Labouchere*, [1893] 2 Q. B. 183, 188, 189 (explained in *Waynes Merthyr Co. v. D. Radford & Co.*, [1896] 1 Ch. 29).

(*j*) *Ridgway v. Smith & Son* (1890), 6 T. L. R. 275.

(*k*) *Yorkshire Provident Life Assurance Co. v. Gilbert and Rivington*, [1895] 2 Q. B. 148, O. A.; *Foster v. Perryman* (1891), 8 T. L. R. 115; *Arnold and Butler v. Bottomley*, [1908] 2 K. B. 151, O. A.

(*l*) *Scaife v. Kemp & Co.*, [1892] 2 Q. B. 319; *Tucker v. Lawson* (1886), 2 T. L. R. 693; *Boyfus v. Jonas* (1886), 2 T. L. R. 687; R. S. O., Ord. 36, r. 37.

(*m*) *Yorkshire Provident Life Assurance Co. v. Gilbert and Rivington*, *supra*; *Arnold and Butler v. Bottomley*, [1908] 2 K. B. 151, O. A.

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Documents.

to his plea or in the particulars delivered by him of the materials upon which his plea is founded (*n*). A defendant is entitled to interrogate as to the alleged publication by him of the libel (*o*).

169. Interrogatories as to what documents a party has or has had in his possession or control are not allowed, either before (*p*) or after (*q*) an affidavit of documents has been made, except in special circumstances (*r*), nor will questions be allowed that seek to show that privilege is improperly claimed in the affidavit of documents where the affidavit is sufficient on its face (*s*). Interrogatories as to the contents of a lost document are permissible (*t*), but not, as a rule, of those of an existing document (*u*).

A party may be asked whether he wrote a particular document (*a*), where the document is material to the issue, provided he be allowed to see it first (*b*); or, in order to prove the handwriting of one document in issue, whether he wrote another of which inspection is allowed before answering (*c*).

Insurance.

170. In an action by the holder of a life policy at a higher rate of premium than the ordinary against an insurance company to enforce his claim to have a policy, which had lapsed through default in payment of one of the premiums after payment had been made regularly for several years, reinstated upon the same terms originally charged, where the issue was whether the higher rate had been charged because he was about to go to India (as he alleged) or because of his general bad health (alleged by the company), the plaintiff was allowed to interrogate

(*n*) *Peter Walker & Son, Ltd. v. Hodgson*, [1909] 1 K. B. 239, C. A.

(*o*) *Tangyes v. Inman Steamship Co.* (1889), 88 L. T. Jo. 32. In this case interrogatories (1) as to when, where, how and from whom copies of the circular containing the libel were obtained by the plaintiff; (2) when, where, how and from whom the persons to be referred to in the answer to the above interrogatory obtained the copies, were disallowed as being irrelevant and of a "fishing" nature.

(*p*) *Jacobs v. Great Western Rail. Co.*, [1884] W. N. 33; *Hall v. Truman, Hanbury & Co.* (1885), 29 Ch. D. 307, C. A.

(*q*) *Robinson v. Budgett & Co.*, [1884] W. N. 94; *Hall v. Truman, Hanbury & Co.*, *supra*.

(*r*) *Jones v. Monte Video Gas Co.* (1880), 5 Q. B. D. 556, C. A.; *Hall v. Truman, Hanbury & Co.*, *supra*; *Catt v. Tourle* (1870), 22 L. T. 775; *Nicholl v. Wheeler* (1886), 17 Q. B. D. 101, 105, C. A.; *White v. Spafford & Co.*, [1901] 2 K. B. 241, 246, C. A. A *prima facie* case that there are material documents relevant to the issue in the action in the possession of the party from whom discovery is sought must be made out. A general roving interrogatory as to documents "believed to be in the possession" of the party will not be allowed (*Edison and Swan United Electric Light Co. v. Holland and Jablochkoff General Electricity Co.* [1888], W. N. 31, C. A. In *Shrewsbury (Countess) v. Shrewsbury (Earl)* (1885), 80 L. T. Jo. 66, and *Ross & Co. v. Holman & Sons* (1889), 5 T. L. R. 505, interrogatories were allowed. In *New Zealand Shipping Co. v. Tyser & Co.* (1892), 8 T. L. R. 276, interrogatories as to documents in the hands of other persons were disallowed.

(*s*) *Nicholl v. Wheeler*, *supra*; *Morris v. Edwards* (1890), 15 App. Cas. 309.

(*t*) *Wolverhampton New Waterworks Co. v. Hawksford* (1859), 7 W. R. 241.

(*u*) *Herschfeld v. Clarke* (1856), 11 Exch. 712.

(*a*) See *Lyell v. Kennedy* (1884), 33 W. R. 44.

(*b*) *Dalrymple v. Leslie* (1881), 8 Q. B. D. 5, per BOWEN, J., at p. 8.

(*c*) *Jones v. Richards* (1885), 15 Q. B. D. 439.

the company as to their habit in similar cases, and for this purpose the company were held bound to answer as to what they had done in the ten similar cases immediately preceding and succeeding the plaintiff's policy (*d*).

SECT. 2.
Interrogatories in Particular Cases.

Negligence.

171. In actions for damages alleged to have been sustained through the negligence of the defendant, the plaintiff may interrogate as to the circumstances under which the injury occurred(*e*), as to the injuries and loss sustained by him (*f*), but not as to who caused them if the defendant did not (*g*), nor as to which of the defendant's servants saw the position of the plaintiff at the time the accident occurred (*h*), or witnessed the accident (*i*).

The defendant may interrogate the plaintiff as to what the negligence alleged consists of, and as to the amount of damages sustained, unless this information is sufficiently given in the particulars (*k*). Where plaintiff sued the defendant, a valuer, for alleged negligence in the conduct of the valuation, it was held that he was entitled to interrogate him as to the basis of valuation (*l*).

172. In an action against a shipowner by the owners of the cargo for non-delivery, interrogatories asking plaintiffs whether the cargo was insured have been held to be relevant (*m*). **Non-delivery of cargo.**

173. In an action by executors where payment to the deceased is pleaded by the defendant, the executors may be allowed to interrogate as to the time, place, and circumstances of the alleged payment, the information being material to the maintenance of the plaintiff's case, and exclusively within the knowledge of the defendant (*n*). So also in an action for money lent, where the defence alleged payment, the defendant was allowed to interrogate the plaintiff as to whether he was not paid on a certain date as alleged in the defence (*o*). **Payment.**

174. A plaintiff in an action for the recovery of land, whether he claims by a legal or an equitable title, may interrogate the **Recovery of land.**

(*d*) *Girdlestone v. North British Mercantile Insurance Co.* (1870), 40 L. J. (CH.) 230. The relevancy of the interrogatories allowed seems to be open to question.

(*e*) *Jones v. London Road Car Co.*, [1883] W. N. 196; *Frost v. Brook* (1875), 23 W. R. 260, where a form of interrogatory is given. But see *contra*, *Peppiatt v. Smith* (1864), 33 L. J. (EX.) 239, cited in *Frost v. Brook*, *supra*, and *Bechervaise v. Great Western Rail. Co.* (1870), L. R. 6 C. P. 36.

(*f*) *Frost v. Brook*, *supra*.

(*g*) *Meek v. Witherington* (1892), 67 L. T. 122.

(*h*) *Marshall v. Metropolitan District Rail. Co.* (1890), 7 T. L. R. 49, C. A., where the interrogatory was held to be frivolous and vexatious.

(*i*) *Potter v. Metropolitan District Rail. Co.* (1873), 28 L. T. 231. In this case an interrogatory as to the name of the driver of the train was allowed. As to the confidential reports made by servants to their employers, see p. 78, *ante*.

(*k*) *O'Meara v. Stone*, [1884] W. N. 72, and as to damages see p. 99, *ante*.

(*l*) *Turner v. Goulden* (1873), L. R. 9 C. P. 57.

(*m*) *Bolckow, Vaughan & Co. v. Young* (1880), 42 L. T. 660.

(*n*) *Hills v. Wates* (1874), L. R. 9 C. P. 688, following *Hawkins v. Carr* (1865), L. R. 1 Q. B. 89, where the plea alleged an adjustment of accounts with a deceased partner of the plaintiffs resulting in what amounted to a quasi payment of the ascertained balance and a discharge by the deceased partner, and the court allowed the defendant to be interrogated.

(*o*) *Hellier v. Ellis*, [1884] W. N. 9.

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defendant as to all matters relevant to and tending to support his own case (*p*), but as a plaintiff in such an action where the defendant is in possession must recover on the strength of his own title, while he may seek to obtain from a defendant admissions in support of that title, he cannot frame his questions in such a manner as to prejudicially affect the title of the defendant, nor interrogate as to the defendant's title, for it is immaterial to show merely that the defendant has no title (*q*).

A defendant to an action for recovery of land may interrogate the plaintiff as in any other action (*r*), and in all other actions in which the title to land is involved the parties are bound to disclose the nature of their title, just as they are bound to disclose the nature of their case in any other action (*a*). Interrogatories for the mere purpose of establishing a forfeiture are not allowed to be put at all (*b*).

Sale of goods.

175. In an action to recover the price of horses sold to the defendant where the defence was a denial that the goods were sold to him, that the horses were ordered by his wife without his authority, and that the price was excessive, and the reply was that they were necessities, interrogatories by the defendant were allowed as to the date when the horses alleged to have been sold to the defendant were bought by the plaintiff and the amount paid for them, but interrogatories as to whether in fact the plaintiffs were the owners when the alleged sale took place, or if not, how they came to have them in their possession and control, and the date the horses were received into their control, were disallowed (*c*). But where the plaintiff alleged a sale of horses by the defendant on commission as agent for plaintiff which was denied by the defendant, who pleaded that the sale had been on other terms, discovery as to the entries in the horse-dealers' books relating to the sales was refused

(*p*) *Lyell v. Kennedy* (1883), 8 App. Cas. 217; *Miller v. Kirwan*, [1903] 2 I. R. 118. In *Eyre v. Rodgers* (1891), 40 W. R. 137, where defendants pleaded possession by themselves or their tenants, interrogatories as to the tenants' names and as to the duration and date of the tenancies were held relevant, but not as to the nature of the tenancies. See Bray, Digest of Discovery, art. 63.

(*q*) *Horton v. Donnington (Lord)* (1886), 2 T. L. R. 739; *Lyell v. Kennedy*, *supra*; *Horton v. Bott* (1857), 2 H. & N. 249; *Eyre v. Rodgers*, *supra*; *Nicholl v. Wheeler* (1886), 17 Q. B. D. 101, C. A.; *Morris v. Edwards* (1890), 15 App. Cas. 309; *Chester v. Wortley* (1856), 17 C. B. 410; *Pye v. Butterfield* (1864), 34 L. J. (Q. B.) 17; *Cromwell v. Swail* (1885), 1 T. L. R. 474.

(*r*) *Kettlewell v. Dyson* (1868), 9 B. & S. 300; *Garle v. Robinson* (1857), 3 Jur. (N. S.) 633; *Flitcroft v. Fletcher* (1856), 11 Exch. 543. In *Garland v. Oram* (1890), 55 J. P. 374, it was held that interrogatories put by the defendant to plaintiff in an action by a lay rector asking for a declaration that the freehold lay in him went too far, in that they went rather to the evidence of plaintiff's title.

(*a*) *Cayley v. Sandycroft Brick, Tile and Colliery Co.* (1885), 33 W. R. 577; *Bidder v. Bridges* (1885), 29 Ch. D. 29, C. A.; *Milbank v. Milbank*, [1900] 1 Ch. 376; *Tadman v. Henman* (1893), 87 Sol. Jo. 478.

(*b*) See *p.* 41, *ante*.

(*c*) *Sheward v. Lonsdale (Lord)* (1879), 5 O. P. D. 47, affirmed 42 L. T. 172, C. A.

as irrelevant to the issue as to what the agreement between plaintiff and defendant was (*d*).

176. In an action for seduction, the defendant may be asked whether he had had connection with the girl, whether he had been told by her that she was pregnant by him, whether he was not the father of her child and had offered to maintain it, and whether he had stated that he thought she had not had connection with another man, but not as to his present means (*e*). But where paternity is denied, an interrogatory as to whether the defendant alleges that carnal knowledge of the girl had been had by some other man, and if so, to give the name and address of such person, will be disallowed (*f*).

SMOT. 2.
Interrogatories in Particular Cases.

Seduction.

177. Where a defendant alleges that the transactions between stockbrokers and himself were illegal, being by way of gaming and wagering, he may interrogate the plaintiffs as to whether they ever had in their possession or were owners of the stocks concerning which the transactions had taken place (*g*).

Stock Exchange transactions.

178. The mere plea that if the discovery sought were given it would have the effect of compelling the party to disclose a secret process by which articles were manufactured by him does not constitute an absolute privilege from compulsion to answer interrogatories or give discovery of documents. The matter is one for the discretion of the court, but the court in the exercise of that discretion will take care that no unfair pressure is put upon the party interrogated, and will limit the interrogatories, so far as is possible under the circumstances of the particular case, in order that full disclosure of the secret process need not be made (*h*).

Trade secrets.

(*d*) *Re Leigh's Estate, Rowcliffe v. Leigh* (1877), 6 Ch. D. 256, C. A.

(*e*) *Hodsoll v. Taylor* (1873), L. R. 9 Q. B. 79.

(*f*) *Hooton v. Dalby*, [1907] 2 K. B. 18, C. A.

(*g*) *Universal Stock Exchange Co. v. Crowther* (1892), 8 T. L. R. 650, C. A. In *General Stock Exchange v. Bethell* (1886), 2 T. L. R. 683, and *Petre v. Sutherland* (1887), 3 T. L. R. 275, C. A., where the defence set up was that the plaintiffs had not acted as agents for the defendants, but had engaged in speculations on their own account, interrogatories as to date of purchases and sales, names of vendors or purchasers, and amount and mode of payment were disallowed on the ground that the discovery was oppressive.

(*h*) *Mislovski v. Mandelberg & Co.* (1890), 6 T. L. R. 207; *Ashworth v. Roberts* (1890), 45 Ch. D. 623; *The Don Francisco* (1862), 31 L. J. (P. M. & A.) 205; *Howe v. M'Kernan* (1862), 30 Beav. 547. In *Renard v. Levinstein* (1864), 10 L. T. 94, an action for infringement of a patent for making dyes, it was held that the defendant was bound to answer interrogatories as to whether he used the ingredients mentioned in the plaintiff's specifications alone or with additions, and if the latter, whether the additions made any difference in the process, but he was held not bound to disclose the nature and quantities of the additions, and the court stated that it would be able at the proper time to protect the defendant from any improper disclosure of his secret. So also in *Benno Jaffe und Darmstaedter Lanolin Fabrik v. Richardson & Co., Ltd.* (1893), 68 L. T. 404, where the validity of a patent was denied, the defendant was held bound to answer interrogatories put as to what he was doing in the course of manufacturing the articles sold by him which were framed upon the lines of the plaintiff's specification. And in *Ashworth v. Roberts* (1890), 45 Ch. D. 623, where defendant having denied user of any of the plaintiff's

SECT. 2.
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Trustee.
 Wrongful dismissal.

Dissolution of partnership.

179. A trustee is entitled to know the title of a person claiming to be his *cestui que trust* or claiming any beneficial interest under the trust (i).

180. In an action for wrongful dismissal the servant is entitled to discovery, by interrogatories or inspection of documents, with reference to his employment (j), and where misconduct is alleged in the defence the servant is entitled to have particulars of the instances on which the employer relies as justifying the dismissal (k). So also, in an action for dissolution of partnership, where the plaintiff alleges misconduct towards the plaintiff in the presence of clients of the partnership, an interrogatory by the defendant calling upon the plaintiff to set forth the particulars and circumstances of the occasions on which the defendant had so misconducted himself may be allowed (a).

SECT. 3.—Application for leave to deliver Interrogatories.

Practice.

181. Under the present practice interrogatories cannot in any case be delivered without leave (b), and on the hearing of the application for leave (c) the particular interrogatories sought to be delivered must be produced and submitted to the master (d), a copy having been first delivered to the opposite party with notice of the application (e). No affidavit is necessary in support of the

was compelled to answer interrogatories framed especially with reference to the plaintiff's specification, taking it step by step and asking whether and to what extent the defendant had used this or that particular process set out in the specification, but interrogatories were disallowed which would compel disclosure of the defendant's own process. In *Badische Anilin und Soda Fabrik v. Levinstein* (1883), 24 Ch. D. 156, PEARSON, J., gave leave to the defendant to state his secret process by way of answers to examination-in-chief, cross-examination, and to the judge, and ordered the shorthand writers' notes which would have disclosed the process to be impounded. The defendant had, however, been previously held bound to answer an interrogatory as to the nature of the materials used by him in the manufacture of dyes alleged to be infringements of the plaintiff's dyes. See S. C. on appeal (1885), 29 Ch. D. 366, O. A., at p. 394. The defendant's answers were disclosed on the hearing of the appeal.

(i) *Hurst v. Hurst* (1874), 9 Ch. App. 762, 766.

(j) See *Hill v. Great Western Rail. Co.* (1861), 10 C. B. (n. s.) 148.

(k) *Saunders v. Jones* (1877), 7 Ch. D. 435, O. A.; see also observations on this case in *Benbow v. Low* (1880), 16 Ch. D. 93, by JESSEL, M.R., at p. 97.

(a) *Lyon v. Tweddell* (1879), 13 Ch. D. 375.

(b) R. S. C., Ord. 31, r. 1.

(c) In the High Court the application is made to a master in chambers. It may be made on the hearing of the summons for directions (see title PRACTICE AND PROCEDURE), but as interrogatories are usually not allowed till after defence (see p. 50, *ante*), the application is generally made at a later stage on notice under the summons for directions where there has been one, or by ordinary summons. In proceedings in the county court the application may be made on an application for directions under Ord. 15, r. 1, or *ex parte* (County Court Rules, Ord. 12, r. 11). It is made to the judge. See title COUNTY COURTS, Vol. VIII., p. 513. In bankruptcy proceedings the application may be *ex parte* (Bankruptcy Rules, 1886—1890, r. 72); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 318.

(d) Master includes district registrar, registrar in Probate, Divorce, and Admiralty Division, official referee.

(e) R. S. C., Ord. 31, r. 2.

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application (*f*). The master has a discretion to refuse to allow any interrogatories at all (*g*), and in coming to a decision on this point will take into consideration any offer to make admissions or give particulars (*h*). If he decides to allow any at all the particular interrogatories are considered separately, and each is allowed or disallowed after argument (*i*).

After all the interrogatories have been considered, the master will initial a copy as allowed, and make the order. This must be drawn up and served (*j*) on the opposite party, together with a copy of the interrogatories as allowed. The master's decision is subject to an appeal to the judge in chambers (*k*), and from him to the Court of Appeal by leave, but not otherwise (*l*). The Court of Appeal will not interfere with the judge's order unless some serious error in principle or gross injustice can be shown (*m*). One defendant has no *locus standi* to appeal against an order for interrogatories made against a co-defendant (*n*).

Appeal.

SECT. 4.—Form of Interrogatories.

182. Each question should be numbered consecutively, and should form the subject of a separate interrogatory and be put in the plainest language and manner possible. Where there are more defendants than one a note must be put at the end of the interrogatories specifying which interrogatories each defendant is required to answer (*o*). **Form.**

SECT. 5.—Delivery of more than One Set of Interrogatories.

183. In exceptional cases there is power to allow a party to deliver a second set of interrogatories. This may be proper where the answers to the first set render further questions necessary (*p*), or where fresh facts are discovered after the first set has been delivered, **Delivery of**
further inter-
rogatoria.

(*f*) R. S. C., Ord. 31, rr. 1, 2.

(*g*) *Codd v. Delap*, [1906] W. N. 57, 78, C. A.; see also *Clarke v. Clarke* (1899), 43 Sol. Jo. 719.

(*h*) R. S. C., Ord. 31, r. 2.

(*i*) The master's decision, in the first instance, is only as to what interrogatories shall be delivered. If an interrogatory is relevant and proper, the fact that the opposite party may have a good ground for refusing to answer it is not a reason for not allowing it, nor is the fact that the master allows an interrogatory to be put any bar to the party raising an objection in his answer. See p. 96, *ante*, and p. 110, *post*. In *Tye v. Willoughby* (1894), 38 Sol. Jo. 338, CHITTY, J., said that under the (then) new rule the judge was not to settle the interrogatories but to decide what should be administered. As to the power to order security for the costs of interrogatories, see p. 53, *ante*.

(*j*) Personal service is not necessary (*Little v. Roberts* (1874), 30 L. T. 367). Service on the party's solicitor is sufficient (*Re Mulcaster, Dalston v. Nanson* (1878), 47 L. J. (CH.) 609); see p. 57, *ante*.

(*k*) R. S. C., Ord. 54, r. 21.

(*l*) Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1 (1).

(*m*) *Peele v. Ray*, [1894] 3 Ch. 282, C. A., *per* LINDLEY, L.J., at p. 286.

(*n*) *Ibid.*, at p. 285.

(*o*) R. S. C., Ord. 31, r. 4; Form No. 6, Appendix B.

(*p*) *Lyell v. Kennedy* (1884), 27 Ch. D. 1, C. A., *per* BOWEN, L.J., at p. 20.

SECT. 5.
Delivery of
more than
One Set of
Interroga-
tories.

Application
to set aside.

or where some of the interrogatories proposed at first have been disallowed (q).

SECT. 6.—*Application to set aside Interrogatories.*

184. Under the old practice where interrogatories were delivered without leave the party to whom they were delivered was not confined to refusing to answer any one or more, but could apply to have them set aside on the ground that they had been exhibited unreasonably or vexatiously, or to have them struck out on the ground that they were prolix, oppressive, unnecessary, or scandalous (r). But, as the particular interrogatories proposed to be delivered have now to be considered before being allowed (s), an application of this kind is now never met with.

Under the old practice, before the particular interrogatories were considered, it was held that the rule allowed all or any one or more of the interrogatories to be set aside or struck out (t), and that all might be struck out, even though some were unobjectionable (a).

The particular interrogatories objected to must be specified (b).

SECT. 7.—*The Answer.*

Extent of
duty to
answer.

185. Subject to the right to refuse to answer at all (c), the party interrogated must answer to the best of his own knowledge, information, recollection, and belief (d), and, further, where the acts inquired into are such as would be done by or known to his servants or agents in the ordinary course of their employment, he must make inquiries from them and give the result of the inquiries (e). Their knowledge is his knowledge, and he is bound to answer in respect of it (f). He cannot escape answering by saying that he

(q) *Boake v. Stevenson*, [1895] 1 Ch. 358, per KEKEWICH, J., at p. 360.

(r) *B. S. C.*, Ord. 31, r. 7; *Oppenheim & Co. v. Sheffield*, [1893] 1 Q. B. 5, C. A.; *Grumbrecht v. Parry* (1884), 32 W. R. 558, C. A.; and see, as to meaning of these terms, p. 97, ante.

(s) *B. S. C.*, Ord. 31, r. 1 (*B. S. C.*, November, 1893). As to refusal to answer, see p. 110, post.

(t) *Oppenheim & Co. v. Sheffield*, supra, disapproving *Sammons v. Bailey* (1890), 24 Q. B. D. 727, and *McIlroy v. Duncan*, [1884] W. N. 48.

(a) *Oppenheim & Co. v. Sheffield*, supra.

(b) *Church v. Perry* (1877), 36 L. T. 513; *Allhusen v. Labouchere* (1878), 3 Q. B. D. 654, C. A.

(c) See p. 110, post.

(d) *Lyell v. Kennedy* (No. 2) (1883), 9 App. Cas. 81, per Lord BLACKBURN, at p. 85; *Foakes v. Webb* (1884), 28 Ch. D. 287, per KAY, J., at p. 289; *Darvynple v. Leslie* (1881), 8 Q. B. D. 5; compare *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.*, [1900] 2 Ch. 1, C. A.

(e) *Bolckow v. Fisher* (1882), 10 Q. B. D. 161, 169, C. A.; *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, 657, 659, C. A.; *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.*, supra, at pp. 10, 11; *Manby v. Beuicks* (1856), 8 De G. M. & G. 476, C. A.; *A.-G. v. Rees* (1849), 12 Beav. 50; *Neave v. Marlborough (Duke)* (1836), 5 L. J. (ex. eq.) 98; *Pavitt v. North Metropolitan Tramways Co.* (1883), 48 L. T. 730. Agents may include bankers and solicitors (*Alliott v. Smith*, [1895] 2 Ch. 111). It has been held that the inquiries need not be made if they are not specially mentioned in the interrogatories, unless the acts in question were obviously done by the party's servants or agents or with their knowledge (*Rasbotham v. Shropshire Union Railways and Canal Co.* (1883), 24 Ch. D. 110).

(f) *Alliott v. Smith*, supra; *Anderson v. Bank of British Columbia*

SECT. 7.
The
Answer.
—

has no personal knowledge as to the matter inquired into (g). However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to his case, he is required and compelled to set forth all he knows, believes, or thinks or can elicit from his servants or agents in relation to the matters in question (h). He must also, if necessary, examine documents in his possession or power, or that of his agents, for the purpose of answering (i).

186. Where the party is a body corporate or company the officer or member (k) ordered to answer the interrogatories is only bound to give such information as the corporation or company if an individual would have been bound to give. He is the *alter ego* of the body for the purpose (l). He must, in like manner, not only answer as to his own individual knowledge, but also get information from the other servants of the company who have personally conducted the transaction or acquired the necessary knowledge in their capacity as such servants (m), but he is not bound to give information which has come to his or their knowledge outside the course of their employment (n). The answer of the officer or member is the answer of the corporation or company, and can be read against it, and binds it as an admission (o).

(1876), 2 Ch. D. 644, C. A., at p. 659; *Rasbotham v. Shropshire Union Railways and Canal Co.* (1883), 21 Ch. D. 110, at p. 113; *Bolckow v. Fisher* (1882), 10 Q. B. D. 161, C. A., per LINDLEY, L.J., at p. 171. Where the agent is no longer under the party's control, or is in such a position that it would not be reasonable to force the party to communicate with him, the party will be relieved from the obligation (*Bolckow v. Fisher*, *supra*, at pp. 169, 171).

(g) *Foakes v. Webb* (1884), 28 Ch. D. 287, per KAY, J., at p. 289; *Southwark Water Co. v. Quick* (1878), 3 Q. B. D. 315, C. A., per COTTON, L.J., at p. 321; *Bolckow v. Fisher*, *supra*.

(h) *Flight v. Robinson* (1844), 8 Beav. 22, per Lord LANGDALE.

(i) *Taylor v. Rundell* (1843), 1 Ph. 222. A document is in a party's power for this purpose if he has an enforceable right to inspect it (*ibid.*). But a party is not bound to examine documents which are equally accessible to the party seeking discovery (*Lyell v. Kennedy* (1884), 27 Ch. D. 161, C. A.). In *Emmott & Co. v. Walters*, [1891] W. N. 79, the court refused an application for further and better answers to interrogatories in an action for libel where defendants had stated in their affidavit of documents that certain documents therein referred to were in their possession only in an official capacity and the interrogatories objected to in the answer related to the contents of these documents.

(k) See p. 46, *ante*.

(l) *Berkeley v. Standard Discount Co.* (1879), 13 Ch. D. 97, C. A., per THESIGER, L.J., at p. 101.

(m) *Southwark Water Co. v. Quick* (1878), 3 Q. B. D. 315, C. A., per COTTON, L.J., at p. 321.

(n) *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.*, [1900] 2 Ch. 1, 10, 11, C. A.; compare *Bolckow v. Fisher*, *supra*, at p. 169.

(o) *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.*, *supra*, at pp. 9, 12; *Chaddock v. British South Africa Co.*, [1896] 2 Q. B. 153, C. A., per SMITH, L.J., at p. 158; compare *Manchester Val de Travers Paving Co. v. Slugg*, [1882] W. N. 127, C. A. If an order is made for a corporation to answer interrogatories by the town clerk he may object to give information obtained by him as solicitor for the corporation for the purpose of the action (*Salford Corporation v. Lever* (1890), 24 Q. B. D. 695), but this is otherwise where the corporation has the option of answering by another officer (*Swansea Corporation v. Quirk* (1890), 5 C. P. D. 106).

SECT. 7.

The
Answer.Objections to
answer.

187. The fact that the master or judge has allowed a particular interrogatory to be put is not conclusive as to the duty of the party to answer it (*p*). He can object to answer it on the ground that it is scandalous or irrelevant (*q*) or not put *bonâ fide* for the purpose of the action (*r*), or that the matters inquired into are not sufficiently material at that stage of the action (*s*), or any other ground (*t*) of a like kind (*a*). But in practice objections of this kind are not frequently met with in the answer, because these grounds are generally gone into on the application for leave to deliver the interrogatories (*b*).

Usual
objections.

A party who is called upon to answer interrogatories which have actually been delivered can object to do so upon grounds some of which are common to the different modes of discovery (*c*). The form the objections most frequently take in the affidavit are (1) that the answer to the question might tend to criminate the party answering or render him liable to a criminal charge or prove such a charge against him (*d*); (2) that it might expose him to the exaction of a penalty or forfeiture (*e*); (3) that the information sought has only been acquired by him from confidential privileged communications with his solicitors or their agents (*f*); (4) that public policy requires that it should not be answered (*g*); (5) that the answer would disclose the evidence which the party proposes to adduce or the names of his witnesses (*h*). An objection to an interrogatory, which, if substantiated, will dispose of the whole action, may sometimes be taken in the answer (*i*).

(*p*) *Peek v. Ray*, [1894] 3 Ch. 282, O. A.; and see pp. 59, 107, *ante*.

(*q*) *Gay v. Labouchere* (1879), 4 Q. B. D. 206. See as to meanings of these expressions, p. 97, *ante*.

(*r*) See p. 95, *ante*.

(*s*) See pp. 52, 97, *ante*.

(*t*) R. S. C., Ord. 31, r. 6.

(*a*) *Fisher v. Owen* (1878), 8 Ch. D. 645, O. A., at p. 652.

(*b*) See p. 106, *ante*.

(*c*) See pp. 64, 70, *ante*.

(*d*) *Lee v. Read* (1842), 5 Beav. 381; *Allhusen v. Labouchere* (1878), 3 Q. B. D. 654, O. A.; *Fisher v. Owen*, *supra*; *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, O. A.; *National Association of Operative Plasterers v. Smithies*, [1906] A. C. 434, 437; *Alabaster v. Harness* (1894), 70 L. T. 375; *Lamb v. Munster* (1882), 10 Q. B. D. 110; *Hill v. Campbell* (1875), L. R. 10 O. P. 222; see, further, p. 82, *ante*.

(*e*) See p. 83, *ante*.

(*f*) *Kennedy v. Lyell* (No. 2) (1883), 23 Ch. D. 387, O. A.; 9 App. Cas. 81; *Proctor v. Smiles* (1886), 55 L. J. (Q. B.) 527, O. A.; *Proctor v. Raikes* (1886), 3 T. L. R. 229; *Swinborne v. Nelson* (1853), 16 Beav. 416; *Olegg v. Edmonson* (1856), 22 Beav. 125; *Foakes v. Webb* (1884), 28 Ch. D. 287. Information derived from written communications from the party's agent may have to be given although the documents themselves are privileged; see *Southwark Water Co. v. Quick* (1878), 3 Q. B. D. 315, O. A., *per* CORTON, L.J., at p. 321; see, further, pp. 72, 87, *ante*.

(*g*) See p. 84, *ante*.

(*h*) See p. 93, *ante*.

(*i*) *E.g.*, in an action for slander the party interrogated may raise the objection to an interrogatory as to what were the words spoken, that if spoken at all they were spoken on an occasion which was absolutely privileged (*Barratt v. Kearns*, [1905] 1 K. B. 504); compare *Webb v. East* (1880), 5 Ex. D. 108, O. A.; and see further, as to actions for defamation, pp. 99—101, *ante*.

188. When any of these objections is raised the party must state that he objects to answer the particular interrogatory and state the grounds on which he so objects (*k*). Each question must be taken by itself and the objection to answer it stated (*l*), unless the same objection applies to interrogatories which can be bracketed together.

SECT. 7.
The
Answer.

Stating
objection.

189. The affidavit in answer to the interrogatories must be filed (*m*) within ten days from the time when they were delivered, or within such other time as may have been ordered (*n*); but where security for costs has been ordered the time runs, instead, from the date of the service of the copy of the receipt for payment into court (*o*). The time may be extended by consent (*p*) or by order (*q*). It is the duty of the party on whose behalf the affidavit in answer is filed to take an office copy for production when necessary (*r*).

Time for
answer.

190. The interrogatories must be answered on oath. Each interrogatory must be dealt with and answered specifically and substantially (*s*), or the objection to answer it must be stated, with the grounds for so objecting. As a rule the answer should be simply an answer to the particular interrogatory, but wherever such an answer would be misleading, unfair, or incomplete, any necessary or reasonable explanation or qualification may be added (*a*), provided the matter so introduced be relevant (*b*) and

Form of
answer.

(*k*) *Church v. Perry* (1877), 36 L. T. 513; *Smith v. Berg* (1877), 36 L. T. 471. But where the objection is irrelevancy the grounds of the objection to answer, *semble*, need not be stated (*Smith v. Berg, supra*, GROVE, J., dissenting).

(*l*) *Dalglish v. Lowther*, [1899] 2 Q. B. 590, C. A., at p. 594, *per* LINDLEY, L. J.; but see *Smith v. Berg, supra*, and *Church v. Perry, supra*, where it was held that if a question is irrelevant the party may neglect to answer it and need not give any reason for not answering. In the former case LINDLEY, J., at p. 472, is reported to have said that where the objection to answering was a mere matter of argument, and not a statement of new facts, and the judge sees that the objection to answer is otherwise sufficient, the grounds for the objection need not be stated. So also there is authority for the statement that the party interrogated need not answer as to conclusions of law as opposed to matters of fact; see *Muckleston v. Brown* (1801), 6 Ves. 52; Wigram, *Law of Discovery*, p. 64.

(*m*) In the King's Bench and Chancery Divisions the place of filing is the Affidavit and Filing Department of the Central Office; in the Probate, Divorce, and Admiralty Division, the Probate and Admiralty Registries. In *Walker v. Daniell* (1874), 30 L. T. 357, an answer was refused filing on the ground of irregularities in form.

(*n*) R. S. C., Ord. 31, r. 8.

(*o*) *Ibid.*, r. 26; *Jones v. Jones*, [1884] W. N. 17; see p. 55, *ante*.

(*p*) R. S. C., Ord. 64, r. 8.

(*q*) *Ibid.*, r. 7.

(*r*) *Marshall v. National Provincial Bank of England* (1892), 61 L. J. (CH.) 465; *Levi v. Taylor*, [1903] W. N. 183.

(*s*) *Lyell v. Kennedy* (1884), 27 Ch. D. 1, 16, 17, 21, 28, C. A.; *Parker v. Wells* (1881), 18 Ch. D. 477, 487, C. A.; *Bolckow v. Fisher* (1882), 10 Q. B. D. 161, 170, C. A. As to the sufficiency of answers in patent action, see *Hoffmann v. Postill* (1869), 4 Ch. App. 673; *Crossley v. Tomey* (1876), 2 Ch. D. 533.

(*a*) *Lyell v. Kennedy* (1884), 33 W. R. 44; *Lyell v. Kennedy* (1884), 27 Ch. D. 1, 14, C. A.

(*b*) *Ibid.*, in both reports; *Peyton v. Harting* (1873), L. R. 9 C. P. 9.

SECT. 7.
The
Answer.

clear (c). The answers should be divided into paragraphs numbered consecutively, each interrogatory being dealt with in a separate paragraph (d).

Where the affidavit exceeds ten folios it must be printed (e), unless printing is dispensed with by an order of a judge (f).

SECT. 8.—Application for further and Better Answer.

Answer
incomplete.

191. Where one or more of the interrogatories are not answered at all or are answered insufficiently, the party interrogating may apply for an answer or a further and better answer. The application is made to a master in chambers, by notice under the summons for directions, which must specify the answers objected to (g), unless all are objected to (h). No time is fixed within which the application must be made, but it must be made within a reasonable time after the filing of the answer (i).

Sufficiency,
not truth,
the test.

192. Where the answer is objected to as being insufficient, the insufficiency alone, and not the truth of the answer, is taken into consideration in deciding whether a further answer shall be ordered (k); on the latter point the answer is for this purpose conclusive (l). The party interrogated is entitled to refer to the whole of the affidavit to show the sufficiency of any answer objected to, and is not confined to that part which deals with the particular interrogatory in question (m).

Where

193. Where objection is taken in the answer to answering an interrogatory or part of an interrogatory and the ground for refusing to answer is properly stated, the objection so far as it is an objection founded on fact is conclusive, and an answer will not be ordered on a mere suspicion that the objection is untrue, but it will if it can be shown from admissions in the answers themselves or from documents referred to or from the very nature of the interrogatory itself or the privilege claimed that the answer cannot be justified (n).

Answer
embarrassing.

194. Where the answer is embarrassing (o), or so involved or insufficient as to be incapable of being used, or is irrelevant or

(c) *Lyell v. Kennedy* (1884), 33 W. R. 44, where the answer to a simple interrogatory was ninety folios in length and had to be picked out. See also *Richards v. Crawshaw* (1892), 8 T. L. R. 446; *Peyton v. Harting* (1873), L. R. 9 C. P. 9 (answers containing irrelevant matter held insufficient).

(d) See *Dalgleish v. Lowther*, [1899] 2 Q. B. 590, 594, C. A.

(e) As to paper etc. for printing, see R. S. C., Ord. 66, r. 3.

(f) R. S. C., Ord. 31, r. 9; *Webb v. Bornford* (1876), 46 L. J. (CH.) 288.

(g) *Anstey v. North and South Woolwich Subway Co.* (1879), 11 Ch. D. 439 (following *Chesterfield and Boythorpe Colliery Co. v. Black* (1876), 24 W. R. 783); compare *Allhusen v. Labouchere* (1878), 3 Q. B. D. 654, C. A.

(h) *Furber and Price v. King* (1881), 50 L. J. (CH.) 496.

(i) *Lloyd v. Morley* (1879), 5 L. R. Ir. 74.

(k) *Lyell v. Kennedy* (1884), 27 Ch. D. 1, C. A., at pp. 19, 21; *Field v. Bennett* (1885), 2 T. L. R. 122, C. A.

(l) *Lyell v. Kennedy* (1884), 27 Ch. D. 1, C. A., at pp. 19, 21.

(m) *Ibid.* at pp. 1, 16.

(n) *Ibid.*, at pp. 21 *et seq.*; *Bradley v. Clayton* (1890), 26 L. R. Ir. 405; and see p. 62, ante.

(o) *Lyell v. Kennedy* (1884), 27 Ch. D. 1, C. A., at p. 27.

improper in its explanations or qualifications (*p*), a further answer may be ordered. Where an answer or a further answer is ordered the time for filing the answer and the costs of the application and the answer are generally dealt with in the order. An appeal lies from the master to the judge in chambers and from the latter, by leave only, to the Court of Appeal, but the judge's order will not generally be interfered with (*q*).

SECT. 8.
Application
for further
and Better
Answer.

195. The order may be that the answer or further answer be by affidavit or by *vivá voce* examination (*r*), but the latter mode is only adopted in exceptional cases. Where it is ordered the scope of the examination is not larger than that of interrogatories, and the party examined can only be required to give such an answer as would have been sufficient if given in the affidavit in answer to the interrogatories (*s*).

Vivá voce
examination.

196. There is power to order the costs of the *vivá voce* examination to be paid by the party examined "in any event" (*t*), but where the examination is oppressive the party examining may have to pay them (*a*).

Costs of *vivá*
voce examina-
tion.

SECT. 9.—Using Answer at the Trial.

197. A party may at the trial of a cause, matter, or issue use in evidence any one or more of the answers or any part of an answer of the opposite party without putting in the others or the whole, subject to the power of the judge to direct the others or the whole to be put in whenever he is of opinion that they are so connected with those originally put in that the latter should not be used without them (*b*).

Using answer.

(*p*) *Lyell v. Kennedy* (1884), 33 W. R. 44; *Peyton v. Harting* (1873), L. R. 9 C. P. 9. See also *Kelly v. Wyman* (1869), 20 L. T. 300 (answer held insufficient).

(*q*) *Field v. Bennett* (1885), 2 T. L. R. 122, C. A.

(*r*) R. S. C., Ord. 31, r. 11.

(*s*) *Litchfield v. Jones* (1884), 54 L. J. (CH.) 207; see also *Vicary v. Great Northern Rail. Co.* (1882), 9 Q. B. D. 168.

(*t*) *Vicary v. Great Northern Rail. Co.*, *supra*.

(*a*) *Litchfield v. Jones*, *supra*.

(*b*) R. S. C., Ord. 31, r. 24; and see *Lyell v. Kennedy* (1884), 27 Ch. D. C. A., *per* COTTON, L.J., at p. 15.

DISEASES.

See ANIMALS; FACTORIES AND SHOPS; MASTER AND SERVANT;
PUBLIC HEALTH ETC.

DISSENTAILMENT.

See REAL PROPERTY AND CHATTELS REAL.

DISFRANCHISEMENT.

See ELECTIONS.

DISHONOUR.

See BILLS OF EXCHANGE ETC.

DISINTERMENT.

See BURIAL AND CREMATION ; CORONERS.

DISORDERLY CONDUCT.

See CRIMINAL LAW AND PROCEDURE ; MAGISTRATES.

DISORDERLY HOUSE.

See CRIMINAL LAW AND PROCEDURE.

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DISTRESS.

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Part I.—Nature of the Remedy of

PART I.
Nature of
the Remedy
of Distress.

Definition
of distress.

198. Distress is a summary remedy by which a person, in order to minister redress to himself, is entitled without legal process to take into his possession the personal chattels of another person, to be held as a pledge to compel the performance of a duty, the satisfaction of a debt or demand, or the payment of damages for trespass by cattle (*a*).

The term "distress" by almost universal sanction is now interchangeably used to designate the process of taking, and the chattels taken (*b*).

Nature of law
of distress.

199. The law of distress is for the most part an important portion of the law of landlord and tenant. It enables the landlord to secure the payment of rent or the performance of certain obligations due to him, by seizing the goods and chattels found upon the premises in respect of which the rent or obligations are due. This remedy obtained so early in our law that we have no memorial of its origin. It has been described as the creature of the common law, and has existed, perhaps, since the time of the Norman Conquest. Although the right to distrain is of common law origin, it was subject at common law to many exceptions and has since undergone many statutory modifications and been extended by additional statutory powers. The exceptions and additions are so many that scarcely an important absolute statement can be made in dealing with the law of distress as it affects landlord and tenant. The law of distress as it stood before statutory alteration was perhaps simple and of easy application. To-day it demands, by reason of statutory alterations, more knowledge of various branches of law than any other common law authority which is as frequently exercised. It calls for a knowledge of the law relating to leases, fixtures, trespass, property in goods, specific performance, fraud, executions, and the obligations arising in respect of the sale of the goods distrained. The right to distrain is given either by common law, by contract (*c*), or by statute (*d*).

(*a*) The following definition is given in Bradby, *Law of Distresses*, p. 1: "A distress is the taking of a personal chattel, without legal process, from the possession of a wrong-doer, into the hands of the party grieved; as a pledge, for the redress of an injury, the performance of a duty, or the satisfaction of a demand." For distress damage feasant, see title *ANIMALS*, Vol. I., pp. 378—386.

(*b*) 3 Bl. Com. 6.

(*c*) *E.g.*, power to distrain off the demised premises (see p. 155, *post*); powers given by mortgages (see *Re Willis, Ex parte Kennedy* (1888), 21 Q. B. D. at p. 395, O. A.); powers in brewers' leases to distrain for price of goods supplied (see *Stevens v. Marston* (1890), 60 L. J. (Q. B.) 192), or in mining leases and licences (see *Encyclopædia of Forms*, Vol. VIII., pp. 294, 406, 421, 434), or in deeds apportioning rents (see *Encyclopædia of Forms*, Vol. II., p. 14), or partitioning leaseholds (*ibid.*, Vol. IX., p. 435), or granting rentcharges (*ibid.*, Vol. I., p. 548; Vol. XII., p. 637). For attornment or express authority to distrain for what is not rent, or for rent in respect of which the common law conditions do not exist, see p. 118 and p. 124. note (*o*), *post*.

(*d*) *E.g.*, by the Distress for Rent Act, 1737 (11 Geo. 2, c. 16), see p. 133,

PART I.

Nature of the Remedy of Distress.

Common law right to distrain confers no power to sell.

200. The common law right of distress was not so much a remedy as a means of obtaining a remedy, and was given in respect of a great number of services in regard to tenure which are now obsolete (e). Of the various purposes for which a common law distress could be made the only two of practical importance at the present day are the recovery of rent in arrear and the recovery of recompense for trespass by animals taken damage feasant (f).

When the remedy was exercised the chattels remained only as a pledge in the hands of the party making the distress, and could not be sold. And so the law continues with regard to chattels taken damage feasant, and with regard to other distresses the mode of dealing with which has not been altered by Act of Parliament; over such the distrainer has no other power than to retain them till satisfaction be made (g). In the case of distress for rent due under a lease, a power to sell has been given by statute (h).

Express power to distrain.

201. By express agreement between the parties a power to distrain may be conferred for payments which are not rent, and in cases where the common law requisites are absent (i). Under an express power of distress only the goods of the person giving the power can, as a rule, be taken (j).

When void.

With regard to powers of distress given by contract, it must be borne in mind that an instrument giving such a power as security for any present or future debt is, as a rule, deemed to be a bill of sale, and unless registered as regards the chattels seized under the power is void as against a trustee in bankruptcy, creditors under an assignment, or execution creditors (k). An express power of

post; by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44, see p. 120, *post*; and in the case of rates and taxes, see p. 210, *post*. A statutory power of distress, such as that for rates and taxes, is entirely the creature of the Act which creates it, and it confers no further rights than those expressly given by the statute. And although such rights are somewhat analogous to the common law right of distress, they are more nearly allied to an ordinary execution by seizing and selling the goods of the debtor (*Hutchins v. Chambers* (1758), 1 Burr. 579, 588).

(e) In the last edition of Comyns' Digest (1822) is the following enumeration of the cases in which a distress may be taken:—"For all services a distress may be made of common right. As for rent service, so for heriot service. So, for suit service: as suit to a hundred court or court baron. So, for a fine assessed in a court, a distress is due of common right. So, for an amercement in a court leet, for an offence in or out of court. So a distress might be for aid *pur faire fits chivaler, ou file marrier*. So, for a relief the lord himself may distrain; or *pro valore maritagii*. So, for trespass with cattle a distress may be of the cattle damage feasant" (Com. Dig. Distress (A)).

(f) For distress damage feasant, see title ANIMALS, Vol. I., pp. 378 *et seq.*

(g) 3 Bl. Com. 10.

(h) See pp. 120, 180, *post*.

(i) *Pollet v. Forrest* (1847), 11 Q. B. 949; as to what are the common law requisites in the case of rent, see p. 121, *post*.

(j) *Freeman v. Edwards* (1848), 2 Exch. 732; *Gibbs v. Cruikshank* (1873), 28 L. T. 104; *Re Willis, Ex parte Kennedy* (1888), 21 Q. B. D. 384, C. A., *per* LINDLEY, L.J., at p. 395. In the case of a rentcharge probably only the goods of the owner or occupier of the land for the time being could be taken; but see *Saffery v. Elgood* (1834), 1 Ad. & El. 191; *Johnson v. Faulkner* (1842), 2 Q. B. 925.

(k) See title BILLS OF SALE, Vol. III., pp. 11, 14—16.

distress for rent, which is due under a lease and is not a security for some other debt, is not within this rule (*l*), unless it is a power to distrain on property entirely unconnected with the demised premises (*m*).

PART I.
Nature of
the Remedy
of Distress.

It is apprehended that an express power of distress given to secure the payment of a rentcharge is not within the Bills of Sale Act, 1878 (*n*), inasmuch as the instalments of the rentcharge would seem not to be debts within s. 6 of that Act.

Part II.—Distress for Rent.

SECT. 1.—*Different Kinds of Rent.*

202. There are three kinds of rent, namely, rent service, rentcharge, and rent seek (*o*). Kinds of rent

203. A rent service is a rent reserved on a lease or grant of lands as incidental to their tenure (*a*), and this was the only kind of rent originally known to the common law. A right of distress was inseparably incident to it, as long as it was payable to the lord who was entitled to the fealty of the tenant. It was called rent service because the ancient retribution was made by the corporal service of the tenant in ploughing his lord's demesnes, which came afterwards to be changed into gabel or rent; but the service of fealty is still incident to a rent service (*b*). Rent service.

204. A rentcharge is a certain annual sum charged upon the land and granted by deed or will by the owner of land to some other person. It is not incident to the tenure, and the grantee of the rentcharge takes no reversion, but is given an express power to distrain for the rent. It is called a rentcharge because the lands are charged with such distress by force of the writing only, and not of common right (*c*). Rentcharge.

(*l*) *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Oh. 373, C. A., per LINDLEY, L.J., at p. 391.

(*m*) *Ibid.*, at pp. 396, 399.

(*n*) 41 & 42 Vict. c. 31; *Re Blackburn and District Benefit Building Society, Ex parte Graham* (1889), 42 Oh. D. 343, C. A., per Lord Esher, M.R., at pp. 346, 347. See also, as to the object of the Act, *Charlesworth v. Mills*, [1892] A. C. 231, per Lord Halsbury, L.C., at p. 235; and see title BILLS OF SALE, Vol. III., p. 14.

(*o*) Littleton's Tenures, s. 213.

(*a*) Littleton describes a rent service to be where the tenant holds his land by fealty and certain rent, or by homage, fealty, and certain rent, or by other services and certain rent (Littleton's Tenures, s. 213).

(*b*) Bac. Abr. tit. Rent (A), 1; Co. Litt. 87 b, 142 b; Oru. Dig. tit. 28, c. 1, s. 5.

(*c*) Co. Litt. 143 b; Bac. Abr. tit. Rent (A), 2; Littleton's Tenures, s. 221; *Monypenny v. Monypenny* (1861), 9 H. L. Cas. 114, 137, 138. For tithe commutation rentcharge, see *Bedford v. Sutton Coldfield (Warden etc.)* (1857), 3 O. B. (N. S.) 449; for corn rent, see *Newling v. Pearce* (1823), 1 B. & C. 437. See, further, title RENTCHARGES AND ANNUITIES.

SECT. 1.
Different
Kinds of
Rent.

Rent seck.
Other rents.

205. A rent seck is a bare rent reserved by a deed or will without any clause of distress. It only differs from a rentcharge in the fact that it is not accompanied by such a clause (*d*).

206. Although every species of rent is comprised in the above division, there are yet other rents which are known by particular names, such as rents of assize, or certain rents at which freeholders or copyholders of a manor have held under the lord from time immemorial, and chief rents, which are similar rents paid by freeholders, both of which are sometimes called quit rents because thereby the tenant goes quit and free of all other services (*e*). A fee farm rent is a perpetual rentcharge of at least one fourth of the value of the lands reserved on a conveyance in fee simple (*f*).

SECT. 2.—Remedy by Distress.

At common
law—to hold.

207. The common law right of distress for rent in arrear is a right for the landlord to seize whatever movables he finds on the premises out of which the rent or service issues, and to hold them until the rent is paid or the service performed (*g*).

By statute—
to sell.

208. In the year 1689 it was enacted that in all cases of distress for rent upon any demise the distrainor should have power to sell the distress unless replevied within five days (*h*).

Now all rents, whether rents seck, rents of assize, or chief rents which were duly answered or paid for three years within twenty years before the first day of the Session of Parliament in 1730, or which have been since created, may be recovered by distress in the same manner as rent reserved upon a lease (*i*).

In case of
rentcharges
not incident
to a reversion.

Where under an instrument coming into operation after 31st December, 1881, a person is entitled to receive out of any land any annual sum payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being a rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same has a right to distrain, as far as such a right might have been conferred by the instrument under which the annual sum arises, but not further (*k*).

(*d*) 2 Bl. Com. 42.

(*e*) 2 Co. Inst. 19.

(*f*) Co. Litt. 144 a. See, further, title RENTCHARGES AND ANNUITIES.

(*g*) *Lyons v. Elliott* (1876), 1 Q. B. D. 210, per BLACKBURN, J., at p. 213.

(*h*) Stat. (1689) 2 Will. & Mar., c. 5, s. 1.

(*i*) Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 5; see *Re Gerard (Lord) and Beecham's Contract*, [1894] 3 Ch. 295, O.A., per LINDLEY, L.J., at p. 308; compare *Reedham v. Wright* (1701), 2 Doug. 681, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1721, 1722, 1723, 1724, 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737, 1738, 1739, 1740, 1741, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 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A rentcharge may be divided, and the assignee of each portion may distrain for it (*l*). Growing crops cannot be taken in distress for a rentcharge unless an express power be inserted in the grant (*m*).

SECT. 2.
Remedy by
Distress.

SECT. 3.—*In what Cases the Right to Distrain arises.*

209. In order that the right to distrain may arise the relation of landlord and tenant must exist, both when the rent becomes due and when the distress is levied, and the rent must be in arrear (*n*).

Requisites to
distress.

If the rent is only payable on a condition precedent it cannot be distrained for until the condition is fulfilled (*a*).

An actual existing demise is requisite. The common law right to distrain does not arise before the relationship of landlord and tenant is complete (*b*), nor (apart from the Landlord and Tenant Act, 1709 (*c*)) continue after it has determined (*d*). A formal instrument of tenancy is not requisite. Possession taken by the tenant under an agreement for a tenancy which can be specifically enforced gives the landlord the right to distrain (*e*). Provided there is a demise, the nature or duration of the tenancy is immaterial. It may be a tenancy at will (*f*) or a weekly tenancy (*g*). The right of distress also exists where, after the expiration of a previous tenancy, a tenant by the consent of both parties continues in possession under such circumstances as to warrant the inference that there is a tacit renovation of the contract of tenancy (*h*). But there must be facts to warrant the inference of a renewal of the tenancy. The landlord cannot distrain after treating the tenant as a trespasser by bringing an ejectment for forfeiture (*i*). A tenancy at sufferance, which is not created by demise, does not authorise a distress, the only remedy being by action for use and occupation (*k*).

An existing
demise.

A demise entitles the tenant to the exclusive possession of hereditaments. If a person is not to have the exclusive possession of

(*l*) *Rivis v. Watson* (1839), 5 M. & W. 255.

(*m*) *Miller v. Green* (1831), 8 Bing. 92.

(*n*) This short proposition involves a number of circumstances (commonly referred to as the essentials to the right of distress) hereafter more fully enumerated. If a tenancy is created, the right to distrain will follow as an incident of it (*Jolly v. Arbuthnot* (1859), 4 De G. & J. 224, *per* Lord CHELMSFORD, at p. 242).

(*a*) *Mechelen v. Wallace* (1836), 7 Ad. & El. 54, n. Hence, if a lessee agrees not to distrain on an underlessee unless he shall have previously paid the rent due from himself to the superior landlord and shall have produced to the underlessee the receipt for such rent, the lessee cannot distrain until he has fulfilled these conditions (*Giles v. Spencer* (1857), 3 C. B. (N. S.) 244).

(*b*) *Dunk v. Hunter* (1822), 5 B. & Ald. 322.

(*c*) 8 Ann. c. 14 (Ruff., c. 18 in Revised Statutes), s.6; see p. 149, *post*.

(*d*) *Williams v. Stiven* (1867), 9 Q. B. 14.

(*e*) *Walsh v. Lonsdale* (1882), 21 Ch. D. 9, C. A.

(*f*) *Anderson v. Midland Rail. Co.* (1861), 3 E. & E. 614; *Morton v. Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch.

(*g*) *Yeoman v. Ellison* (1867), L. R. 2 C. P. 681.

(*h*) See *Right v. Darby* (1786), 1 Term Rep. 159; *Dougal v. McCarthy*, [1893] 1 Q. B. 736, C. A.

(*i*) *Bridges v. Smyth* (1829), 5 Bing. 410.

(*k*) *Alford v. Vickery* (1842), Car. & M. 280; *Jenner v. Clegg* (1832), 1 Mood. & B. 213.

SECT. 3.
In what
Cases the
Right to
Distrain
arises.

Rent issuing
 out of
 corporeal
 hereditament,
 and reserved
 as such on the
 demise.

the premises his limited right of use and enjoyment is a licence, not a demise; in such a case there is no relation of landlord and tenant, and no right to distrain is conferred (*l*).

210. Rent for which a distress may be made must be rent properly so called, that is, rent reserved out of lands and tenements upon which entry can be made for the purpose of seizing goods found there; and, therefore, rent for which distress may be made cannot be reserved out of any incorporeal hereditament (*m*).

Sums reserved for the use of chattels confer no right of distress, but when chattels are let with houses or land at one entire rent the payment issues out of the land and is rent, and may be distrained for (*n*).

Payments agreed upon during the currency of the tenancy by way of increased rent or percentage on the outlay for additions or improvements to be made by the landlord on the premises (*o*), and an annual sum agreed to be paid over and above the rent towards compensation for the goodwill or the like (*p*), though expressly called rent, are not in fact rent, but sums in gross for which a distress cannot be levied, for a rent can only be reserved at the time the demise is made. Any attempt to alter the rent by a collateral agreement not amounting to a new demise only operates as a personal contract between the parties (*q*). But a reservation in the demise itself of an increased rent equal to a percentage on the landlord's outlay is good, and will support a distress (*r*).

Rent certain.

211. Unless a tenant is to pay a rent certain the landlord has no right to distrain (*s*). If that which is agreed upon as the payment is uncertain it is not rent. But the rent is certain if, by calculation and upon the happening of certain events, it becomes certain, and the mere fact of rent being fluctuating does not make it uncertain (*t*).

(*l*) *Hancock v. Austin* (1863), 14 C. B. (N. S.) 634 (right to "standings" for machines in factory); see also *Provincial Bill Posting Co. v. Low Moor Iron Co.*, [1909] 2 K. B. 344, C. A.

(*m*) Co. Litt. 47 a; *Buszard v. Capel* (1828), 8 B. & C. 141, 150. The landlord's right to distrain is founded on the principle that the rent reserved by his demise issues out of the land and he distrains by taking possession, in the nature of a pledge, of goods and chattels found upon such land. In distraining, therefore, the landlord looks to the land demised and to the goods and chattels found thereon (*British Mutoscope and Biograph Co., Ltd. v. Homer*, [1901] 1 Ch. 671, *per* FARWELL, J., at p. 674).

(*n*) *Newman v. Anderton* (1806), 2 Bos. & P. (N. R.) 224. And so where an entire rent is payable for the exclusive occupation of a room or defined space in a factory, with a supply of steam power, the rent is deemed to issue out of the room or land and will support a distress (*Selby v. Greaves* (1868), L. R. 3 C. P. 594, 602; *Marshall v. Schofield* (1882), 52 L. J. (Q. B.) 58, C. A.).

(*o*) *Hoby v. Roebuck* (1816), 7 Taunt. 157; *Donellan v. Read* (1832), 3 B. & Ad. 899; *Lambert v. Norris* (1837), 2 M. & W. 333.

(*p*) *Smith v. Mapleback* (1786), 1 Term Rep. 441.

(*q*) *Donellan v. Read*, *supra*.

(*r*) *Re Knight, Ex parte Voisey* (1882), 21 Ch. D. 442, C. A., *per* JESSEL, M.R., at p. 456.

(*s*) *Regnart v. Porter* (1831), 7 Bing. 451, *per* ALDERSON, J., at p. 454.

(*t*) *Re Knight, Ex parte Voisey*, *supra*. If a lease be made for ten or twenty years at a rent increasing every two or three years, then the rent fluctuates, but it is not uncertain. It becomes certain as each year advances. If the rent of a farm for one year is to be so much if a certain number of

The necessary certainty may be implied from the acts and dealings of the parties (a).

212. Distress cannot be made until after the rent is in arrear. It is not in arrear until after the last moment of the day on which it is made payable, and therefore there can be no distress until the day after the rent becomes due (b).

Rent payable in advance, either by reservation (c) or by custom (d), may be distrained for on the day following that fixed for payment, unless the rent is expressed to be payable in advance if required, in which case a demand for payment must be made before a distress (e); but in the latter case the demand may be made after the day on which the rent thereby reserved becomes due (f); and the landlord may distrain immediately after demand, if his rights are in peril (g). When an express power of distress is given to be

SECT. 3.
In what
Cases the
Right to
Distrain
arises.

Rent in
arrear.

In arrear
though pay-
able in
advance.

are ploughed up, then in the next year a different rent if so many acres are left in pasture or in crops, the rent is fluctuating, but it becomes certain the moment the condition is fulfilled, and therefore, although a fluctuating, it is a certain rent. A stipulation that the rent should be the damage which the landlord might suffer by certain defaults of the tenant, so that it would have to be ascertained at large or by a tribunal, would be a stipulation for an uncertain payment, which could not be rent (*ibid.*, per BRETT, L.J., at p. 458). And so a distress may be levied for a rent of so much per cubic yard for marl got and so much per thousand for bricks made (*Daniel v. Gracie* (1844), 6 Q. B. 146), or of so much per annum for as many looms as the lessee may run (*Walsh v. Lonsdale* (1882), 21 Ch. D. 9, C. A.), or for so much per acre for every acre of land converted into tillage. And a demise of a room with steam power at a certain sum per annum payable quarterly, with a provision for a deduction in the event of hindrances in the supply of power beyond seven days in each quarter, was held to authorise a distress (*Selby v. Greaves* (1868), L. R. 3 Q. P. 594; see also *dictum* of WILLES, J., at p. 602).

(a) Where a tenant entered under an agreement for a lease which did not state the amount of rent to be paid, and no lease was ever executed, but the tenant paid a certain rent for two years, the landlord was held entitled to distrain for subsequent rent at the rate previously paid (*Knight v. Bennett* (1826), 3 Bing. 361).

(b) *Dibble v. Bowater* (1853), 2 E. & B. 564; see further as to this, p. 148, *post*. A short period of indulgence, usually denominated days of grace, beyond the prescribed days of payment is sometimes conceded to the lessee by the terms of reservation, as, for example, where the rent is made payable on the four usual feasts or within so many days or weeks after each of the said days. This gives the tenant the right of election of paying the rent at the one time or the other. It cannot, therefore, be said to become absolutely due until the last of the days of grace, nor can the landlord distrain for it before (*Clun's Case* (1613), 10 Co. Rep. 127 a). See also *Child v. Edwards*, [1909] 2 K. B. 773.

(c) *Lee v. Smith* (1854), 9 Exch. 662; *Harrison v. Barry* (1819), 7 Price, 690; *Walsh v. Lonsdale* (1882), 21 Ch. D. 9, C. A.

(d) *Buckley v. Taylor* (1788), 2 Term Rep. 600.

(e) Where rent was reserved payable quarterly or half-quarterly if required, and the landlord received it quarterly for a twelvemonth, it was held that he could not without notice distrain for a half-quarter's rent (*Mallam v. Arden* (1833), 10 Bing. 299). Where a yearly rent was reserved payable in advance if the landlord required it, nothing being said as to days of payment, and after the first quarter he demanded a quarter's rent only, it was held that he was not thereupon entitled to distrain for the whole year's rent (*Clarke v. Holford* (1848), 2 Car. & Kir. 540).

(f) *Witty v. Williams* (1864), 12 W. B. 755.

(g) *London and Westminster Loan and Discount Co. v. London and North Western Rail. Co.*, [1893] 2 Q. B. 49.

SECT. 3.
In what
Cases the
Right to
Distrain
arises.

The necessary
 reversion

may be
 defeasible

or by estoppel.

Rent on an
 assignment.

exercised after the rent has been "legally demanded," it is not necessary to follow the strict common law rules as to demand (*h*).

A minimum or dead rent may be reserved in advance, and so distrained for, though the rest of the rent is not recoverable until the expiration of the period in respect of which it is payable (*i*).

213. Unless otherwise provided by statute or by the agreement of the parties, the person distraining must at the time the distress is made possess a reversion to which the rent is incident (*j*), though it is immaterial how short that reversion may be (*k*). The reversion must also have been vested in him at the time the rent distrained for fell due.

A defeasible reversion, until it is defeated, is sufficient to support a distress. So a tenant from year to year, whose estate consists in point of law of a lease for a year certain with a growing interest during every year thereafter springing out of the original contract and parcel of it (*l*), has a sufficient reversion to support a distress under a demise; and it is immaterial whether he simply underlets from year to year (*m*) or grants a lease for a long term (*n*).

A reversion by estoppel will also support a distress (*o*), though in such a case the goods of a third party cannot be taken (*p*).

Rent reserved on an assignment cannot be distrained for at common law, as there is no reversion (*q*). And when a leaseholder, whether purporting to assign or underlet, parts with all his interest in a term of years, he cannot distrain for rent due on the underlease, unless he reserve to himself an express power to do so (*r*). When he purports to

(*h*) *Thorpe v. Hurt*, [1886] W. N. 96.

(*i*) *Walsh v. Lonsdale* (1882), 21 Ch. D. 9, C. A. The intention to reserve rent payable in advance should be clearly expressed.

(*j*) Co. Litt. 47 a, 142 b. As to a lessor losing his right of distress by parting with the reversion, see p. 125, *post*.

(*k*) If a tenant underlet for any period of time shorter than his own interest, though only for a day, he has a reversion sufficient to entitle him to distrain (*Wade v. Marsh* (1627), Lat. 211).

(*l*) *Oxley v. James* (1844), 13 M. & W. 209, *per* PARKE, B., at p. 215.

(*m*) *Curtis v. Wheeler* (1830), Mood. & M. 493; *Pike v. Eyre* (1829), 9 B. & C. 909.

(*n*) *Oxley v. James*, *supra*. A demise by such a person for a term of years is not an assignment. It is a term for so many years subject to determination by the cessation of the original interest.

(*o*) If by attornment or otherwise parties agree that the relation of landlord and tenant shall be established between them, the tenant is estopped from setting up that the landlord has no legal reversion entitling him to distrain; for the law which estops him from denying the tenancy also prevents him disputing that a reversion exists in his landlord, and it makes no difference that the fact that the landlord has no reversion appears on the document of demise (*Morton v. Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch.; *Jolly v. Arbuthnot* (1859), 4 De G. & J. 224). The estoppel is binding upon all persons claiming possession of the premises under the tenant either as assignees or undertenants.

(*p*) *Tadman v. Henman*, [1893] 2 Q. B. 168.

(*q*) See p. 125, *post*.

(*r*) *Preece v. Corrie* (1828), 5 Bing. 24, where an oral tenancy of the last year of a term destroyed the right of distress; *Lewis v. Baker*, [1905] 1 Ch. 46. But where a lease is granted by a mortgagor after he has parted with his reversion by a mortgage for a long term as for 1,000 years, but the lease is made in pursuance of a power in the mortgage so that it is contemporaneous with the mortgage, the mortgagees are the reversioners and entitled to the rent, and

demise for a period co-extensive with his own interest or longer, reserving a rent, the transaction is in law an assignment, although purporting to be a demise, for an underlease for the whole of the residue of a term is in law an assignment (s). It makes no difference that the instrument contains a stipulation that the assignee is to be tenant to the assignor during the term (a), or that the assignee has paid or agreed to pay money as rent (b), but the action for rent may remain (c).

SECT. 3.
In what
Cases the
Right to
Distrain
arises.
—

SECT. 4.—Who may Distrain.

SUB-SECT. 1.—In General.

214. Any person, in whom is vested the reversion incident to a term for years (d), may by virtue of the common law distrain for rent due: the right of distress ceases when the reversion or the whole of the estate is parted with, but the right has by statute and otherwise been extended to various classes of persons who have no reversionary interest (e).

Who may
distrain for
rent.

SUB-SECT. 2.—In Particular Cases.

215. Tenants in fee, in tail, for life (f), and *pur autre vie* are all entitled to distrain, as by the common law they have all a sufficient reversion, whether the rent be considered a rent service or a rentcharge. Tenants *pur autre vie* can distrain for arrears of rent due at the death of the *cestui que vie*, as they can during his life (g). Tenants for terms of years, who sub-let and retain even a day's reversion, can distrain; as can a tenant from year to year who sub-lets from year to year (h).

Tenants in
fee, in tail,
for life, *pur
autre vie*, &c
for years.

they and their assignees may distrain for it even if the reservation of rent is expressed to be to the person for the time being entitled to the "freehold or inheritance" (*Rogers v. Humphreys* (1835), 4 Ad. & El. 299).

(a) *Lewis v. Baker*, [1905] 1 Ch. 46, 51; — *v. Cooper* (1768), 2 Wils. 375; *Preece v. Corrie* (1828), 5 Bing. 24. See also *Beardman v. Wilson* (1868), L. R. 4 C. P. 57.

(a) *Purmenter v. Webber* (1818), 8 Taunt. 593, where the reservation of a payment for fallows and dung at the end of a term failed to create a sufficient reversion. See for the protection of new leases on termination of existing terms, Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 6; Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), ss. 16, 17; Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 9; and title LANDLORD AND TENANT.

(b) *Hazeldine v. Heaton* (1883), Cab. & El. 40.

(c) See *Poultney v. Holmes* (1720), 1 Stra. 405; and *Pollock v. Stacy* (1847), 9 Q. B. 1033.

(d) See Littleton's Tenures, ss. 214, 215; Gilbert on Distresses, pp. 24, 25; and Bullen on Distress, 2nd ed. (*passim*). See also *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608, *per* FARWELL, J., at pp. 617, 618, who says: "Distress is a legal remedy and depends on the existence at law of the relation of landlord and tenant." As to distress by the Crown, see title CONSTITUTIONAL LAW, Vol. VI., p. 495.

(f) This has been recognised in many statutes, such as the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 15, and other Apportionment Acts. See also the notes to *Ex parte Smyth* (1818), 1 Swan. 337.

(g) By stat. (1540) 32 Hen. 8, c. 37, s. 4.

(h) *Curtis v. Wheeler* (1830), Mood. & M. 493; *Oxley v. James* (1844), 13 M. & W. 209. But a termor, whose term has expired, cannot distrain on an undertenant, if such undertenant has declined to further recognise the termor as his landlord (see *Burne v. Richardson* (1813), 4 Taunt. 720). The power of

SECT. 4.

Who may
Distrain.Joint tenants
etc.

216. One of several joint tenants (*i*), coparceners, or co-heirs in gavelkind (*j*), may distrain for the whole rent due; no express authority is needed for this purpose from the others, and the discharge given binds all the co-tenants (*k*); co-executors even, as joint tenants, can demise to one of their number and justify a distress (*l*), but severance of the reversion expectant on a joint tenancy deprives the remaining joint tenants of their right to distrain for rent already due (*m*).

Tenants in
common.

217. One of several tenants in common is entitled to distrain for his own share of rent without being required to distrain on behalf of the others (*n*); one tenant in common can even distrain for his share when the whole rent has been paid to another of his co-tenants in common, if the payment has been made in spite of notice (*o*); further, one tenant in common by demising his share to his companion becomes entitled to distrain by virtue of such demise (*p*).

Tenants by
curtesy.

218. A tenant by the curtesy can distrain as of common right, whether he be tenant of a rent service or a rentcharge (*q*); a woman tenant in dower has the same right according to the nature of the rent (*r*), and the same rule applies if she holds as tenant by freebench (*s*).

Tenant by
elegit.

219. A tenant by *elegit* of a reversion may distrain without the necessity of attornment and without ejectment (*t*), but cannot distrain for arrears of rent due before delivery by the sheriff (*a*)

distress given by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44, would, however, seem to apply, unless otherwise provided, where a termor has transferred his whole estate, but an annual sum has been charged on the land or its income.

(*i*) *Pullen v. Palmer* (1696), 3 Salk. 207.

(*j*) *Leigh v. Shepherd* (1821), 2 Brod. & Bing. 465; *Stedman v. Bates* (1695), 1 Ld. Raym. 64; compare also *Hogarth v. Jennings*, [1892] 1 Q. B. 907, C. A., *per* FRY, L.J., at p. 909. Should an action, however, be brought, the defendant must justify both on his own behalf and on behalf of the others for the whole amount.

(*k*) It is doubtful whether such authority can be actually countermanded by the others; merely declining to authorise the distress does not prevent its legality. See *Robinson v. Hofman* (1828), 4 Bing. 562, and *Leigh v. Shepherd*, *supra*.

(*l*) *Cowper v. Fletcher* (1865), 6 B. & S. 464.

(*m*) *Staveley v. Alcock* (1851), 16 Q. B. 636.

(*n*) *Whitley v. Roberts* (1825), 1 M'Cle. & Yo. 107 (the others may have been paid the portions to which they are separately entitled). As to rentcharges in common, see *Rivis v. Watson* (1839), 5 M. & W. 255. Should an action be brought, each must defend for his share of the distress (see *Pullen v. Palmer*, *supra*, if three tenants in common distrain thirty beasts, each must avow for ten).

(*o*) *Harrison v. Barnby* (1793), 5 Term Rep. 246 (the plaintiff in replevin was a "terre tenant").

(*p*) *Snelgar v. Henston* (1621), Oro. Jac. 611; *Brennan v. Flood* (1854), 4 I. O. L. R. 332.

(*q*) Co. Litt. 29 a.

(*r*) Co. Litt. 31 a.

(*s*) *Sacheverel v. Frogate* (1671), 1 Vent. 161.

(*t*) *Rogers v. Pitcher* (1815), 6 Taunt. 202 (because the tenant was in by dint of law, whether the sheriff has actually delivered possession or set it out by metes and bounds); *Lloyd v. Davies* (1848), 2 Exch. 103.

(*a*) *Sharp v. Key* (1641), 8 M. & W. 379.

220. The lord of a manor can distrain for the rent due from a copyholder, which is a duty at common law (*b*), as on rent reserved by a lease (*c*); he can, if necessary, also distrain on the copyholder's tenant (*d*); arrears, however, are not the subject of distraint by an executor (*e*). The lord can also distrain for a heriot service, if such service be part of the tenure (*f*), as well as for rentcharges created under the Acts relating to enfranchisement of copyholds (*g*).

SECT. 4.
**Who may
Distrain.**

Lord of the
manor.

221. The mere relationship of mortgagee and mortgagor gives no right to distrain (*h*), but between them the relationship of landlord and tenant involving the right may be given by express words of attornment or by conduct (*i*), and for this purpose the mortgagor may be estopped from setting up the want of the legal estate in the mortgagee (although shown on the face of the mortgage deed) (*k*). Attornment clauses, however, must be registered under the Bills of Sale Acts, 1878 and 1882 (*l*), and do not confer rights beyond those of a tenancy, so that arrears of rent accrued before assignment cannot be distrained for by an assignee (*m*). The tenancy arising from an attornment clause will determine on the death of the mortgagor, and the payment of interest by his heir-at-law will not create a new tenancy so as to justify a distress (*n*).

Mortgagees.

222. Where there is a lease of lands which are mortgaged subsequently to the lease, the mortgagee has the same rights against the lessee and those claiming under him as the mortgagor had, and his remedies are upon the lease as assignee of the reversion; the lessee must pay rent after notice of the mortgage to the mortgagee, who can distrain if necessary, even if the lessee after such notice has

Mortgage
subsequent
to lease.

(*b*) *Laughter v. Humphrey* (1596), Cro. Eliz. 524.

(*c*) By Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 5. See Bullen on Distress, 2nd ed., p. 59, and Scriven on Copyholds, 7th ed., pp. 241, 242.

(*d*) *Rivet v. Down* (1609), 2 Brownl. 279.

(*e*) *Appleton v. Doily* (1608), Yelv. 135, as stat. (1540) 32 Hen. 8, c. 37, does not apply.

(*f*) *Hungerford v. Haviland* (1626), 3 Bulst. 323; *Austin v. Bennet* (1693), 1 Salk. 356. See also title COPYHOLDS, Vol. VIII., pp. 58, 59.

(*g*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 27 (*e*); see also *Searle v. Cooke* (1890), 43 Ch. D. 519, C. A.

(*h*) *Evans v. Elliot* (1838), 9 Ad. & El. 342, 354; *Rogers v. Humphreys* (1835), 4 Ad. & El. 299.

(*i*) *Clowes v. Hughes* (1870), L. R. 5 Exch. 160; *Jolly v. Arbutnot* (1859), 4 De G. & J. 224; *Kearsley v. Philips* (1863), 11 Q. B. D. 621, C. A.; *West v. Fritche* (1848), 3 Exch. 216, where the mortgagor continued in possession under a mortgage deed signed by the mortgagor only, but which contained an attornment clause. A personal licence to seize goods in default of payment of interest does not involve a tenancy so as to give a right to distrain on a mortgagor's tenant (*Gibbs v. Cruikshank* (1873), L. R. 8 O. P. 454).

(*k*) *Morton v. Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch., where a second mortgage was in question; *Kearsley v. Philips*, *supra*.

(*l*) 41 & 42 Vict. c. 31, s. 6, and 45 & 46 Vict. c. 43; and see title BILLS OF SALE, Vol. III., p. 14. Compare *Re Willis, Ex parte Kennedy* (1888), 21 Q. B. D. 384, C. A.; *Green v. Marsh*, [1892] 2 Q. B. 330, C. A.

(*m*) *Brown v. Metropolitan Counties Life Assurance Society* (1859), 1 E. & E. 832; compare *Pinhorn v. Souster* (1853), 8 Exch. 763, per PARKER, B.

(*n*) *Scobie v. Collins*, [1895] 1 Q. B. 375.

SECT. 4.
Who may
Distrain.

paid the mortgagor (*o*); payment before knowledge of the mortgage is protected, but no attornment by the tenant to the mortgagee is necessary (*p*). Such payment, however, must be strictly in accordance with the terms of the lease, and cannot apply to rent paid in advance of the due date (*q*). The notice necessary should be by the grantee, but notice by a *cestui que trust* instead of by trustees is sufficient (*r*).

Lease
subsequent
to mortgage.

223. A lease by a mortgagor subsequent to the mortgage, unless made under an express power given by the mortgage (*s*) or by statute (*t*), is void as regards the mortgagee, who cannot distrain, as there is no relation of landlord and tenant between him and the lessee (*a*); such relationship, however, may arise by express agreement or by conduct, but does not relate back to notice of the mortgage (*b*). The question as to whether a new tenancy between the mortgagee and the tenant has been created is one of fact; mere notice of the mortgage deed and of the interest being in arrear accompanied by a demand for rent is not sufficient, but the fact that rent is paid in accordance with such notice is evidence of a tenancy (*c*).

Mortgagor
under statute.

224. If a mortgagor makes a lease complying with the provisions of the Conveyancing and Law of Property Act, 1881 (*d*), it will be good against the mortgagee, and is treated as if made with his authority and concurrence. The mortgagor is entitled to distrain while in possession, and the mortgagee has a reversionary estate expectant on the end of the term, and he can distrain after he has given notice that he intends to exercise his rights to act as lessor under the terms of the lease (*e*).

(*o*) *Moss v. Gallimore* (1779), 1 Doug. (K. B.) 279; 1 Smith L. C., 11th ed., 514; confirmed in *Birch v. Wright* (1786), 1 Term Rep. 378, 384; *Rogers v. Humphreys* (1835), 4 Ad. & El. 299 (see note (*r*) on p. 124, *ante*). The object of the right is to prevent collusion between the mortgagor and the tenant, and the tenant is not prejudiced, as the mortgagor cannot claim rent afterwards.

(*p*) Stat. (1705) 4 & 5 Ann. c. 3, ss. 9, 10.

(*q*) *De Nicholls v. Saunders* (1870), L. R. 5 C. P. 589; the rent in such a case would be considered an advance to the landlord.

(*r*) *Lumley v. Hodgson* (1812), 16 East, 99; the notice was sufficient to put defendant on his guard (*ibid.*, *per* GROVE, J., at p. 104).

(*s*) *Rogers v. Humphreys*, *supra*.

(*t*) See next paragraph.

(*a*) *Keech v. Hall* (1778), 1 Doug. (K. B.) 21; 1 Smith, L. C., 11th ed., 511; *Pope v. Biggs* (1829), 9 B. & C. 245; *Rogers v. Humphreys*, *supra*; *Partington v. Woodcock* (1837), 6 Ad. & El. 690; see, further, title MORTGAGE.

(*b*) *Evans v. Elliot* (1838), 9 Ad. & El. 342; see judgment of DENMAN, C.J., explaining the dicta in *Pope v. Biggs*, *supra*. But an express attornment may relate back; see *Gludman v. Plumer* (1845), 10 Jur. 109.

(*c*) *Evans v. Elliot*, *supra*; *Partington v. Woodcock*, *supra*; *Towerson v. Jackson*, [1891] 2 Q. B. 484, O. A. The notice is the offer, and evidence of acceptance or of assent to the offer is necessary. Compare judgment of BOWEN, L.J., in *Towerson v. Jackson*, *supra*, at p. 487, criticising *Brown v. Storey* (1840), 1 Man. & G. 117; see also dicta of Lord SELBORNE, L.C., in *Corbett v. Plowden* (1884), 25 Ch. D. 678, 681, O. A., that evidence might be given of the mortgagees being in substance parties to and authorising the agreement, and that it was made by the mortgagor for them as well as for himself.

(*d*) 44 & 45 Vict. c. 41, ss. 10, 18.

(*e*) *Municipal Permanent Investment Building Society v. Smith* (1888), 22

No obligation lies on a mortgagee in possession to distrain, nor can he be called upon so to do by the owner of an equity of redemption, nor is he bound, on a distraint, to continue and defend at law any seizure he may have made (*f*).

SECT. 4.
Who may
Distrain.

225. A mortgagor, while in possession of the land mortgaged, is, as lessor, entitled to distrain for rent due (*g*), whether the lease be prior or subsequent to the mortgage; if the lease be prior to the mortgage, the distress is *præsumptione juris* by the mortgagor as bailiff of the mortgagee, in whose name he should justify (*h*). The mortgagor under these circumstances is not liable to account for the rents to the mortgagee (*i*).

Mortgagor
in possession.

226. A married woman, if married since January 1st, 1883, can distrain in respect of all her property, and if married before that date can distrain on property acquired by her since that date as if she were a *feme sole* (*k*). A married woman, if married before the above-mentioned date, cannot distrain alone on property acquired by her before that date, but the husband can distrain alone for all rent due in right of the wife; while in the case of freeholds, where there is a joint reversion, the wife may not improperly join in making the distress (*l*). By statute the husband could also distrain for arrears due before coverture (*m*).

Married
woman.

Husband in
right of wife.

227. Executors and administrators, when the reversion incident on the legal estate is vested in them, whether by the Land Transfer Act, 1897 (*n*), or otherwise, can distrain for all rent accruing due to them after the testator's death (*o*). An executor can distrain before

Executors
and admin-
istrators.

Q. B. D. 70, O. A. Collateral agreements, however, do not bind the mortgagee; see *Wilson v. Queen's Club*, [1891] 3 Ch. 522, and title LANDLORD AND

(*f*) *Cocks v. Gray* (1857), 1 Giff. 77.

(*g*) *Alchorne v. Gomme* (1824), 2 Bing. 54; a lessee cannot plead "*nil habuit in tenementis*." If, however, a receiver be appointed, see p. 180, *post*, and *Woolston v. Ross*, [1900] 1 Ch. 788.

(*h*) *Trent v. Hunt* (1853), 9 Exch. 14 (where a lessor, having mortgaged his reversion, was permitted by the mortgagee to receive the rent, and it was held that he was thereby impliedly authorised to distrain for the rent in the mortgagee's name), approved in *Snell v. Finch* (1863), 13 O. B. (N. S.) 651, where the assignee of an equity of redemption had distrained after the assignee had paid off the incumbrance, but before the actual transfer; see also *Christchurch, Oxford (Dean and Chapter) v. Buckingham and Chandos (Duke)* (1864), 17 C. B. (N. S.) 391, *per WILLES, J.*, at p. 413; *Reece v. Strousberg* (1885), 54 L. T. 133. The right of the mortgagor to sue under these circumstances is recognised in the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5), and see the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10; *Turner v. Walsh*, [1909] 2 K. B. 484, O. A. The mortgagee can only interfere by taking the steps mentioned in the previous paragraph (mortgagees distraining) and thus rebut the presumption.

(*i*) *Ex parte Wilson* (1813), 2 Ves. & B. 252; *Trent v. Hunt*, *supra*.

(*k*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12.

(*l*) See Bullen on Distress, 2nd ed., pp. 56, 57.

(*m*) Stat. 32 Hen. 8, c. 37, s. 3 (1540). See *Ognel's Case* (1587), 4 Co. Rep. 48 b, 51 a. For husband's right by estoppel to distrain, see *Howe v. Scarrott* (1859), 4 H. & N. 723.

(*n*) 60 & 61 Vict. c. 65, ss. 1, 3.

(*o*) 2 Bac. Abr., tit. Distress, A.

SECT. 4.
Who may
Distrain.

probate. Administrators, however, in spite of the doctrine of the relating back of the letters of administration to the date of death, cannot distrain before the grant (*p*). An executor or administrator of any lessor or landlord can distrain for rent of any kind in arrear at the time of a testator's death, and such distress may be made after the determination of the term, provided it be within six months of such determination, and during the continuance of the possession of the tenant from whom such arrears became due (*q*).

Guardians.

228. Guardians of property appointed by the courts or under statutory authority may be entitled to make leases in their own names, and can then distrain (*r*). Guardians at common law (*i.e.*, in socage) have a sufficient interest to let the ward lands during minority, and can distrain and defend in their own names (*a*).

Receivers.

229. A receiver, appointed by the High Court, has a power, where necessary, to distrain for rent, and need not apply first to the court for a particular order for this purpose, although this course should be adopted by him when a doubt arises as to who has the legal title to the rent, the subject of the distress, as the receiver must distrain in the name of the legal owner (*b*). The receiver, however, can issue distress and justify in his own name where the tenant has attorned to him personally, or where he has in his own name granted a lease (*c*). Attornment to a receiver does not enure to the benefit of the person who is ultimately found to have the legal estate (*d*). A receiver can even distrain where a purchaser under the court's order has paid the purchase-money before the execution of the conveyance; in this event he is

(*p*) *Whitehead v. Taylor* (1839), 10 Ad. & El. 210; *Woolley v. Clark* (1822), 5 B. & Ald. 744. The probate refers back to the testator's death (*King v. Horsley (Inhabitants)* (1807), 8 East, 405, *per* Lord ELLENBOROUGH, C.J., at p. 410).

(*q*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), ss. 37, 38. At common law there was no such right; a similar right was first conferred by stat. (1540) 32 Hen. 8, c. 37, s. 1, but that statute does not apply to a person seised in fee and demising for years, reserving a rent (*Prescott v. Boucher* (1832), 3 B. & Ad. 849).

(*r*) See title INFANTS AND CHILDREN.

(*a*) *Bedell v. Constable* (1668), Vaugh. 177; *R. v. Sutton* (1835), 3 Ad. & El. 597, *per* Lord DENMAN, C.J., at p. 610.

(*b*) *Pitt v. Snowden* (1752), 3 Atk. 751; *Bennett v. Robins* (1832), 5 C. & P. 379; *Justici v. James* (1899), 15 T. L. R. 181, C. A., *per* CHITTY, L.J., at p. 182. In *Brandon v. Brandon* (1821), 5 Madd. 473, it is suggested that if a receiver distrain for rent in arrear for more than a year, an order of the court is necessary. If an order of court were ordinarily necessary the object of the receivership order might be frustrated by the tenant removing his goods before the order could be obtained, or while the court was not sitting. See also *Cox v. Harper* (1910), 26 T. L. R. 264, C. A. As to the necessity for an order in the case of a receiver appointed under the Tithe Act, 1891 (54 Vict. c. 8), see Tithe Rentcharge Recovery Rules, 1891, r. 20; Statutory Rules and Orders Revised, Vol. III., County Court, England, p. 578; and title ECCLESIASTICAL LAW, *post*.

(*c*) *Hughes v. Hughes* (1790), 1 Ves. 162; *Dancer v. Hastings* (1826), 4 Bing. 2. The usual form of order is that the tenant do attorn and pay the rents in arrear and growing rents to the receiver; see *Yorkshire Banking Co. v. Mullan* (1887), 35 Oh. D. 125.

(*d*) *Evans v. Mathias* (1857), 7 E. & B. 590. The attornment creates an estoppel between the actual parties only.

regarded as a trustee for the purchaser, and will be restrained from carrying out the distress to the purchaser's detriment (e).

SECT. 4.
Who may
Distrain.

A private receiver or agent has not by virtue of such appointment any power to distrain, nor does an authority to tenants "to pay rent to an agent whose receipt shall be their discharge" confer this right (f). A receiver can, however, be appointed either in a mortgage deed or by a separate instrument with a power of distress under an attornment by the mortgagor, although the instrument on its face discloses the absence of any reversion in the receiver (g).

A receiver appointed under the provisions of the Conveyancing and Law of Property Act, 1881, has a statutory power of distress, and after his appointment the mortgagor cannot thenceforward himself distrain, even if the receiver has been negligent in collecting the rents, or has declined to distrain himself or allow the mortgagor to distrain personally, as long as the receivership is in force (h).

230. Corporations sole can distrain according to the nature of their estate (i). Corporations aggregate also have the same power of distress at common law, while by statute their rights are extended to the recovery of rents seek, chief rents, and rents of assize (k). Corporations distrain by a bailiff, whose appointment may be by writing, not under seal (l); an officer of a corporation (such as the director of a company) distraining can only justify as bailiff, and not otherwise (m). Corporations.

231. Churchwardens and overseers of the poor of a parish can hold property purchased or leased by them, so that the legal estate and right to distrain vests in them as a corporation of a particular kind, and any one churchwarden or overseer can authorise a distress without the concurrence of the others (n). Churchwardens and overseers.

(e) *Re Powers, Manisty v. Archdale* (1890), 63 L. T. 626.

(f) *Ward v. Shew* (1833), 9 Bing. 608. The receiver could only distrain as bailiff to his principals, and the instrument in question in this case gave no such right, and authorities must be strictly construed; see also *Woolston v. Ross*, [1900] 1 Ch. 788. A formal power of attorney to distrain was held good in *Eagleton v. Gutteridge* (1843), 11 M. & W. 465. An agent would, however, have to justify in his principal's name; see *Trent v. Hunt* (1853), 9 Exch. 14.

(g) *Jolly v. Arbutnot* (1859), 4 De G. & J. 224; *Dancer v. Hastings* (1826), 4 Bing. 2. Lord CHELMSFORD, L.C., in the first-mentioned case left it doubtful if attornment to a receiver (without a formal power of distress) created an estoppel, when the absence of the reversion was apparent in his title.

(h) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 19, 24; see *Bayly v. Went* (1884), 51 L. T. 764, and *Woolston v. Ross*, [1900] 1 Ch. 788. Two parties cannot have a concurrent right to distrain for the same arrears of rent.

(i) See Bullen on Distress, 2nd ed., p. 84.

(k) Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 5.

(l) Bac. Abr. Corporations, E (3); see *Cary v. Matthews* (circa 1688), 1 Salk. 191, note, Ex. Ch.; *Smith v. Birmingham Gas Co.* (1834), 1 Ad. & El. 526.

(m) *Hogarth v. Jennings*, [1892] 1 Q. B. 907, O. A.

(n) Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 17; *Gouldsworth v. Knights* (1843), 11 M. & W. 337.

SECT. 4.

Who may
Distrain.

232. Sequestrators of ecclesiastical benefices can levy a distress in the same way as the incumbent might have done had the benefice not been under sequestration (o).

Sequestrators.

SECT. 5.—*What may and what may not be Distrained.*SUB-SECT. 1.—*General Rule.*

What may
and what
may not
be distrained.

233. Under the common law a landlord can *prima facie* seize and distrain for rent in arrear all goods and chattels found on the premises out of which the rent issues; the goods and chattels may be the property of the tenant, or of a stranger, the landlord being entitled to have recourse to all chattels actually on his tenant's premises without reference to their ownership (a). The rule, however, applies only to goods and personal chattels, while chattels of an incorporeal nature and incorporeal hereditaments, such as advowsons, rights of common, fairs, tithes, markets, privileges, franchises, and patent rights, are incapable of physical possession and seizure, and cannot be the subject of distress, although the actual goods the subject of these rights may be taken (b).

Moreover, in the case of personal chattels certain exceptions have been engrafted upon the general rule both by the common law and by statute (c): these exceptions depend in part on the person in whose possession, or the place wherein, the goods may be found, and in part on the nature of the goods themselves. But anyone claiming the benefit of one of these exceptions must satisfy the court that his case falls within it. These exceptions are stated in the form of rules and not of principles, and the court will not travel beyond the definitions of the exceptions prescribed (d).

(o) Sequestration Act, 1849 (12 & 13 Vict. c. 67), s. 1; and see title ECCLESIASTICAL LAW, *post*, as to sequestration generally.

(a) 3 Bl. Com. p. 8; Gilbert on Distresses, p. 35; *Gorton v. Falkner* (1792), 4 Term Rep. 565; *Gilman v. Elton* (1821), 3 Brod. & Bing. 75; *Muspratt v. Gregory* (1836), 1 M. & W. 633, and (1838) 3 M. & W. 677, Ex. Ch.; *Cramer v. Mott* (1870), L. R. 5 Q. B. 357, *per* BLACKBURN, J., at p. 360; *Lyons v. Elliott* (1876), 1 Q. B. D. 210; *Clarke v. Millwall Dock Co.* (1886), 17 Q. B. D. 494, C. A.; *Challoner v. Robinson*, [1908] 1 Ch. 49, C. A. "The rule grows out of the relation of landlord and tenant and out of the nature of the thing itself" (*per* DALLAS, C.J., in *Gilman v. Elton*, *supra*); see also judgment of BLACKBURN, J., in *Lyons v. Elliott*. See as to the goods of strangers, p. 143, *post*; and as to goods comprised in a bill of sale, see title BILLS OF SALE, Vol. III., p. 70.

(b) Co. Litt. 47a; *British Mutoscope and Biograph Co., Ltd. v. Homer*, [1901] 1 Ch. 671. In this case the actual chattels, the subject of letters patent, were seized without objection, but an injunction was granted to restrain their use contrary to the terms of such letters patent. In *Horsford v. Webster* (1835), 1 Cr. M. & R. 696, it was stated that the "eatage of grass" could not be distrained.

(c) The exceptions are set out in detail at pp. 138—148, *post*.

(d) See the authorities cited in note (a), *supra*. See also *Simpson v. Hartopp* (1744), Willes, 512; 1 Smith, L. C., 11th ed., 437, where the leading common law exceptions are precisely stated. Other exceptions are stated by ALDERSON, B., in *Muspratt v. Gregory* (1836), 1 M. & W. 633, 645. See especially the judgments of Lord HERSCHELL, L.C., and Lord ESHER, M.R., in *Clarke v. Millwall Dock Co.*, *supra*, and the judgment of the court in *Challoner v. Robinson*, *supra*, citing the *dictum* of Lord HERSCHELL, L.C., that both the general rule of distraint on strangers' goods and the exception in question were anomalous.

Of these exceptions some are absolute and some are conditional, that is, the goods within them can only be taken if there is no other sufficient distress (e). It does not matter in whose possession the demised land may be (f).

SECT. 5.
What may
and what
may not be
Distrained.

234. At common law growing corn etc. could not be distrained (g), but now by statute the landlord may seize, for arrears of rent, all sorts of corn and grass, hops, roots, fruit, pulse, or other product growing on any part of the land demised (h).

Growing
corn.

235. At common law sheaves or cocks of corn were not distrainable (i), but now by statute sheaves or cocks of corn, or corn loose or in the straw, or hay lying in any barn or granary or upon any level stack or rick, may be seized and may be detained in the place where it shall be found, until it is replevied, and in default of replevy until it is sold; it must not, however, be removed until replevied or sold to the damage of the owner (k). This provision applies to corn thrashed or unthrashed (l). The owner of a rent-charge may take advantage of it, even if the goods are those of a stranger (m).

Sheaves or
cocks of
corn.

SUB-SECT. 2.—*Things Absolutely Privileged (n).*

(1) *Constitutional Privilege.*

236. The property of the Crown, whether in the possession of the Crown or on premises demised to a subject, cannot be taken in distress (a).

Crown
property.

237. The goods and chattels of any ambassador or other public minister of any foreign prince or State authorised and received

Goods of
ambassadors
etc.

(e) For absolute exceptions, see pp. 133—141, *post*, and for conditional exceptions, pp. 141 *et seq.*, *post*.

(f) *Humphry v. Damion* (1612), Cro. Jac. 300. Where, however, two tenants in common separately allotted tenants by way of mortgage of equal undivided moieties of the premises for the share of the rent, the mortgagees were held unable to distrain on partnership property of the two tenants on such premises. See also *Groom v. Bluck* (1841), 2 Man. & G. 567, as to when an assignor's goods are seized for rent due by assignee.

(g) 1 Roll. Abr. 666; and Co. Litt. 47 b (note 299 of Hargrave).

(h) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), ss. 8, 9. For this right, see title AGRICULTURE, Vol. I., p. 254.

(i) Co. Litt. 47 a. Growing crops and sheaves of corn etc. are, however, generally included in the list of things absolutely privileged, see *Simpson v. Hartopp* (1744), Willes, 512, 515; 1 Smith, L. O., 11th ed., 437; these must necessarily be damaged by removal.

(k) Stat. (1689) 2 Will. & Mar. c. 5, s. 2. In default of a replevy it must be sold within five days (*Piggott v. Birles* (1836), 1 M. & W. 441, *per* PARKE, B., at p. 448), unless this time is extended by the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), which also avoids the necessity of appraisal in ordinary cases. See s. 5 thereof, and pp. 180, 182, *post*.

(l) *Delasyee v. Burbridge* (1695), 1 Lut. 213.

(m) *Johnson v. Faulkner* (1842), 2 Q. B. 925.

(n) As to the protection afforded to the goods of undertenants, lodgers etc. under the Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), see p. 143, *post*.

(a) *Secretary of State for War v. Wynne*, [1905] 2 K. B. 845, where a horse was lent to a member of the yeomanry and distrained on his farm.

SECT. 8.
What may
and what
may not be
Distrained.

Goods in
custody of
the law.

Things
delivered to
persons
exercising a
public trade.

Trade must
be a public
one.

as such by the Sovereign of this country, and, in some circumstances, of the domestic servants of such ambassador or minister, are privileged from distress (*b*).

238. Goods in possession of the law, especially when seized by virtue of an execution, are immune from distress (*c*).

(2) *Trade Privilege.*

239. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade, are privileged from distress for rent due from the person in whose custody they are, such as a horse in a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up (*d*).

Delivery for the purposes of trade is essential, and this rule does not extend to all cases in which goods happen to be on premises for these purposes, although if an article to be manufactured has been completed, and the person who has the property in it leaves it upon the demised premises to have some alteration made, there may be an equivalent to delivery of the thing manufactured (*e*).

240. The trade must be a public one, *i.e.*, a trade or business carried on generally for the benefit of all persons who choose to avail themselves of it, as distinguished from a special employment by particular individuals; this term (*i.e.*, public) is not

(*b*) Diplomatic Privileges Act, 1708 (7 Ann. c. 12), s. 3, which is declaratory of the Law of Nations (*per* Lord MANSFIELD in *Triquet v. Bath* (1764), 3 Burr. 1478). As to this privilege, see title CONSTITUTIONAL LAW, Vol. VI., pp. 428 *et seq.*

(*c*) See as to goods in *custodia legis*, p. 171, *post*.

(*d*) *Simpson v. Hartopp* (1744), Willes, 512; 1 Smith, L. O., 11th ed., 437; *Gisbourn v. Hurst* (1710), 1 Salk. 249. This rule must be construed strictly, and the statements in Coke (Co. Litt. 47 a) and Blackstone (3 Bl. Com. 8) are too wide (*per* Lord HERSCHELL, L.O., in *Clarke v. Millwall Dock Co.* (1886), 17 Q. B. D. 494, O. A., at p. 500. See also *Muspratt v. Gregory* (1838), 3 M. & W. 677, Ex. Ch., and *Joule v. Jackson* (1841), 7 M. & W. 450, where it is laid down that this rule ought not to be extended; VAUGHAN, B., however, in *Adams v. Grane* (1833), 1 Cr. & M. 380, at p. 391, suggested that the rule should not be construed strictly, while PATTESON, J., in *Findon v. M'Laren* (1845), 6 Q. B. 891, at p. 897, stated that the principles of this exemption have been varied according to the state of trade. In *Challoner v. Robinson*, [1908] 1 Ch. 49, O. A., at p. 59, the court adopted Lord HERSCHELL's statement. This rule is for "trade and commerce, which could not be carried on if such things in these circumstances could be distrained for rent." According to DALLAS, O.J., in *Gilman v. Elton* (1821), 3 Brod. & Bing. 75, this exception is for the public benefit and convenience; DENMAN, C.J., in *Muspratt v. Gregory*, *supra*, adds "for public peace," and BAYLEY, B., in *Adams v. Grane*, *supra*, says, "interest reipublicæ that buyer and seller should be brought together"; BLACKBURN, J., in *Lyons v. Elliott* (1876), 1 Q. B. D. 210, at p. 214, states that the ground is "public policy for the benefit of trade." This branch of privilege has lost most of its former importance by the passing of the Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), as to which see p. 143, *post*.

(*e*) *Clarke v. Millwall Dock Co.*, *supra*; and see the judgments of Lord HERSCHELL, L.O., and Lord ESHER, M.R., therein. In this case an unfinished ship, being built for the plaintiff in a dry dock rented by the builder from the defendants, was held liable to distress, as the purchaser of the ship never had the right to possession at any time.

confined to cases such as those of an innkeeper or common carrier, where all the public have a right to deal with the trader, but one open *prima facie* to the dealings of all persons indiscriminately, such as a butcher or trader in corn. The quantity of trade is no criterion, and a workman employed for wages may be carrying on a public trade within the meaning of this rule. The trade, however, is not public if carried on substantially on behalf of one employer only or in one particular case (*f*).

SECT. 5.
What may
and what
may not be
Distrained.

241. The trade in question must be carried on on premises either regularly or temporarily occupied by the trader, and must not be on premises occupied by the owner of the goods; the goods, however, may be deposited by the trader in a public warehouse or store kept for this purpose (*g*). They must, however, be in the trader's possession for the actual purpose of his trade. So that this privilege was held not to extend to boats brought to salt works (where salt was publicly sold) and left in cuts or canals to be loaded with the salt sold (*h*); nor does this privilege extend to machinery delivered with materials for the exercise of the trade, although the tools of trade are conditionally privileged (*i*), or to the implements of storage or conveyance (*j*).

Goods must
be in trader's
possession.

242. The goods must be put into the trader's hands that he may exercise his trade upon them; work and skill need not be bestowed upon the goods sent, if the trade in question does not involve such

Regular trade
must be
exercised on
goods.

(*f*) The Court of Appeal in *Challoner v. Robinson*, [1908] 1 Ch. 49, C. A., declined to define a public trade, but NEVILLE, J., held that a club to which only members or persons introduced were admitted was not carrying on a public trade, although the object of the club was to sell pictures on commission. As to publicity, see the judgments in *Brown v. Shevill* (1834), 2 Ad. & El. 138; *Gibson v. Treson* (1842), 3 Q. B. 39, and in *Muspratt v. Gregory* (1836), 1 M. & W. 633 (where PARKE, B., defined it in a judgment which was not dissented from on this point), and in the Exchequer Chamber (1838), 3 M. & W. 677 (see judgment of DENMAN, C.J.). In *Tapling & Co. v. Weston* (1883), Cab. & El. 99, CAVE, J., held that an agent who, although entitled to carry on other agency business, only held one agency beyond that of his regular principals was not carrying on a public trade. Similarly an artist who has been intrusted with a picture to work up is not carrying on a public trade so as to make the picture privileged from distress (*Von Knoop v. Moss and Jameson* (1891), 7 T. L. R. 500), and pictures deposited for sale on commission with a restaurant keeper who is not a commission agent are not privileged (*Edwards v. Fox & Son* (1896), 60 J. P. 404, C. A.). In pleading this rule as a defence the publicity of the trade must be pleaded. See *Farrant v. Robson* (1834), 3 L. J. (C. P.) 146.

(*g*) Goods sent to an auctioneer to be sold on premises temporarily hired for the auction, or on which the auctioneer is trespasser, are privileged (*Brown v. Arundell* (1850), 10 C. B. 54; and see *Williams v. Holmes* (1853), 8 Exch. 861); but the contrary was held where the auction was to take place on the owner's premises (*Lyons v. Elliott* (1876), 1 Q. B. D. 210). See, also, title AUCTION AND AUCTIONEERS, Vol. I., p. 520. For goods deposited in a warehouse by the trader, see *Matthias v. Mesnard* (1826), 2 C. & P. 353, and *Farrant v. Robson* (1834), 3 L. J. (C. P.) 146.

(*h*) *Muspratt v. Gregory* (1838), 3 M. & W. 677, Ex. Ch.

(*i*) *Wood v. Clarke* (1831) 1 Cr. & J. 484; see also p. 142, *post*.

(*j*) *Joule v. Jackson* (1841), 7 M. & W. 450 (brewers' casks sent to a publican with beer to remain on the premises until the beer was consumed); *Muspratt v. Gregory*, *supra*. As to goods in the hands of an agent, see titles AGENCY, Vol. I., p. 206; BAILMENT, Vol. I., p. 546.

SECT. 5.
What may
and what
may not be
Distrained.

work and skill, and mere storage, whether for sale or otherwise, is enough if the storage or sale constitutes the trade in question, but goods sent to a trader who merely stores them instead of exercising his regular trade upon them are not exempt from distress (*k*). The word "managed" in this rule must be taken in a wide sense so as to include, if not to be equivalent to, "disposed of" (*l*). Sample articles sent to an agent for exhibition purposes only are not privileged (*m*).

Where these goods are privileged from distress, the instruments or vehicles used for their conveyance are equally privileged (*n*).

(3) *Fixtures.*

Fixtures.

243. Whatever is part of or annexed or affixed to the freehold cannot be distrained, such as kilns, furnaces, cauldrons, windows, keys, shutters, doors, chimney-pieces, anvils in a forge, and the like (*o*). No fixtures (so long as they continue such) are distrainable

(*k*) *E.g.*, wine in cask or bottle deposited for storage in a wine-warehouseman's cellar is not, whereas wine sent to be bottled is, privileged (*Re Russell, Ex parte Russell* (1870), 18 W. R. 753). In *Parsons v. Gingell* (1847), 4 C. B. 545, WILDE, C.J., stated that the question in these cases is whether the goods are placed in the hands of the tenant merely with the intent that they shall remain upon the premises or with the view of having labour and skill bestowed upon them; but in *Miles v. Furber* (1873), L. R. 8 Q. B. 77, this dictum is dissented from.

The following have been held privileged:—Cloth left at a clothworker's to be woven (*Read v. Burley* (1597), Cro. Eliz. 549), and while waiting to be weighed at a neighbouring house (*ibid.*, 596); cattle pastured for one night on the way to market (*Tate v. Glead* (1784), 2 Wms. Saund. 675, note (x); *Nugent v. Kirwan* (1838), 1 Jebb & S. 97); goods in the hands of a carrier for the purpose of carriage (*Gisbourn v. Hurst* (1710), 1 Salk. 249); goods sent to a factor for sale (*Gilman v. Elton* (1821), 3 Brod. & Bing. 75), or deposited by a factor at a wharfinger's warehouse (*Thompson v. Mashiter* (1823), 1 Bing. 283), and goods sent to a wharfinger direct (*ibid.*, *per DALLAS*, C.J.); corn sent to a factor for sale and deposited by him in the warehouse of a granary keeper (*Matthias v. Mesnard* (1826), 2 C. & P. 353); goods sent to a commission agent to be exposed for sale or sold (*Findon v. M'Laren* (1845), 6 Q. B. 891); carcases of beasts sent to a butcher to be slaughtered (*Brown v. Shevill* (1834), 2 Ad. & El. 138); goods pledged with a pawnbroker for money advanced (*Swire v. Leach* (1865), 18 C. B. (N. S.) 479); furniture sent to a depository to be warehoused for hire (*Miles v. Furber, supra*). For the privilege of goods sent to an auctioneer, see *Adams v. Grane* (1833), 1 Cr. & M. 380, and p. 135, note (g); and see *Lyons v. Elliott* (1876), 1 Q. B. D. 210, that goods are not privileged if brought on to owner's premises to be included in a sale on such premises. Horses and carriages standing at livery have been held distrainable (*Francis v. Wyatt* (1764), 3 Burr. 1498; *Parsons v. Gingell, supra*); see as to this latter case, however, *Miles v. Furber, supra*; and a landlord can distrain horses in a stable let by a tenant to an innkeeper during races (see *Crosier v. Tomkinson* (1759), 2 Keny. 439). See also title BAILMENT, Vol. I., p. 546.

(*l*) *Per curiam* in *Challoner v. Robinson*, [1908] 1 Ch. 49, C. A., where it was held that the pictures in question were not delivered to the plaintiff "to be managed in the way of his trade."

(*m*) *Simms Manufacturing Co. v. Whitehead*, [1909] W. N. 95, where a motor chassis sent to an agent as a model of a type of car was held liable to distraint. See also title AGENCY, Vol. I., p. 206.

(*n*) *Muspratt v. Gregory* (1836), 1 M. & W. 633 (see the judgment of ALDERSON, B., therein); *Wood v. Clarke* (1831), 1 Cr. & J. 484, at p. 498.

(*o*) Co. Litt. 47 b; Gilbert on Distresses, pp. 38, 39; *Simpson v. Hartopp*

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What may
and what
may not be
Distrained.

whether such fixtures are irremovable or fixtures severable by a tenant (*p*). Whether an article, such as a machine, is a parcel of the freehold, is a question of fact, depending on the circumstances of each case and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, whether it can easily be removed *integre salve et commode* or not, without injury to itself or the fabric of the building; and, secondly, the purpose of annexation, whether it was for the permanent and substantial improvement of the dwelling or merely for a temporary purpose and the more complete enjoyment of it as a chattel (*q*). In any event things cannot be distrained which cannot be restored in the same state in which they were before the distress (*r*), and if fixtures are under a distress wrongfully removed from the freehold so as to be treated as chattels trover will lie at the instance of the landlord (*s*). A temporary removal, *e.g.*, for repair of a fixture, such as an anvil in a smith's shop or a millstone, does not destroy this privilege (*t*).

(4) *Things in Actual Use.*

244. Whatever is in a man's present use or occupation is for that time privileged from distress, such as a horse when being ridden, or an axe being used for cutting wood, or a net in a man's hand (*a*); this privilege extends to a horse drawing a cart and

Things in
use.

(1744), Willes, 512, 515; 1 Smith, L. C., 11th ed., 437; *Pitt v. Shew* (1821), 4 B. & Ald. 206. In Bullen on Distress, 2nd ed., p. 105, three reasons are given for this rule—(1) because they form part of the thing demised; (2) because their removal would injure the freehold; (3) because their removal would injure the things themselves. See also *Niblet v. Smith* (1792), 4 Term Rep. 504.

(*p*) *Crossley Bros., Ltd. v. Lee*, [1908] 1 K. B. 86; see also *Provincial Bill Posting Co. v. Low Moor Iron Co.*, [1909] 2 K. B. 344, C. A., where advertisement hoardings, although removable by the tenant, could not be distrained.

(*q*) *Helluwell v. Eastwood* (1851), 6 Exch. 295. This statement of PARKE, B., as distinct from the decision on the actual facts of the case, has been approved and noted in several subsequent cases, though the decision itself was not followed in *Crossley Bros., Ltd. v. Lee*, *supra*; *Walmesley v. Milne* (1859), 29 L. J. (C. P.) 97; *Climie v. Wood* (1868), L. R. 3 Exch. 257; *Longbottom v. Berry* (1869), L. R. 5 Q. B. 123; *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Hobson v. Gorringe*, [1897] 1 Ch. 182, C. A.; *Reynolds v. Ashby & Son*, [1904] A. C. 466. A shop counter is not affixed for a "temporary purpose," but an anchor dropped, or a carpet tacked to a floor, is distrainable (see judgment in *Holland v. Hodgson*, *supra*, at p. 337). But a "railway" for the better enjoyment of a colliery is not distrainable (see *Turner v. Cumeron* (1870), L. R. 5 Q. B. 306).

(*r*) *Darby v. Harris* (1841), 1 Q. B. 895, in which affixed kitchen ranges, stoves, grates, and coppers were held not distrainable; see also Gilbert on Distresses, 31, 38.

(*s*) *Dalton v. Whitem* (1842), 3 Q. B. 961.

(*t*) *Gorton v. Falkner* (1792), 4 Term Rep. 565, *per* Lord KENYON, C.J., at p. 567.

(*a*) Co. Litt. 47 a; Gilbert on Distresses, p. 39; *Read v. Burley* (1597), Cro. Eliz. 549; if this rule did not exist there would be a perpetual liability to a breach of the peace (see *Storey v. Robinson* (1795), 6 Term Rep. 138). In *Simpson v. Hartopp* (1744), Willes, 512, 517; 1 Smith, L. C., 11th ed., 437, a stocking frame being used by a weaver was held privileged.

SECT. 5.
What may
and what
may not be
distraigned.

Perishable
articles.

to the harness (b), and to wearing apparel actually being worn (c). In the case of animals, such as a dog, actual manual possession and use is necessary (d).

(5) *Perishable Articles.*

245. Things of a perishable nature, or such as cannot be restored again in the same state and condition that they were before being taken or must necessarily be damaged by removal or severance, are exempt from distress (e). The flesh of animals lately slaughtered cannot, therefore, be distraigned (f), nor can milk, fruit, or things of a similar nature (g). A cart, however, loaded with corn is not within this rule (h).

(6) *Money.*

Money.

246. Money is not distrainable unless it is in a bag or in such a closed or sealed receptacle that it can be identified (i).

(7) *Live Animals.*

Animals.

247. Things in which there can be no valuable property, especially animals *feræ naturæ*, are exempt, such as deer and rabbits in their wild state, birds, and cats (k). Deer, however, may become valuable property by being kept in an inclosed ground or for purposes of profit, so that they can be considered the goods of the tenant (l). Dogs are now considered to be liable to distress (m), as well as animals kept in cages (n).

(b) *Field v. Adames* (1840), 12 Ad. & El. 649.

(c) *Bissett v. Caldwell* (1790), Peake, 36, and *Baynes v. Smith* (1794), 1 Esp. 206; at common law wearing apparel can be distraigned, although merely taken off for the purposes of repose. See, however, the statutory privilege, p. 139, *post*.

(d) *Bunch v. Kennington* (1841), 1 Q. B. 679. A plea of actual possession, personal care, and use was held insufficient in the case of a dog to sustain this privilege.

(e) 1 Roll. Abr. tit. Distress, 667; Bac. Abr. tit. Distress, B, 697; Co. Litt. 47 a; *Simpson v. Hartopp* (1744), Willes, 512; 1 Sm. L. O., 11th ed., 437. It is on this principle that cocks and sheaves of corn were formerly held not distrainable (*Wilson v. Duckett* (1675), 2 Mod. Rep. 61); sheaves of corn are now dealt with by statute; see title AGRICULTURE, Vol. I., p. 254; and in *Darby v. Harris*, (1841), 1 Q. B. 895, this principle was applied to fixtures. Replevin did not lie where things could not be identified.

(f) *Morley v. Pincombe* (1848), 2 Exch. 101, where carcasses of pigs were held to be perishable commodities.

(g) 3 Bl. Com. 9; Bullen on Distress, 2nd ed., 103. In Bullen, p. 104, grain out of a barn or flour out of a sack are also instanced.

(h) 3 Bl. Com. p. 10; Co. Litt. 47 a.

(i) Gilbert on Distresses, p. 31; Bac. Abr. tit. Distress, B, 697. The reason of this rule is to be found in the original law when distress was merely a form of pledge; see also *Wilson v. Duckett*, *supra*.

(k) Co. Litt. 47 a; 3 Bl. Com. 7, 8. See title ANIMALS, Vol. I., p. 365.

(l) *Davies v. Powell* (1738), Willes, 46; *Morgan v. Abergavenny (Earl)* (1849), 8 O. B. 768, where deer in a park were considered to be reclaimed and to be no longer *feræ naturæ*; see also *Ford v. Tynte* (1861), 2 John. & H. 150.

(m) They are included in the exemptions in Co. Litt. 47 a, but the modern opinion is that this exemption is no longer the law; see the discussion on this point in the notes to *Simpson v. Hartopp* (1744), 1 Smith, L. O., 11th ed., 437, and see *Bunch v. Kennington*, *supra*. As to dogs in actual use, see note (d), *supra*.

(n) See for this, title ANIMALS, Vol. I., p. 366; and as to straying cattle, title AGRICULTURE, *ibid.*, p. 253.

(8) *Wearing Apparel, Bedding, and Tools of Trade.*

SECT. 5.

What may
and what
may not be
Distrained.

Wearing
apparel etc.

248. By statute the wearing apparel and bedding of a tenant and his family, and the tools and implements of his trade, may not be distrained (o), but this protection is limited to such goods of the total value of £5 (p), and does not apply where the lease, term, or interest of the tenant has expired and possession of the premises in respect of which the rent is claimed has been demanded, and the distress is made not earlier than seven days after such demand (q). Where in spite of this statute such goods and chattels have been taken under a distress, on complaint a court of summary jurisdiction may direct their restoration, and, if they have been sold, may order the payment by the person who levied or directed the levy to the complainant of such sum as the court may determine to be their value (r).

Bedding includes whatever is used for the purposes of sleeping accommodation, such as a bedstead or a mattress (a).

If an implement of trade, such as a sewing machine, is hired by a husband for the use of his wife, and the wife uses it and devotes her earnings to the support of the household and family, the hirer is held to carry on a trade by the hands of his wife, so as to privilege the implement from distress; the fact that the implement is hired and not the tenant's property is for this purpose immaterial (b). A cab used by a driver is an implement of trade, and so is a piano used by a music teacher for teaching, but a typewriter used as a sample by a commercial traveller is not. At least £5 worth of tools etc. must be left, and if only one article of greater value than £5 is available for distress the protection of the statute is extended to such article (c).

(9) *Miscellaneous Statutory Privilege (d).*

249. Where the Agricultural Holdings Act, 1908, applies,

Agricultural
machinery
and breeding
stock.

(o) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4, referring to the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 147; *Boyd, Ltd. v. Bilham*, [1909] 1 K. B. 14, where it was held that the requirements of s. 147 are satisfied if apparel or bedding or tools to the value of £5 are left on the premises.

(p) At common law wearing apparel, unless in actual use (see *Bisset v. Caldwell* (1790), Peake, 36, and *Baynes v. Smith* (1794), 1 Esp. 206), and bedding are distrainable, and tools are only conditionally privileged, see p. 142, *post*.

(q) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4. The terms of this proviso are apparently cumulative.

(r) Law of Distress Amendment Act, 1895 (58 & 59 Vict. c. 24), s. 4. See also p. 209, *post*.

(a) *Davis v. Harris*, [1900] 1 Q. B. 729.

(b) *Churchward v. Johnson* (1889), 54 J. P. 326; *Masters v. Fraser* (1901), 85 L. T. 611, where Lord ALVERSTONE, C.J., said, at p. 613, that any lawful possession is sufficient.

(c) *Lavell v. Richings*, [1906] 1 K. B. 480; *Addison v. Shepherd*, [1908] 2 K. B. 118; *Boyd, Ltd. v. Bilham*, *supra*. Apparently an implement is something to be used for actual work, and not merely to be shown for trade.

(d) The privilege treated under this heading has, perhaps, become of less importance owing to the passing of the Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), as to which see p. 143, *post*.

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What may
and what
may not be
Distrained.

agricultural or other machinery which is the property of a person other than the tenant, and is on the holding under an agreement with the tenant for the hire or use thereof in the conduct of his business, and live stock which is the property of a person other than the tenant and is on the property solely for breeding purposes, must not be distrained for rent (e). Live stock includes any animal capable of being distrained (f). Disputes as to any matter relating to a distress on a holding may be determined either by a county court or a court of summary jurisdiction (g).

Frames and
materials in
textile trades.

250. No frame, loom, or machine, materials, tools, or apparatus intrusted for the purpose of being used in connection with the manufacture of woollen, worsted, linen, cotton, flax, or silk materials, and no machine employed in the manufacture of stockings, gloves, and other articles of hosiery, and the work and processes thereof, whether such frame, loom etc. is rented or hired or not, is liable to be distrained, unless the rent be due by the owner of the same or of any part thereof (h).

Railway
rolling stock.

251. Railway rolling stock being in a "work" is not liable to be distrained for rent payable by a tenant of the work, unless such rolling stock is such tenant's actual property, if the ownership thereof is sufficiently indicated by a metal plate or other distinguishing mark conspicuously affixed (i). This protection does not, however, extend to a tenant's interest in such stock, which is liable to distress as if the tenant had possessed the whole interest (k). "Work" is defined as including any colliery, quarry, mine, manufactory, warehouse, wharf, pier, or jetty in, or on which is any railway siding, and includes an engine shed on a siding connected with a railway (l). "Rolling stock" includes "waggon, trucks, carriages of all kinds, and locomotive engines used on railways" (m).

(e) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), which repeals the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61). In the former statute both the machinery and the stock had to be "the *bona fide* property of a person other than the tenant." The section cited is s. 29 (4). See generally, for this, title AGRICULTURE, Vol. I., pp. 252—258. For the other limitations under these sections see p. 159, *post*.

(f) *Ibid.*, s. 48, wherein "tenant," "holding," and "agreement" are also included in the "interpretation section."

(g) *Ibid.*, s. 30. See p. 142, *post*.

(h) Hosiery Act, 1843 (6 & 7 Vict. c. 40), s. 18. If the frames, material etc. are unlawfully seized, a summary remedy before a justice of the peace is provided by s. 19. The definition clauses are ss. 34, 35.

(i) Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), s. 3; see also title RAILWAYS AND CANALS.

(k) *Ibid.*, s. 5. Rival claims under this section are to be settled by a court of summary jurisdiction, which court can also by s. 4 make summary orders, if the distress is levied on the rolling stock, and the statute in s. 6 contains provisions for appeal to quarter sessions.

(l) *Ibid.*, s. 2; *Easton Estate and Mining Co. v. Western Waggon and Property Co.* (1886), 54 L. T. 735, where the definition clause was held not to be exhaustive of the word "work." WILLS, J., said herein at p. 737, "'Work' applies to any establishment or place used for the purpose of trade or manufacture, and which is connected with a line of railway by sidings along which this rolling stock may be propelled."

(m) Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50),

SECT. 5.

**What may
and what
may not be
Distrained.**

Gas meters
and fittings.

252. Where the Gasworks Clauses Act, 1847, has been incorporated into special Acts to which the Gasworks Clauses Act, 1871, does not apply, meters and gas fittings let for hire by the undertakers for the supply and consumption of gas are exempt from distress, and by the Gasworks Clauses Act, 1871, meters and fittings thereto are equally exempt for the rent of the premises where they may be used when let by the undertakers, subject in each case to the various provisions of the statutes (*n*). A gas stove let to the tenant is within the words "fittings for the gas" in the earlier statute (*o*).

Water pipes,
meters and
apparatus.

253. Where the "undertakers" of waterworks have, on request, laid down communication pipes and other necessary works for the supply of water to a house of an annual value not exceeding £10, such pipes and other necessary works are not subject to distress, unless the occupier or owner shall have become the proprietor of such pipes or works (*p*); and where the Waterworks Clauses Act, 1863, is incorporated into special Acts meters, instruments for measuring water supplied, and pipes and apparatus for the conveyance, reception, and storage of water let for hire by the undertakers to the consumer are not liable to be distrained for the rent of the premises where they are used (*q*).

Electric light
meters,
fittings etc

254. Where the "undertakers" for electric lighting, as defined by statute, place in any premises not in their possession any electric lines, meters, accumulators, fittings, works, or apparatus belonging to them for the purpose of supplying electricity under the statute, these lines etc. are not subject to distress for rent of the premises where the same may be (*r*).

SUB-SECT 3.—*Things Conditionally Privileged (s).*(1) *In General.*

255. In certain cases goods can be distrained only if there is no other sufficient distress upon the premises (*t*). In such

Things
conditionally
privileged.

In *Easton Estate and Mining Co. v. Western Waggon and Property Co.* (1886), 54 L. T. 735, the magistrates found as a fact that the engine was in use on a branch line of the railway.

(*n*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 14, as dealt with by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66). The modern statute is the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 18; see also title GAS.

(*o*) *Gaslight and Coke Co. v. Hardy* (1886), 17 Q. B. D. 619, O. A., where the construction of the term "fittings" in both statutes is considered.

(*p*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 44.

(*q*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 14; see also title WATER SUPPLY.

(*r*) Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 25; Electric Lighting Act, 1909 (9 Edw. 7, c. 34), s. 16; see also title ELECTRIC LIGHTING.

(*s*) For privilege as to agisted cattle, see titles AGRICULTURE, Vol. I., p. 253; ANIMALS, *ibid.*, 389; as to growing crops, see title AGRICULTURE, *ibid.*, p. 254; as to beasts of the plough, *ibid.*, 252.

(*t*) *Simpson v. Hartopp* (1744), Willes, 512; 1 Smith, L. O., 11th ed., 437; *Muspratt v. Gregory* (1838), 3 M. & W. 677, Ex. Ch.; *Lyons v. Elliott* (1876), 1 Q. B. D. 210, *per* LUSH, J., at p. 215. In *Roberts v. Jackson* (1795), Peake, Add. Cas. 36, Lord KENYON held that goods conditionally privileged could be

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cases the onus of proof that no other sufficient distress can be found lies on the distrainer (*u*). Where on a fair estimate of the goods on the premises it is *bonâ fide* believed that the distress will not be satisfied without taking goods conditionally privileged, no action will lie against the distrainer for distraining thereon, even if ultimately it is shown that the remaining goods would have been sufficient in value to satisfy the landlord's claim, for the circumstances of the distress at the time it is made constitute the test, and no rule exists that if the distrainer in such a case acts *bonâ fide* and reasonably the other goods must be disposed of before those conditionally privileged are sold (*x*). A landlord can also seize goods conditionally privileged, if there is other sufficient distress on the premises (such as growing crops) which is not immediately available and may not prove of sufficient value ultimately (*y*).

(2) *Instruments of Trade.*

Tools of
trade or
husbandry.

256. The tools and instruments of a man's trade or profession and instruments of husbandry (if they be not in actual use) (*a*) are distrainable only if there are not other goods on the premises sufficient to countervail the arrears of rent (*b*). The axe of a carpenter, the books of a scholar, the kneading-trough of a baker, the stocking-frame or loom of a weaver, and even the cab of a cabdriver have been held to be within this rule (*c*). It is

seized in spite of the presence on the premises of a lodger's goods which were not within any rule of conditional privilege and which the distrainer had not seized.

(*u*) *Nargett v. Nias* (1859), 1 E. & E. 439. In this case it was also held that in the event of the unlawful seizure of goods conditionally privileged trespass lay as well as an action on the case. The distrainer in this case, however, only becomes a trespasser as to the excess, and if the goods thus illegally seized have not been sold, but have been returned, the owner of the goods can only recover nominal damages (*Harvey v. Pocock* (1843), 11 M. & W. 740; and see p. 198, *post*).

(*x*) *Jenner v. Volland* (1818), 6 Price, 3. Although this case was a decision on the statutory privilege of beasts of the plough, it is apprehended that this rule applies to conditional privilege generally; if the rule were otherwise, a tenant by collusive bidding at the sale could always subject his landlord to an action; besides, especially where goods seized are of an uncertain, imaginary, or fancied value, if insufficient distress is at first seized, the tenant may be subjected to a second seizure; see *Hutchins v. Chambers* (1758), 1 Burr. 579.

(*y*) *Piggott v. Birtles* (1836), 1 M. & W. 441. In this case *averia caruæ* had been seized in spite of the presence of a crop of corn, which could not be productive till a later period.

(*a*) See p. 137, *ante*.

(*b*) Co. Litt. 47 a; 3 Bl. Com. 10; *Simpson v. Hartopp* (1744), Willes, 512; 1 Smith, L. O., 11th ed., 437; *Gorton v. Falkner* (1792), 4 Term Rep. 565; *Roberts v. Jackson*, *supra*. As to other distress on the premises, see p. 141, *ante*.

(*c*) See Gilbert on Distresses, p. 33; *Lavell v. Richings*, [1906] 1 K. B. 480, and other instances cited, p. 139, *ante*, under the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21). In *Davies v. Aston* (1845), 1 O. B. 746, where this privilege was claimed for churns, clocks, carpets, beds, bolsters, blankets etc., the court stated that many of the articles named could not possibly be implements of husbandry. In *Fenton v. Logan* (1833), 9 Bing. 676, a thrashing machine was held distrainable because there was no evidence of other goods being on the premises, and in *Nargett v. Nias* (1859), 1 E. & E. 439, a farm labourer's spade and fork were admitted to be within this rule; in *Lavell v.*

doubtful whether ledgers, day-books, and papers of a business or professional man are distrainable under the rule (*d*).

SUB-SECT. 4.—*Goods of Undertenants, Lodgers, and Strangers.*

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What may
and what
may not be
Distrained.

Goods of
undertenants,
lodgers and
strangers.

257. The common law rule that a landlord could distrain for rent on all goods on the demised premises, even though not the property of the tenant (*e*), has been so encroached upon that it hardly exists as a practical proposition of law. As already noted, exceptions have been grafted on to the rule in the interests of trade, husbandry, and public convenience (*f*), and, further, a landlord may by his own act or conduct be estopped from setting up a right to seize the property of a third person. Thus, a landlord cannot distrain on the goods of a third person brought on the demised premises by himself (*g*), and by his conduct he may be held to have waived his right of distress on a stranger's goods, although there is no absolute contract between them (*h*), and when a stranger's goods (even a lodger's or sub-tenant's), being lawfully on the premises, are lawfully distrained by the landlord for rent due from someone else, the owner of the goods is entitled to be reimbursed their value from the person from whom the rent was due. (*i*)

258. By a recent statute (*k*) an additional measure of protection has been given to certain undertenants, and to lodgers, and any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof (*l*).

Law of
Distress
Amendment
Act, 1908.

259. For an undertenant to be within the protection of the Act he must be liable to pay, by equal instalments not less often than

Under-
tenants.

Richings, [1906] 1 K. B. 480, a cab was held to be an implement of the trade of a cabdriver.

(*d*) *Gauntlett v. King* (1857), 3 O. B. (N. S.) 59.

(*e*) See p. 132, *ante*.

(*f*) See p. 134, *ante*.

(*g*) *Paton v. Carter* (1883), Cab. & El. 183; in this case the goods had originally been brought on to the premises by the third party, and wrongly removed by the distrainer's servants before they were returned by the distrainer to the demised premises.

(*h*) *Horsford v. Webster* (1835), 1 Cr. M. & R. 696 (in this case the landlord was allowed to recover the proceeds of the sale of goods not in law the subject of distress, such goods being acquired by the third party; PARKER, B., however, dissented); *Giles v. Spencer* (1857), 3 O. B. (N. S.) 244. For waiver, see also *Welsh v. Rose* (1830), 6 Bing. 638.

(*i*) 3 Bl. Com. 8; *Exall v. Partridge* (1799), 8 Term Rep. 308; see also *Edmunds v. Wallingford* (1885), 14 Q. B. D. 811, O. A., at p. 814; and *Re Button, Ex parte Haviside*, [1907] 2 K. B. 180, O. A. See also title CONTRACT, Vol. VII., pp. 468, 469.

(*k*) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 1. Provisions almost exactly similar to those contained in ss. 1 and 2 of this Act were contained in the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), but restricted to lodgers only. The latter Act was by s. 8 of the Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), repealed, "wherever and so far as this Act applies." The exact effect of this repeal is not obvious, but, inasmuch as the provisions of the two Acts in regard to lodgers are almost exactly similar, it is thought unnecessary to state those of the Act of 1871, and the cases decided under the previous Act are treated as authorities for the interpretation of the later Act.

(*l*) *Ibid.*, s. 1.

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every actual or customary quarter of a year, a rent which would return in any whole year the full annual value of the premises or the part thereof comprised in the undertenancy; but the protection does not extend to an undertenancy created in breach of any covenant or agreement in writing between the landlord and his immediate tenant; nor does it extend to an undertenancy created under a lease existing at the date of the passing of the Act contrary to the landlord's wish in that behalf, where such wish has been expressed in writing and delivered at the premises within a reasonable time after the circumstances have come, or with due diligence would have come, to his knowledge (*m*).

Lodgers.

260. The Act does not define the term "lodger," but it is not included in the terms "tenant" and "undertenant" (*n*), and probably the word is used in its popular meaning. The onus of proving that he is within the statute lies on the person claiming protection as a lodger (*o*). Whether the facts constitute the claimant a lodger is a question to be decided by the judge, on the facts found by the jury (*p*). A lodger may be an undertenant at the same time; the immediate tenant must retain power and dominion over the house, as the master of a house usually does in this country. The lodger may have the exclusive right to the rooms he occupies and uncontrolled right of ingress and egress, but the person letting must have a right to interfere with the general control of the house; the lodger may occupy a very substantial part, but not the whole, of the house (*q*). It is not absolutely essential that the immediate

(*m*) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), ss. 1, 5. The date of the passing of this Act was December 21st, 1908, although the statute did not come into operation until July 1st, 1909; apparently the exemption applies to underleases made before the earlier date, but whether in such case it was the landlord's duty to give notice before the latter date seems doubtful.

(*n*) *Ibid.*, s. 9.

(*o*) *Morton v. Palmer* (1881), 51 L. J. (Q. B.) 7, O. A. See also *Thwaites v. Wilding* (1883), 12 Q. B. D. 4, O. A., *per* BOWEN, L.J., at p. 7. See *Bensing v. Kumsey* (1898), 14 T. L. R. 344.

(*p*) *Morton v. Palmer*, *supra*, *per* BRETT, L.J., at p. 9; and see *per* LINDLEY, L.J., at p. 11. The question of the exact dominion or control of the landlord is one of fact to be decided by a jury or justices who are judges of fact (*Ness v. Stephenson* (1882), 9 Q. B. D. 245, *per* FIELD, J., at p. 249).

(*q*) See the cases quoted below, which, however, are either cases decided under the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), or registration cases; and as to the right of control being the essential point, see *Kent v. Fittall*, [1906] 1 K. B. 60, 70, 76, O. A. (a registration case). In *Phillips v. Henson* (1877), 3 C. P. D. 26, where the lodger occupied the whole of the house, save a housekeeper's room occupied with a few attics by the latter, who slept on the premises, the jury were held entitled to find the lodger within the statute. In *Morton v. Palmer*, *supra*, where the immediate tenant, although originally in occupation, had let the whole of the house in question to the plaintiff and to one other, a new trial was ordered to determine whether such tenant had resigned the possession of and control over the house. In *Toms v. Lockett* (1847), 5 C. B. 23, MAULE, J., said, "The distinction between lodger and occupier is that 'where the owner of a house takes some person into his house, who occupies a room, and has the right of ingress and egress, yet if the owner retains his general character of master of the house that person so occupying is a lodger'; see also judgment of BLACKBURN, J., in *Allan v.*

tenant or his agent sleeps on the premises (*r*), but the lodger must do so to come within the protection of the statute, so that mere occupation of premises for business purposes in the daytime is insufficient (*s*).

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261. The protection given by the Act does not apply (*t*) to:—

(a) Goods belonging to the husband or wife of the tenant whose rent is in arrear; (b) Goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant; (c) Goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof (*u*); (d) Any live stock to which the Agricultural Holdings Act, 1908, s. 29, applies (*x*); (e) Goods of a partner of the immediate tenant; (f) Goods (not being goods of a lodger) upon premises where any trade or business is carried on in which both the immediate tenant and the undertenant have an interest; (g) Goods (not being goods of a lodger) on premises used as offices or warehouses where the owner of the goods neglects for one calendar month after notice (which shall be given in a like manner as a notice to quit) to remove the goods and vacate the premises (*y*); (h) Goods belonging to and in the offices of any company or corporation on premises the immediate tenant whereof is a director or officer or in the employment of such company or corporation (*a*).

Goods ex-
cluded from
the protection
of the Act.

It is competent for a stipendiary magistrate, or two justices, upon hearing the parties, to determine whether any goods are in fact goods included in exceptions, (*e*), (*f*), (*g*), (*h*) (*b*).

Liverpool Overseers (1874), L. R. 9 Q. B. 180; see also other cases under title ELECTIONS. In *Ness v. Stephenson* (1882), 9 Q. B. D. 245, the court held the respondent to be a lodger where she occupied the house, except a shop, herself took in lodgers, and acted as caretaker of the shop on behalf of the immediate tenant. In *Bradley v. Baylis* (1881), 8 Q. B. D. 195, 210, C. A., at p. 219, JESSEL, M.R., said: "As to unfurnished lodgings, where the owner of the house does not let the whole of it, but retains a part for his own residence, and where he does not let out the passages, staircase, and outer doors, but gives the inmates a right of ingress and egress, and retains to himself the general control with the right of interfering, such as to turn out trespassers, the inmate, whether he has or has not the exclusive use of a room, is a lodger"; BRETT, L.J., on p. 235, also speaks of an owner, not residing in a house, but by his servants performing duties or retaining control; see also *per* COTTON, L.J., p. 241.

(*r*) See *Bradley v. Baylis* (1881), 8 Q. B. D. 195, 220, 241, C. A., and *Kent v. Fittall*, [1906] 1 K. B. 60, 70, 76, C. A. (both registration cases); *Morton v. Palmer* (1881), 51 L. J. (Q. B.) 7, C. A.; *Page v. Vallis* (1903), 19 T. L. R. 393.

(*s*) *Heawood v. Bone* (1884), 13 Q. B. D. 179.

(*t*) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 4.

(*u*) For the interpretation given to this sentence in bankruptcy matters, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 173—181.

(*x*) See Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 29, and p. 140, *ante*; also title AGRICULTURE, Vol. I., p. 252.

(*y*) For notice to quit, see title LANDLORD AND TENANT.

(*a*) See for company and corporation and interpretation of director and officer, titles COMPANIES, Vol. V.; CORPORATIONS, Vol. VIII., p. 325.

(*b*) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 2. Compare the powers (p. 147, *post*) of a magistrate or magistrates after service of the declaration and inventory: presumably a civil action is necessary to test questions arising under headings (*a*), (*b*), (*c*), (*d*).

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and what
may not be
Distrained.**

**Declaration
by person
protected by
the Act.**

**Undertaking
to pay rent.**

**Inventory
must be
annexed.**

**When decla-
ration to be
made.**

262. If any superior landlord (c) levies or authorises the levy of a distress on any goods of any person protected by the Act for arrears of rent due to such superior landlord by his immediate tenant (d), any person so protected may serve such superior landlord, or the bailiff or other agent employed by him to levy such distress, with a declaration in writing, setting forth that such immediate tenant has no right of property or beneficial interest in the goods so distrained or threatened to be distrained upon, and that such goods are the property or in the lawful possession of such person, and are not goods or live stock to which the Act is expressed not to apply (e). If the person serving the declaration is an undertenant or lodger he must also set forth the amount of rent (if any) then due to his immediate landlord, and the amount of and times at which future instalments of rent will become due, and the declaration must contain an undertaking to pay to the superior landlord any rent so due or to become due to his immediate landlord until the arrears of rent in respect of which the distress was levied or authorised to be levied have been paid off (f). The declaration need not, if no rent is due, in terms say so, and if a declaration does not state that any rent is due it will be read as stating that no rent is due (g).

To the declaration must be annexed a correct inventory subscribed by the person so claiming protection of the goods referred to in the declaration; and if any such person makes or subscribes such declaration and inventory knowing the same or either of them to be untrue in any material particular he will be guilty of a misdemeanour (h).

The declaration must be subsequent to the seizure or threat of seizure, so that a declaration made in consequence of one distress is not available for a second distress, even if the facts in the declaration originally made are still correct at the time of the second distress (i). The statute does not specify any time within which the declaration must be served, but if the landlord proceeds to sell within the five clear days mentioned in 2 Will. & Mar. sess. 1, c. 5, s. 2 (j), an action will lie at the suit of the

(c) "Superior landlord" includes a landlord in cases where the goods in question are not those of an undertenant or lodger (Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 9).

(d) As to the meaning of "immediate tenant," see p. 144, *ante*.

(e) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 1. Goods include furniture and chattels. Beneficial interest is not defined in the Act.

(f) *Ibid.*; as to the undertaking, see p. 147, *post*. For form of declaration by lodger, see Encyclopædia of Forms, Vol. VII., p. 704.

(g) *Ex parte Harris* (1885), 16 Q. B. D. 130, C. A. (a case under the Act of 1871, where it was also held that the declaration need not state that the declarant is a lodger, that Act applying to lodgers only).

(h) *Ibid.*; where a proper declaration was made and signed with a statement that "the list of articles hereto annexed is a correct inventory," and the inventory was written on the same piece of paper, but not otherwise signed or subscribed, the inventory was held (under the Act of 1871) sufficiently subscribed within the Act (*Godlonton v. Fulham and Hampstead Property Co.*, [1905] 1 K. B. 431).

(i) *Thwaites v. Wilding* (1883), 12 Q. B. D. 4, C. A., confirming decision of divisional court (1883), 11 Q. B. D. 421. The rights of the parties must be ascertained at the moment the distress is levied (*per* BOWEN, L.J., at p. 7).

(j) See p. 18

lodger, although the lodger has not served any declaration and inventory (*k*).

263. If any superior landlord, or any bailiff or other agent employed by him, after being served with the before-mentioned declaration and inventory, and in the case of an undertenant or lodger, after such undertaking as is mentioned above has been given, and after payment or tender in accordance therewith of rent then due (if any), levies or proceeds with a distress on the goods of any person protected by the Act, he will be guilty of an illegal distress, and any person so protected may apply to a justice of the peace for an order for the restoration to him of such goods: the hearing of the application will be before a stipendiary magistrate, or before two justices where there is no stipendiary magistrate (*l*). The magistrate or justices cannot award damages for illegal distress (*m*). The superior landlord will also be liable to an action at law at the suit of the person so protected (*n*), and so will the bailiff (*o*).

SECT. 5.
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and what
may not be
Distrained.

Penalty for
disregard of
Act.

264. In cases where the rent of the immediate tenant of the superior landlord is in arrear, such superior landlord may serve upon any undertenant or lodger a notice (by registered post addressed to such undertenant or lodger upon the premises) stating the amount of such arrears of rent, and requiring all future payments of rent, whether already accrued due or not, by such undertenant or lodger to be made direct to the superior landlord, until such arrears shall have been duly paid, and such notice will operate to transfer to the superior landlord the right to recover, receive, and give a discharge for such rent (*p*).

Procedure to
avoid distress.

265. For the purposes of the recovery of any sums payable by an undertenant or lodger to a superior landlord under such a

Payment to
constitute
rent.

(*k*) *Sharp v. Fowle* (1884), 12 Q. B. D. 385. In this case the declaration was served the day after the sale; CAVE, J. said at p. 388, "It seems to me immaterial when the subsequent declaration was actually served, for after the sale of the goods the service of the declaration became an idle ceremony." In any event a lodger has an action against the landlord for excessive distress (see *Fisher v. Algar* (1826), 2 C. & P. 374).

(*l*) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 2. The magistrate inquires into the truth of both the declaration and inventory and makes such order for the recovery of the goods, or otherwise, as may be just.

(*m*) *Lowe v. Dorling & Son*, [1905] 2 K. B., 501, *per* Lord ALVERSTONE, O.J., at p. 504.

(*n*) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 2.

(*o*) *Lowe v. Dorling & Son*, [1906] 2 K. B. 772, O. A. See also judgment of Lord ALVERSTONE, O.J., in the divisional court, [1905] 2 K. B. 501; in the C. A. COLLINS, M.B., dissented. In *Page v. Vallis* (1903), 19 T. L. R. 393, DARLING, J., held that no such action would lie against the bailiff or solicitor acting, but this decision must be regarded as overruled by the later case.

(*p*) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 6. This provision is quite new; it is noticeable that nothing in this section apparently invalidates a distress on the immediate tenant after such notice has been given or acted upon, although the marginal note in the statute says "to avoid distress"; nor is any provision made for an undertenant or lodger to take proceedings corresponding to interpleader, if informed by the immediate tenant that the superior landlord's notice is in any way wrongful.

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notice or under the undertaking before mentioned, the undertenant or lodger is deemed to be the immediate tenant of the superior landlord, and the sums payable are to be deemed to be rent; but, where the undertenant or lodger has, in pursuance of any such notice or undertaking as aforesaid, paid any sums to the superior landlord, he may deduct the amount thereof from any rent due, or which may become due from him to his immediate landlord, and any person (other than the tenant for whose rent the distress is levied or authorised to be levied) from whose rent a deduction has been made in respect of such payment may make the like deductions from any rent due or which may become due from him to his immediate landlord (q).

SECT. 6.—When Distress may be made.

Earliest time
for distress.

266. A landlord may not distress until rent is in arrear (i.e., until it is ascertained, due, and unpaid) (r), but rent, although previously demandable, is not actually due until the last instant of the due day, so that the earliest period at which a distress for rent may be made is on the day following that on which it falls due (s). Rent is *prima facie* not due till the end of each year of a term, but in practice the due date is generally provided by agreement (t), and by this means or by custom rent may be payable in advance, so that in default of payment distress is legitimate at the beginning of each quarter or other period (u). Agreement may also postpone the right to distress (x).

When a
demand is
necessary.

267. The making of a distress in itself constitutes a demand, so that an actual previous demand is generally unnecessary, but by agreement it may be provided that no distraint may be made without a previous demand, or only at a fixed or reasonable time after demand (y). A demand in fact is also requisite in the case of a penal rent, or where the time for payment is at the election of

(q) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 3. The superior landlord, if this notice is not acted upon, is apparently entitled to distress on the undertenant or lodger direct.

(r) 3 Bl. Com. s. 7.

(s) Co. Litt. 47 b; Com. Dig. tit. Distress, A, 2; Gilbert on Distresses, p. 50; *Clun's Case* (1613), 10 Co. Rep. 127 a; *Duppa v. Mayo* (1670), 1 Wms. Saund. 276, 287; *Rockingham (Lord) v. Oxenden* (1711), 2 Salk. 578; *Cutting v. Derby* (1776), 2 Wm. Bl. 1075, per BLACKSTONE, J., at p. 1077; *Leffley v. Mills* (1791), 4 Term Rep. 170, 174; *Dibble v. Bowater* (1853), 2 E. & B. 564.

(t) See title LANDLORD AND TENANT.

(u) *Lee v. Smith* (1854), 9 Exch. 662, and *Buckley v. Taylor* (1788), 2 Term Rep. 600, where a custom was proved that a half-year's rent was payable on the day of the tenant's entry into possession; see also *Walsh v. Lonsdale* (1882), 21 Ch. D. 9, C. A., and p. 123, ante.

(x) *Giles v. Spencer* (1857), 3 C. B. (N. S.) 244; *Horsford v. Webster* (1835), 1 Cr. M. & R. 696. But to negative the common law right of distress express words must be inserted; an affirmative special right of distress does not oust the common law right (*Re River Swale Brick and Tile Works, Ltd.* (1883), 52 L. J. (CH.) 638).

(y) *Browne v. Dunnery* (1617), Hob. 208; *Kind v. Ammery* (1618), Hut. 23; *Witty v. Williams* (1864), 12 W. R. 755; see p. 121, ante.

the landlord, although no interval may on the construction of the agreement necessarily intervene between demand and the levy (a).

268. The latest time for distress is considered hereafter (b), but in any event a landlord cannot distrain after his reversion has expired (c), nor after he has resumed actual possession under an equitable right of re-entry (d).

269. Distress for rent may not be at night (e); night for this purpose is the interval between sunset and sunrise, and not between dusk and daybreak (f), and, if necessary, the time of sunset and sunrise must be proved as a fact (g); a landlord who prevents removal by a third party during the night so that he may distrain in the morning is not guilty of conversion (h), though he may be liable to an action of trespass (i); nor may a distress take place on Sunday (j), although a distress thereon is an irregularity which may be waived (k), and although a distress for rent due on a Sunday may be levied on the Monday following (l).

270. Distress may be made for any rent in arrear or due upon any lease after the determination of such lease in the same manner as it might have been made but for the determination of such lease whether the lease be for life, for years, or at will (m); provided

SECT. 6.
When
Distress
may be
made.

—
Latest time
for distress.

Must not be
at night or on
Sunday.

Statutory
distress after
expiration of
term.

(a) *Mallam v. Arden* (1833), 10 Bing. 299; *primâ facie* the tenant by his bargain ought to be at hand to pay his rent when due. See also *Clarke v. Holford* (1848), 2 Car. & Kir. 540; *Williams v. Holmes* (1853), 8 Exch. 861; *London and Westminster Loan and Discount Co. v. London and North Western Rail. Co.*, [1893] 2 Q. B. 49, where the question of "rent in advance if required by the landlord" was considered.

(b) See p. 151, *post*.

(c) See p. 125, *ante*.

(d) *Murgatroyd v. Silkstone and Dodsworth Coal and Iron Co., Ex parte Charlesworth* (1895), 65 L. J. (CH.) 111. In this case the landlord had entered under an interim order of the court, and was thereby held disentitled to distrain on the goods of third parties on the premises in question.

(e) Co. Litt. 142 a; Com. Dig. tit. Distress, A (2). Distress for damage feasant may be at night, otherwise the cattle may escape (*Gilbert on Distresses*, p. 49; *Tinckler v. Prentice* (1812), 4 Taunt. 549, *per GIBBS, J.*, at p. 554; *Aldenburgh v. Peaple* (1834), 6 C. & P. 212; *Lamb v. Wall* (1859), 1 F. & F. 503).

(f) *Tutton v. Darke* (1860), 5 H. & N. 647; *Nixon v. Freeman* (1860), *ibid.* 652.

(g) *Collier v. Nokes* (1849), 2 Car. & Kir. 1012, as the court does not take judicial notice of the hours in the calendar. In *Tutton v. Darke*, *supra*, the question was not decided whether the time of sunset or sunrise must be determined astronomically or by practical observation.

(h) *England v. Cowley* (1873), L. R. 8 Exch. 126.

(i) *Ibid.*, *per KELLY, O.B.*, at p. 132.

(j) Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 6; *Werth v. London and Westminster Loan and Discount Co.* (1889), 5 T. L. R. 521.

(k) See last-mentioned case, which, however, has been criticised, and *Perring & Co. v. Emerson*, [1906] 1 K. B. 1, *per WILLS, J.*, at p. 6.

(l) *Child v. Edwards*, [1909] 2 K. B. 753, where RIDLEY, J., held that by the common law payment of rent on a Sunday was not illegal.

(m) Landlord and Tenant Act, 1709 (8 Ann. c. 14 (Ruff. c. 18 in Revised Statutes)), s. 6. Before this statute it was usual to provide that the last half-year's rent should be paid on some day before the determination of the lease, so as to enable the landlord to distrain before the removal of the tenant; see Co. Litt. 47 b,

SECT. 6.
When
Distress
may be
made.

Possession
must be
of tenant.

that such distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom such arrears became due (*n*).

The possession in question must be that of the tenant, unless an executor or administrator enters on the land as such representative during the term and holds over; mere continuance of occupation by a testator's wife or servant does not constitute a possession by the tenant within the meaning of the statute, even if the wife or other occupier becomes the representative of the late tenant after a distress (*o*). In any event, the statute cannot apply to a tenancy at will which has been determined by the tenant's death (*p*).

New tenancy.

Nor does the statute apply where a new tenancy is created between the same parties before or at the expiration of the old tenancy, even if the new tenancy relates only in part to the original premises; the test is whether the tenant continues in possession under a new right and title or not (*q*).

Determina-
tion of
tenancy.

The statute does not apply where the tenancy has been put an end to by a tenant's own wrongful disclaimer or by forfeiture (*r*), but it applies to determination by lapse of time, and, probably, by notice to quit (*s*); the continuance of the possession need not be tortious (*t*), and is not confined to a holding over of the whole of the premises (*a*).

Holding over.

Possession by the tenant after determination of the term is evidenced by the keeping of the premises as the party's own, to the exclusion of other people; a small thing, if left on the premises with a view to maintaining the tenant's retention of possession, will

(*n*) Landlord and Tenant Act, 1709 (8 Ann. c. 18), s. 7; see *Beavan v. Delahay* (1788), 1 Hy. Bl. 5.

(*o*) *Braithwaite v. Cooksey* (1790), 1 Hy. Bl. 465, where the administratrix actually became tenant under the lease, while in *Turner v. Barnes* (1862), 2 B. & S. 435, at the time of the distress, no letters of administration had been taken out, and the widow and servants in occupation at the time were held technically to be trespassers, as it was very doubtful if the administration could relate back to the time of distress.

(*p*) *Turner v. Barnes*, *supra*; see also *Scobie v. Collins*, [1895] 1 Q. B. 375, *per* VAUGHAN WILLIAMS, J., at p. 377.

(*q*) *Wilkinson v. Peel*, [1895] 1 Q. B. 516. If this rule were otherwise, the tenant would be liable to two rights of distress, one under the old and one under the new agreement (see judgment of KENNEDY, J., given at p. 520). However, a mere holding over after a notice to quit does not imply a new tenancy without any payment of rent or other overt act as evidence thereof (*Jenner v. Clegg* (1832), 1 Mood. & R. 213; *Alford v. Vickery* (1842), Car. & M. 280). But see *Tayleur v. Wildin* (1868), L. R. 3 Exch. 303, where a new tenancy was created in spite of a notice to quit, which had not been waived by both parties.

(*r*) *Doe d. David v. Williams* (1835), 7 C. & P. 322; *Grimwood v. Moss* (1872), L. R. 7 C. P. 360, *per* WILLES, J., at p. 365; *Kirkland v. Briancourt* (1890), 6 T. L. R. 441.

(*s*) *Doe d. David v. Williams*, *supra*.

(*t*) *Nuttall v. Staunton* (1825), 4 B. & C. 51, where the holding over was by permission of the landlord; *Taylorson v. Peters* (1837), 7 Ad. & El. 110, *per* PATTERSON, J., at p. 114; *Gray v. Stait* (1883), 11 Q. B. D. 668, O. A., *per* CORTON, L.J., at p. 673.

(*a*) *Nuttall v. Staunton*, *supra*. The distress, however, must be made on that part where possession is retained.

serve, but the mere fact of part or of the whole of the tenant's goods being left on the demised premises does not in itself conclusively indicate that the tenant is continuing in possession (b).

SECT. 6.
When
Distress
may be
made.

Continuing
possession.

271. Where by custom or agreement the interest and connection between the landlord and the tenant is extended beyond the term, and for this purpose the possession of the tenant is allowed to continue, the tenancy is by such custom or agreement so far prolonged during such further possession as to allow the landlord to distrain (c). When a tenant, under the Landlord and Tenant Act, 1851 (d), holds over in lieu of emblements, the rent may be recovered by distress (e).

272. Except in the cases above stated, a landlord is not entitled to distrain after the expiration of the term or tenancy, even although the tenant continues in occupation after notice to quit has expired (f).

Distress after
expiration of
tenancy.

SECT. 7.—How the Right to Distrain may be lost.

273. The right to distrain, though it may have come into existence, may be lost in several ways.

An assignment by the landlord of his reversion, either absolutely or by way of mortgage, destroys the remedy by distress for arrears of rent due at the date of assignment (g). The assignment gives the assignee the title to the next rent due after the assignment, but not to the antecedent rent, for the latter is severed from the reversion and becomes a mere chose in action (h). Inasmuch, however, as the right of distress is a legal right and depends on the possession of a legal reversion, it is not taken away by a mere agreement by a person to sell or assign his reversionary interest in the premises (i). But after a sale and payment of the purchase-

By assign-
ment of the
reversion.

(b) *Taylorson v. Peters* (1837), 7 Ad. & El. 110, where a tenant went away merely leaving a cow and some pigs behind; *Gray v. Stait* (1883), 11 Q. B. D. 668, C. A.; see especially the judgment of BOWEN, L.J., therein at p. 673.

(c) *Beavan v. Delahay* (1788), 1 Hy. Bl. 5; *Lewis v. Harris* (1778), 1 Hy. Bl. 7, note, where the custom was for an outgoing tenant to leave his away-going crop in the barn of a farm; *Boraston v. Green* (1812), 16 East, 71; *Knight v. Bennett* (1826), 3 Bing. 364, where the tenant was allowed to continue possession to thrash his corn and fodder his cattle; *Griffiths v. Puleston* (1844), 13 M. & W. 358, where the outgoing tenant was entitled to a share of the crop sown during his tenancy, and the custom was for him to cut the crop and keep the fences in repair until the crop was cut and carried away. For a modern case as to continuing possession after expiration of the term under a tenant right, see *Re Powers, Manisty v. Archdale* (1890), 63 L. T. 626.

(d) 14 & 15 Vict. c. 25, s. 1; see title LANDLORD AND TENANT.

(e) *Haines v. Welch* (1868), L. R. 4 C. P. 91.

(f) Co. Litt. 47 b; Com. Dig. tit. Distress, A, 2: "for he is not in, in privity of the lease" (*Pennant's Case* (1596), 3 Co. Rep. 64 a; *Williams v. Stiven* (1846), 9 Q. B. 14; *Turner v. Barnes* (1862), 2 B. & S. 435, per CROMPTON, J., at p. 450.

(g) See — *v. Cooper* (1768), 2 Wils. 375; *Smith v. Mapleback* (1786), 1 Term Rep. 441; *Smith v. Day* (1837), 2 M. & W. 684; *Staveley v. Alcock* (1851), 16 Q. B. 636; and p. 152, *post*.

(h) *Flight v. Bentley* (1835), 7 Sim. 149; and if one joint tenant convey away his interest after the rent becomes due it deprives the other joint tenants of the right of distress (*Staveley v. Alcock* (1851), 16 Q. B. 636). See further, p. 126, *ante*.

(i) *Manchester Brewery Co. v. Coombe*, [1901] 2 Ch. 608.

SECT. 7.
How the
Right to
Distrain
may be
lost.

money, and before a conveyance of the property, the vendor is a trustee for the purchaser, and, although he has the legal estate and therefore the right to distrain, he will be restrained from exercising his legal right in such a way as to prejudice the purchaser (j). A contract by the landlord to sell the freehold of the premises to the tenant suspends the right of distress pending completion (k).

The grant of a second lease to commence on the expiration of an existing lease only confers an *interesse termini*, and creates no interest in the property until the arrival of the day appointed for the commencement. It does not amount to a parting with the reversion in the meantime or take away the right of distress under the first lease (l). The application of the rule that an underlease for the whole of a termor's interest will destroy the right of distress and the rule that an *interesse termini* creates no estate has the effect that if a lessee with an existing lease and a further reversionary lease of the premises underlets for a term exceeding the existing lease he cannot during the currency of the existing lease distrain upon his undertenant, because he has no reversion (m).

By deter-
 mination of
 lessor's
 interest.

274. Where the lessor is himself only a termor his right to distrain ceases with the determination of his interest (n).

By expiration
 of the
 tenancy.

275. The common law right to distrain expires with the tenancy. This right is by statute extended for six months after the determination of the tenancy (o), but unless the remedy is exercised within the statutory limit (p) the right to distrain will be lost notwithstanding the tenant may continue in occupation under a new tenancy (q).

By surrender
 of the
 reversion.

276. When the reversion is surrendered or merges, the rent so far as regards the person who was entitled to that reversion becomes extinguished, and his right of distress for arrears due at the date of the surrender or merger is lost (r). Where, however, a lease out of which underleases have been derived is surrendered for the purpose of a renewal the remedy by way of distress for rent due from the underlessees remains the same as if the reversion under the original lease had been kept on foot (s), and in the case of any other surrender or merger the estate which, as against the underlessee,

(j) *Re Powers, Manisty v. Archdale* (1890), 63 L. T. 626.

(k) *Ellis v. Wright* (1897), 76 L. T. 522, O. A.

(l) *Smith v. Day* (1837), 2 M. & W. 684.

(m) *Lewis v. Baker*, [1905] 1 Ch. 46.

(n) *Burne v. Richardson* (1813), 4 Taunt. 720; and where the lessor has only some other defeasible interest the expiration of such interest determines his right to distrain (*Hopcraft v. Keys* (1833), 9 Bing. 613).

(o) See p. 149, *ante*.

(p) See *Williams v. Stiven* (1846), 9 Q. B. 14.

(q) See *Stanfill v. Hickes* (1697), 1 Ld. Raym. 280; and no right of distress would arise in the case of a tenant holding over in respect of the rent accruing after the expiration of the tenancy without evidence of the renewal of the tenancy (*Jenner v. Clegg* (1832), 1 Mood. & R. 213).

(r) *Webb v. Russell* (1789), 3 Term Rep. 393; *Threr v. Barton* (1570), Moore (x.b.), 94; *Thorn v. Woolcombe* (1832), 3 B. & Ad. 586.

(s) See Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 6.

confers the next vested right to the land, will become the reversion on the underlease, with all incidents, including the right of distress (*t*).

277. Payment of the rent or its equivalent extinguishes the right to distrain (*a*). But the taking of a bill of exchange or promissory note for the rent will not until payment is actually made operate to take away or postpone the landlord's right to distrain, unless there is an agreement to that effect (*b*), though it is some evidence of an agreement by the landlord to suspend his remedy by distress during the currency of the bill or note (*c*). An unsatisfied judgment on the bill will not interfere with the right of distress (*d*), but it will be otherwise if the landlord discounts the bill (*e*). The remedy by distress is not affected by an agreement to take interest on the arrears (*f*).

278. If the landlord recovers judgment for the rent, even though it is unsatisfied, the remedy by distress is lost, since the rent is merged in the judgment (*g*).

279. Tender of the rent, with any proper costs, will deprive the landlord, according to the stage at which it is made, either of the right to distrain or to further pursue the remedy by distress, thus:—A tender to the landlord or his authorised agent by the tenant or his agent of the rent without any costs (even though the landlord has incurred costs) before seizure, extinguishes the right to distrain, and makes the subsequent distress illegal (*h*). A tender after distress taken, but before it is impounded or removed, of the rent and costs of the distress makes the subsequent removal or detainer unlawful (*i*). Even after impounding, a tender of the rent and the proper expenses of the distress made within the time allowed for replevying makes a subsequent sale of the distress irregular and gives a right of action for so selling (*k*). In the case of growing crops seized under the Distress for Rent Act, 1737 (*l*),

SECT. 7.

How the
Right to
Distrain
may be
lost.

By payment
of the rent.

By judgment
for the rent.

By tender
of rent.

(*t*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 9; *Ecclesiastical Commissioners for England v. Tremer*, [1893] 1 Ch. 166.

(*a*) As to setting off payments on behalf of landlord, see p. 157, *post*.

(*b*) *Davis v. Gyde* (1835), 2 Ad. & El. 623; *Harris v. Shipway* (1744), Buller, Nisi Prius, 178.

(*c*) *Palmer v. Bramley*, [1895] 2 Q. B. 405, C. A.

(*d*) *Drake v. Mitchell* (1803), 3 East, 251.

(*e*) *Parrott v. Anderson* (1851), 7 Exch. 93.

(*f*) *Skerry v. Preston* (1813), 2 Chitt. 245.

(*g*) *Chancellor v. Webster* (1893), 9 T. L. R. 568; *Potter v. Bradley & Co.* (1894), 10 T. L. R. 445. But an unsatisfied judgment upon a collateral security (*Wegg Prosser v. Evans*, [1895] 1 Q. B. 108, C. A.), or on a bill of exchange (*Drake v. Mitchell* (1803), 3 East, 251), for the rent would not extinguish the right of distress.

(*h*) *Bennett v. Bayes* (1860), 5 H. & N. 391; *Branscomb v. Bridges* (1823), 1 B. & C. 145.

(*i*) *Loring v. Warburton* (1858), E. B. & E. 507; *Vertue v. Beasley* (1831), 1 Mood. & R. 21; *Six Carpenters' Case* (1610), 8 Co. Rep. 146a; 1 Smith, L. O., 11th ed., 132; *Evans v. Elliott* (1836), 5 Ad. & El. 142.

(*k*) *Johnson v. Upham* (1859), 2 E. & E. 250, overruling *Ellis v. Taylor* (1841), 8 M. & W. 415; compare *Ladd v. Thomas* (1840), 12 Ad. & El. 117; *Singleton v. Williamson* (1862), 7 H. & N. 747.

(*l*) 11 Geo. 2, c. 19.

SMOT. 7.
How the
Right to
Distrain
may be
lost.

To whom
tender
may be made.

By whom.

Must be un-
conditional.

Retention
after pay-
ment.

Second
distrain.

a tender made before they are ripe and cut or gathered puts an end to the distress (*m*).

280. The tender may be made to the landlord himself notwithstanding he has authorised a broker to distrain and left the matter in his hands (*n*), or to his agent authorised to receive the rent though such agent has delivered a distress warrant to the bailiff (*o*), and tender may be made to the bailiff authorised to distrain notwithstanding his employer may have instructed him not to receive the rent (*p*). But tender to a mere man in possession who is not the bailiff holding the warrant to distrain is not good (*q*).

The tender need not be made by the tenant; it may be made by a third person with the tenant's prior authority or subsequent ratification. But if a stranger, without any interest in the property, voluntarily tenders the rent, the landlord is not bound to receive it (*r*), though the subsequent adoption of the act by the tenant would make the tender valid.

The tender must be of the proper amount and be made unconditionally, so that the landlord may accept it without prejudice to his right to recover more if actually due (*s*). The question of whether or not a tender was made unconditionally is one of fact for a jury (*t*). Accompanying words which do not require the landlord to make any admission as to the amount of rent due as a condition to its receipt do not amount to a conditional tender (*u*).

When a landlord after a lawful distress and impounding accepts the rent in arrear and the charges of distress, he is not liable for merely retaining possession of the goods, but if he actually refuses to deliver them up to the tenant he will be liable for conversion (*a*).

281. A distress is, ordinarily, a bar to a second distress for the same rent (*b*).

(*m*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 9; see *Owen v. Legh* (1820), 3 B. & Ald. 470, and title AGRICULTURE, Vol. I., p. 254.

(*n*) *Smith v. Goodwin* (1833), 4 B. & Ad. 413.

(*o*) *Bennett v. Bayes* (1860), 5 H. & N. 391.

(*p*) *Hatch v. Hale* (1850), 15 Q. B. 10.

(*q*) *Boulton v. Reynolds* (1859), 2 E. & E. 369.

(*r*) Co. Litt. 206 b; *Watkins v. Ashwicke* (1589), Cro. Eliz. 132.

(*s*) *Finch v. Miller* (1848), 5 C. B. 428.

(*t*) *Marsden v. Goode* (1845), 2 Car. & Kir. 133.

(*u*) *Bowen v. Owen* (1847), 11 Q. B. 130; *Bull v. Parker* (1842), 2 Dowl. (N. S.) 345; *Jones v. Bridgman* (1878), 39 L. T. 500. Thus, a tender of a sum if the plaintiff who claimed a larger sum would accept it as the whole balance really due (*Evans v. Judkins* (1815), 4 Camp. 156), tender of a sum in payment of the half-year's rent due at Lady Day (*Hastings (Marquis) v. Thorley* (1838), 8 O. & P. 573), and a tender of a quarter's rent with a demand for a receipt to a particular day, it being in dispute whether one or two quarters rent was due (*Finch v. Miller*, *supra*; compare *Richardson v. Jackson* (1841), 8 M. & W. 298), have been held to be invalid tenders. On the other hand, "I have sent you £26 to settle one year's rent of N." (*Bowen v. Owen*, *supra*); "Here is your quarter's rent" (*Jones v. Bridgman*, *supra*, disapproving *Hastings (Marquis) v. Thorley*, *supra*), and a tender under protest (*Scott v. Uxbridge and Rickmansworth Rail. Co.* (1866), L. R. 1 C. P. 596; *Greenwood v. Sutcliffe*, [1892] 1 Ch. 1, C. A.; *Manning v. Lunn* (1845), 2 Car. & Kir. 13), have been held to be unconditional tenders.

(*a*) *West v. Nibbs* (1847), 4 C. B. 172.

(*b*) See p. 188, *post*.

282. The right to distrain may be lost, postponed, or suspended by an express or implied agreement by the landlord not to distrain, or by conduct on the part of the landlord inducing the owner of chattels to believe that he will not take them under a distress (c).

SECT. 7.
How the
Right to
Distrain
may be
lost.

SECT. 8.—Where Distress may be made.

283. The general rule is that a distress can only be made of goods found upon some part of the premises out of which the rent issues (d). This, however, does not exclude a distress on that part of a public highway which by presumption of law is included in the demise (e).

General rule
that distress
must be made
on demised
premises.

Goods upon any part of the demised premises may be distrained for the whole rent (f). But if several parcels of property are let to the same person by separate demises at separate rents, though in the same deed, a joint distress cannot be made on any one parcel for more than the rent which issues out of that parcel, though all are in arrear (g). If there be rent due on each parcel, and no more be taken on each than is due in respect of each, the distress is regular (h).

Where land is let by several demises at separate rents to several persons as tenants in common, the landlord may take in distress property belonging to the tenant in default on any part of the land demised; but, inasmuch as he can only distrain on the demised premises, and no part of the land is exclusively demised to any one tenant, he cannot seize property belonging to the tenant in default jointly with any of the other tenants or the property of a stranger (i).

(c) *Fowkes v. Joyce* (1689), 2 Vern. 129; *Horsford v. Webster* (1835), 1 Cr. M. & R. 696. In *Oxenham v. Collins* (1868), 2 F. & F. 172, the landlord for good consideration undertook not to distrain for six months, and he was held to his bargain; and in *Miles v. Furber* (1873), L. R. 8 Q. B. 77, it was held that the landlords could not distrain where they had allowed themselves to be held out as the persons with whom goods stored at a repository were deposited, though the premises were in fact let to their tenant (and see *Papé v. Westacott*, [1894] 1 Q. B. 272, 280, 282, O. A.). But an agreement to accept a less rent for a time on payment of certain instalments did not prevent a distress for the full rent on default (*Re Smith and Hartogs, Ex parte Official Receiver* (1895), 73 L. T. 221).

(d) *Capel v. Buszard* (1829), 6 Bing. 150, Ex. Ch.; see *Lewis v. Read* (1845), 13 M. & W. 834. This is the common law rule, enforced by the Statute of Marlbridge ((1267) 52 Hen. 3, c. 15), by which it is made unlawful for any person (except the Crown or its officers) to make a distress out of his fee or on the King's highway or in the common street.

(e) That is, to the middle of the road. See *Doe d. Pring v. Pearsey* (1827), 7 B. & C. 304, where the rule that the right to the soil in one half the highway is presumptively in the tenant was held to justify the distraint of chattels on such half; *Hodges v. Lawrence* (1854), 18 J. P. 347; *Gillingham v. Gwyer* (1867), 16 L. T. 640; and title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 469.

(f) *Hargrave v. Shewin* (1826), 6 B. & C. 34.

(g) *Rogers v. Birkmire* (1736), 2 Stra. 1040.

(h) *Phillips v. Whitshed* (1860), 2 E. & E. 804, 809.

(i) *Re Potter, Ex parte Parke* (1874), L. R. 18 Eq. 381.

SECT. 8.

Where
Distress
may be
made.

Exceptions :

(1) Distress
under agree-
ment ;

(2) Cattle on
common ;

(3) Cattle
driven off to
avoid
distress ;

(4) Fraudu-
lent removal.

284. To the above general rule there are four exceptions :—

(1) By agreement between the parties the landlord may distrain on goods on other lands than those out of which the rent issues (*k*).

(2) A landlord may distrain for arrears of rent the cattle or stock of his tenant feeding upon any common appendant or appurtenant or in any way belonging to the premises demised (*l*).

(3) If the landlord coming to distrain sees the tenant's cattle on the premises, and the tenant to prevent the distress drives them off the premises, the landlord may make fresh pursuit and seize them in the highway or in any other place off the lands demised. But if the cattle of their own accord go out of the lands demised or into the highway within his view, he cannot pursue them ; neither can he if they be driven off the lands for any other purpose than to avoid distress (*m*).

(4) Where the tenant fraudulently or clandestinely removes his goods or chattels from the demised premises to prevent the landlord from distraining them for arrears of rent, the landlord or his agent may, within thirty days after the removal of the goods, seize them as a distress wherever they may be found (*n*), provided they have not previously been sold for valuable consideration (*o*).

SECT. 9.—*For what Amount Distress may be made.*

Amount
leviable.

General rule.

285. Apart from statutory restriction as regards arrears, the amount of rent for which a distress may be levied is dependent upon the terms of the *reddendum*. That which according to the terms of the reservation has become an ascertained part of the *render* to be made for the use of the land, and which is unsatisfied either in whole or in part at the time of the levy, may to the extent to which it is unsatisfied be distrained for (*p*).

Fluctuating
rents.

286. The amount may fluctuate under the reservation, as in the cases of graduated rents, of royalties, and of conditional or penal rents reserved according to the user made by the tenant of the demised premises.

Distress for
distinct rents
to be separate.

The form of the demise or the existence of a succession of demises may make what was apparently one rent, or an accumulation of arrears of the same rent, distinct rents requiring separate

(*k*) *Daniel v. Stepney* (1874), L. R. 9 Exch. 185, Ex. Ch. ; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373, Q. A. (a mining lease). But such a power is within the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), ss. 4—6, if the property over which the power is given is unconnected with the demised premises (*ibid.*) ; see title *BILLS OF SALE*, Vol. III., pp. 14 *et seq.* ; *Thorp v. Hurt*, [1886] W. N. 96.

(*l*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 8.

(*m*) Co. Litt. 161 a.

(*n*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 1 ; see p. 189,

(*o*) *Ibid.*, s. 2.

(*p*) Where a tenant has been in possession of the premises for some time before the granting of a lease, but the *reddendum* expressly relates back to the time of entry, the rent as well before as after the granting of the lease may be distrained for (*M'Leish v. Tate* (1778), 2 Cowp. 781)

distresses for the separate amounts. Though there may be one distress for any number of instalments of rent reserved by the same demise, there may not be a joint distress for several rents reserved under separate demises, whether contemporaneous (*q*) or subsequent (*r*).

On the other hand, although a number of instalments of rent under the same demise may be in arrear, they may be separately distrained for, and it is immaterial in what order (*s*).

287. The amount for which a landlord may distrain may have been satisfied in whole or in part by payments made before the levy. These may be either payments made to the landlord himself (*t*) or payments made on his behalf and with his express or implied authority. Thus, where the tenant has paid on behalf of the landlord sums which it was the landlord's duty to pay and which are charged upon the land, so that the failure to pay them would prevent the tenant's peaceable possession of the property, the tenant is considered as authorised by the landlord to make such payments and treat the same as made in satisfaction or part satisfaction of the rent, so that the landlord can only distrain for the balance, if any (*a*).

SECT. 9.
For what
Amount
Distress
may be
made.

Amount
reduced by
payment on
account of
landlord.

(*q*) Thus, the amounts of the rents reserved under distinct contemporaneous demises of different parcels cannot be included in a joint distress (*Rogers v. Birlemire* (1736), 2 Stra. 1040).

(*r*) As in the case of successive demises of the same parcel; and if a tenant hold up to a certain period under one demise, and afterwards his possession is continued under another demise, although each demise be made by parol, a distress cannot include the rent reserved under the two demises (*Stanfill v. Hickes* (1697), 1 Ld. Raym. 280). For this purpose, however, a tenancy from year to year is not a succession of tenancies, but one entire term for the number of years it endures.

(*s*) *Pulmer v. Stanage* (1661), 1 Lev. 43; *Gambrell v. Falmouth (Earl)* (1835), 4 Ad. & El. 73. But if the rent is one entire rent the whole must be distrained for at the same time, if there are sufficient chattels to satisfy it (*Bagge v. Mawby* (1853), 8 Exch. 641).

(*t*) See p. 153, *ante*.

(*a*) *Graham v. Allsopp* (1848), 3 Exch. 186; *Jones v. Morris* (1849), 3 Exch. 742. Of this description are payments of ground and other rents made by the tenant to the superior landlord of his own lessor to prevent his own goods being taken in distress (*ibid.*; *Sapsford v. Fletcher* (1792), 4 Term Rep. 511; *Wilkinson v. Cawood* (1797), 3 Anst. 905; *Doe v. Hare* (1833), 2 Cr. & M. 145; *Wheeler v. Branscombe* (1843), 5 Q. B. 373; *O'Donoghue v. Coalbrook and Broad oak Co.* (1872), 26 L. T. 806, Ex. Ch., notwithstanding the superior landlord may not have threatened to distrain, but only demanded the rent, or may have allowed the occupying tenant time to pay (*Carter v. Carter* (1829), 5 Bing. 406; *Valpy v. Manley* (1845), 1 O. B. 594). And so in the case of a lodger or undertenant paying the superior landlord under the provisions of the Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 3; see p. 147, *ante*. Such also are payments of an annuity or a legacy secured by a power of distress (*Taylor v. Zamira* (1816), 6 Taunt. 524), and interest due on a mortgage created before the tenancy (*Johnson v. Jones* (1839), 9 Ad. & El. 809; *Dyer v. Bowley* (1824), 2 Bing. 94), or after the tenancy (*Underhay v. Read* (1887), 20 Q. B. D. 209, O. A.). But in the latter case, unless the tenancy is binding upon the mortgagee, there must have been an actual payment on demand to the mortgagee, and not merely a notice to pay (*Wilton v. Dunn* (1851), 17 Q. B. 294; *Hickman v. Machin* (1859), 4 H. & N. 716; *Wheeler v. Branscombe*, *supra*). Ordinarily the rule applies only where the payment is compulsory, of a debt due from the landlord, or the amount is a charge on the land (*Carter v. Carter*, *supra*). By

SECT. 2.

For what
Amount
Distress
may be
made.

By payment
of landlord's
taxes.

Allowances
made by
mistake.

No other
set off against
rent.

288. Sums paid by the tenant in discharge of the landlord's rates and taxes go in reduction of the amount for which a distress may be made. Thus, property tax and tithe rentcharge being payable by the landlord notwithstanding any contract to the contrary, if paid by the tenant may be deducted from the rent (b). The same rule applies to all taxes which, in the absence of agreement between the parties, are to be borne by the landlord, though payable in the first instance by the tenant, such as land tax (c) and sewers rate (d).

289. If by mistake and without fraud the tenant is permitted to make deductions from his rent in respect of outgoing which he ought to have borne himself, and the receipt is given for the balance expressing it to be such, the deductions are treated as payment, and cannot afterwards be distrained for (e).

290. With the above exceptions the general rule of law is that there is no right to set off against or deduct from the rent distrained for sums due from the landlord to the tenant or payments made on behalf of the landlord, since a claim of set off, however well founded, does not take away the right of the landlord to distrain for his rent in full, even on equitable grounds (f).

special arrangement between the parties, however, the rent may be discharged by other payments. And where a landlord directed his tenant, who was overseer of the poor, to pay on the landlord's account certain rates assessed on him, promising that the levies should be set against the rent, it was held that payments made in consequence might be considered as payments of rent (*Roper v. Bumford* (1810), 3 Taunt. 76); and in the case of an agreement that sums expended by the tenant in repairs should be deducted from the rent, it was held that such expenditure was equivalent to a payment of rent (*Dallman v. King* (1837), 4 Bing. (N. C.) 105).

(b) *Franklin v. Carter* (1845), 1 O. B. 750.

(c) *Ward v. Const* (1830), 10 B. & C. 635.

(d) *Palmer v. Earith* (1845), 14 M. & W. 428. But the rule only applies so as to allow the deduction from the instalment of rent falling due next after such payment. The amount of the taxes cannot afterwards be retained or recovered by action (*Cumming v. Bedborough* (1846), 15 M. & W. 438; *Denby v. Moore* (1817), 1 B. & Ald. 123; *Andrew v. Hancock* (1819), 1 Brod. & Bing. 37; *Daves v. Thomas*, [1892] 1 Q. B. 414, O. A.; *Mile End Old Town Vestry v. Whitby* (1898), 78 L. T. 80), except under a special agreement (*Lamb v. Brewster* (1879), 4 Q. B. D. 220), or where the payment is made under a distress for the whole rent (*Graham v. Tate* (1813), 1 M. & S. 609), or to avoid a distress, with an express saving of the tenants' rights (*Baker v. Greenhill* (1842), 3 Q. B. 148). Nor can they be retained unless they have been actually paid (*Ryan v. Thompson* (1868), L. R. 3 O. P. 144), and the tenant upon claiming to make the deduction should be prepared to produce the receipt for the tax.

(e) *Waller v. Andrews* (1838), 3 M. & W. 312; *Bramston v. Robins* (1826), 4 Bing. 11.

(f) *Absalom v. Knight* (1743), Buller, Nisi Prius, 177; *Laycock v. Tufnell* (1787), 2 Chit. 531; *Willson v. Davenport* (1833), 5 O. & P. 531; *Townrow v. Benson* (1818), 3 Madd. 203; *Pratt v. Keith* (1864), 10 Jur. (N. S.) 305. Where a tenant has paid to a local authority statutory charges which the local authority is entitled to recover, and which the tenant is liable under his lease to pay, but which the Act imposing the burden says he may deduct from his rent with a proviso that it shall not be taken to affect any contract between the landlord and tenant, the tenant cannot set off the amount paid as against his rent, but the landlord may distrain for the amount of rent not paid (*Skinner v. Hunt*, [1904] 2 K. B. 452, O. A.). And although s. 96 of the Metropolis Management

291. As to holdings to which the Agricultural Holdings Act, 1908, applies, it is, however, provided that, where compensation due under that Act or under any custom or contract has been ascertained before the landlord distrains for rent due, the amount of such compensation may be set off against the rent due and the balance only distrained for (*g*).

SECT. 9.
For what Amount Distress may be made.

292. There is one instance in which the law allows the landlord to distrain for double rent, namely, in case any tenant or tenants shall give notice of his or their intention to quit the premises at a particular time, and shall not deliver up possession accordingly, he or they shall pay the landlord double the former rent for the whole time he or they shall hold the premises after the expiration of such notice; and such double rent shall be levied and recovered as the former single rent might have been (*h*).

Except under the Agricultural Holdings Act. When double rent may be distrained for.

293. No distress for arrears of rent can be made except within six years next after they became due or next after a written acknowledgment of the same shall have been made (*i*). But the right to distrain for six years' arrears subsists as long as the relationship of landlord and tenant continues, notwithstanding the non-payment of rent for any number of years (*k*).

Arrears.

294. A distress upon a holding to which the Agricultural Holdings Act, 1908, applies is limited to rent which became due in respect of such holding not more than one year from the making of such distress (*l*).

Agricultural holding.

Amendment Act, 1862 (25 & 26 Vict. c. 102), empowers a local authority to require payment of any expense which the owner of premises may be liable to pay from the occupier, and provides that the owner shall allow the occupier to deduct what he so pays out of the rent, this does not make the payment one on account of rent, but on account of expenses recoverable by the tenant, and if the tenant has covenanted to bear the expenses he may not deduct the amount from his rent (*ibid.*).

(*g*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 31; and see title AGRICULTURE, Vol. I., p. 256.

(*h*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 18. The Act only applies where the tenant has given a notice binding upon him to quit at the expiration of the term specified in the notice and upon which the landlord might at that time act and bring ejectment (*Johnstone v. Hudleston* (1825), 4 B. & C. 922), and is inapplicable in the case of a notice to quit too vague to be acted upon (*Farrance v. Elkington* (1811), 2 Camp. 591). Acceptance of a single rent after the double rent has accrued would waive the right to the double rent (*Doe d. Cheney v. Batten* (1775), 1 Cowp. 243).

(*i*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42; *Sims v. Thomas* (1840), 12 Ad. & El. 536. See title LIMITATION OF ACTIONS.

(*k*) *Archbold v. Scully* (1861), 9 H. L. Cas. 360. Where a rentcharge had been received from the occupier of one part of the premises charged down to a recent period, and then for the first time a distress was levied on the occupier of another part which for more than twenty years had been in a separate ownership and the owner or occupier of which had never before paid any of the rent, it was held that the right to distrain for rent on that part of the premises charged was not barred by the statute (*Woodcock v. Titterton* (1864), 12 W. R. 865).

(*l*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 28; *Crosse v. Welch* (1892), 8 T. L. R. 401, 709, O. A.). See title AGRICULTURE, Vol. I., p. 255. For the effect of bankruptcy etc. upon the right to distrain, see p. 169, *post*.

SECT. 9.
For what
Amount
Distress
may be
made.

295. In addition to the actual amount of rent due the landlord may distrain sufficient chattels to cover by their sale the expenses of the distress (*m*).

If after the bailiff distrains the rent be paid to the landlord the bailiff has no right to go on and sell for his expenses (*n*).

To cover
costs of
distress.

SECT. 10.—Levying the Distress.

SUB-SECT. 1.—The Warrant.

By whom
and how
levied.

296. A landlord may distrain either in person or by an authorised bailiff or agent (*o*).

When a bailiff makes a distress he should have authority to do so from his employer (*o*). This authority is generally and should properly be in writing, and is commonly called a distress warrant, or warrant of distress, but it is not essential to his authority that a bailiff should be appointed in writing. Even a corporation aggregate may appoint a person to distrain without deed or warrant (*a*).

Authority to
bailiff given
by warrant.

Ratification

297. Unless evidence of authority is required by the tenant, it is not even necessary that a bailiff should have an express antecedent authority before making a distress, for a distress made without previous authority may be afterwards recognised and adopted by the landlord, and the adoption relates back to the time of taking the distress and will be as effectual as a previous authority would have been (*b*).

Withdrawal
of authority.

298. The authority conferred by a warrant to distrain may be withdrawn at any time before the goods are actually sold (*c*). When a warrant to distrain is in fact given to one man it cannot be executed by another man not therein named (*d*).

(*m*) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21); see p. 186,

(*n*) *Harding v. Hall* (1866), 14 W. R. 646.

(*o*) It is a general principle of law that every person whose house is entered and whose property is seized is entitled to know the authority under which it is done and to be able to see whether that authority has been followed (*Symonds v. Kurtz* (1889), 61 L. T. 559, *per* FIELD, J., at p. 560). For form of warrant of distress, see *Encyclopædia of Forms*, Vol. VII., p. 99.

(*a*) *Cary v. Matthews* (circa 1688), 1 Salk. 191, Ex. Ch.; *Randle v. Deane* (1701), 2 Lut. 1496; *Smith v. Birmingham Gas Co.* (1834), 1 Ad. & El. 526.

(*b*) *Trevillian v. Pine* (1707), 11 Mod. Rep. 112; *Potter v. North* (1669), 1 Wms. Saund. 640, ed. 1871; *Haseler v. Lemoyne* (1858), 5 O. B. (N. S.) 530. For example, in an action of replevin against a broker, the fact that the landlord employed his solicitor to defend the broker was held sufficient evidence of the broker's authority to distrain in the absence of a written warrant (*Duncan v. Meikleham* (1827), 3 O. & P. 172). And a bailiff who received his warrant to distrain from a testator, but did not execute it until after the latter's death but before probate of his will, was held to have his authority sufficiently ratified by the executor after probate (*Whitehead v. Taylor* (1839), 10 Ad. & El. 210). Even a corporation may ratify the act of its bailiff in distraining (*Smith v. Birmingham Gas Co.*, *supra*; *Church v. Imperial Gas Co.* (1838), 6 Ad. & El. 846, 861).

(*c*) *Harding v. Hall* (1866), 14 L. T. 410.

(*d*) *Symonds v. Kurtz* (1889), 61 L. T. 559.

299. In the case of a joint distress, as by joint tenants or coparceners, the warrant may be signed by all the parties entitled (e) or be given by one only to authorise a distress for the rent due to all (f).

SECT. 10.
Levying the
Distress.

Joint distress.
Tenants in
common.

Tenants in common may distrain each for his respective share of rent, but one cannot distrain for more than his own share (g). Where, however, the rent consists of an entire thing, as the render of a horse or hawk, all must join (h); and where the rent is reserved to them all in one sum they may join in the warrant to distrain for the entire amount. Even where the rent is reserved in portions, and the whole is in arrear, they may join in one warrant (i).

300. A distress warrant does not require to be stamped (k), unless it contains an express undertaking whereby the landlord engages to indemnify the bailiff, in which case it would require an agreement stamp, unless the subject-matter of the distress was under £5 in value (l).

When stamp
required.

301. A warrant of distress creates an implied warranty on the part of the landlord that he has the right to distrain and an implied undertaking to indemnify the bailiff against any act properly done in exercise of the authority given to him (m). But it will not indemnify the bailiff against illegal or irregular acts done by him or his servants in the course of the distress, unless the indemnity is expressly worded to cover them, or where the conduct of the landlord has been such as to induce the bailiff to believe that he was acting under an indemnity from him (n).

Implied
indemnity to
bailiff.

(e) *Buller's Case* (1587), 1 Leon. 50.

(f) *Leigh v. Shepherd* (1821), 2 Brod. & Bing. 465; *Robinson v. Hofman* (1828), 4 Bing. 562; *Stedman v. Bates* (1695), 1 Ld. Raym. 64; see also p. 126, *ante*.

(g) *Pullen v. Palmer* (1696), 3 Salk. 207; *Whitley v. Roberts* (1825), M'Cle. & Yo. 107; see also p. 126, *ante*.

(h) Co. Litt. 197 a; see Co. Litt. 198 b (Littleton's Tenures, s. 317).

(i) See Bullen on Distress, 50.

(k) *Pyle v. Partridge* (1846), 15 M. & W. 20.

(l) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.; but see *Cox v. Bailey* (1843), 6 Man. & G. 193, decided under an earlier Stamp Act.

(m) *Draper v. Thompson* (1829), 4 O. & P. 84.

(n) *Ibid.*; *Toplis v. Grane* (1839), 5 Bing. (N. C.) 636; *Dugdale v. Lovering* (1875), L. R. 10 C. P. 196. Thus, a warrant in the ordinary form confers no authority on the bailiff to levy on privileged goods; but where the levy is made by the express direction of the landlord the latter is bound to indemnify the bailiff (*Toplis v. Grane, supra*). Where a warrant to distrain was accompanied by an indemnity against all costs and charges the bailiff might be at "on that account," and the bailiff, acting upon incorrect information from the tenant's son that a certain liquid was of no value, wasted it, and it was in fact valuable cochineal dye, for which the owner recovered damages, it was held that the bailiff could not recover the amount under his indemnity, which could only apply to cases where the landlord had no power to put in the distress (*Draper v. Thompson, supra*). It may, however, be so worded as to apply to all actions arising out of the distress, to which the bailiff may be subjected, except for the actual misconduct of himself or his servants. A warrant expressed to be a "sufficient warrant, authority and indemnification against all costs and charges in respect to any law expenses, action or actions that may arise as well as any other and all other charges and expenses which you or your agent may be at, or brought against you or your agent on this account," was held to cover the costs

SECT. 10.

SUB-SECT. 2.—*The Bailiff.***Levying the Distress.**

Bailiff must hold a certificate.

Consequences of acting without certificate.

Uncertificated landlord may distrain.

Landlord's liability in respect of bailiff.

302. No person may act as a bailiff to levy any distress for rent unless he is authorised to act as a bailiff by a certificate in writing under the hand of a county court judge; and such certificate may be general or apply to a particular distress or distresses (o).

303. If any person not holding such a certificate levies a distress contrary to the provisions of the Act, the person so levying, and any person who has authorised him so to levy, will be deemed to have committed a trespass (a), not only as against the tenant, but also as against a third party whose goods are seized (b). The effect of this is to make a distress by an uncertificated bailiff an illegal distress, with all the consequences of a trespass, *ab initio*. In addition an uncertificated bailiff who levies a distress will (without prejudice to any civil liability) be liable on conviction to a fine not exceeding £10 (c). Moreover, the certificate may at any time be cancelled or declared void by the county court judge (d).

304. The statute does not take away from an uncertificated landlord the right to distrain in person, and after a levy he may leave to his uncertificated bailiff the conduct of the distress from levy to sale. But the managing director of a company is not in the position of landlord to the tenants of the company, and unless acting under a certificate as bailiff will be guilty of trespass in distraining (e).

305. The bailiff is not an officer of the court so as to relieve the landlord from liability for the irregular acts of the bailiff. He remains, as before the statute was passed, the agent of the landlord who employs him. The landlord is liable to the tenant for any irregularities committed by the bailiff in the course of his employment so far as he is acting within the scope of his employment. For illegal acts outside the scope of such employment the landlord is not liable without proof that he actually directed them or ratified and adopted them with knowledge of what had been done, or that he chose without inquiry to take the risk upon himself and adopt such acts (f).

of an unsuccessful action for conversion (*Ibbett v. De la Salle* (1860), 6 H. & N. 233).

(o) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 7; *Re Sanders, Ex parte Sergeant* (1885), 54 L. J. (Q. B.) 331, and see title COUNTRY COURTS, Vol. VIII., p. 661.

(a) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 7.

(b) *Perring & Co. v. Emerson*, [1906] 1 K. B. 1.

(c) Law of Distress Amendment Act, 1895 (58 & 59 Vict. c. 24), s. 2.

(d) *Ibid.*, s. 1. See title COUNTRY COURTS, Vol. VIII., p. 662.

(e) *Hogarth v. Jennings*, [1892] 1 Q. B. 907, C. A. In that case, however, only nominal damages were awarded as there had been no sale and the goods had only been distrained for a few hours.

(f) *Haseler v. Lemoyne* (1858), 5 C. B. (N. S.) 530; *Lewis v. Read* (1845), 13 M. & W. 834. Thus, where a bailiff under a warrant in ordinary form authorising him to distrain the goods and chattels of the tenant seized a fixture which was afterwards sold and the proceeds paid to the landlord, it was held that the receipt of the proceeds did not make the landlord liable, it not being

306. A bailiff is liable to the landlord for damages sustained by the latter by reason of the former's negligence or misconduct in exceeding his authority (*g*). SECT. 10.
Levying the Distress.

307. A bailiff holding a warrant to distrain has implied authority to receive rent and costs when tendered, notwithstanding express directions to the bailiff by the landlord not to receive them (*h*). Bailiff's liability to landlord.
Authority to accept tender.

308. Where a distress is made by a bailiff he should show his warrant and the cause of taking the distress if required to do so, but if not required he may distrain generally (*i*). Must show warrant if required.

309. An infant cannot be appointed a bailiff (*k*). Infant cannot be bailiff.

SUB-SECT. 3.—*The Entry.*

310. The right to distrain necessarily involves the right to enter on the premises where the chattels are for the purpose of taking possession of them. The right implies a licence for the distrainor to enter the premises in any way short of breaking into the premises, although he does that which in the case of any other person would be a trespass (*l*). Right to enter.

311. The outer door may be opened in the ordinary way in which persons are accustomed to open it when it is left so as to be accessible to those having occasion to go into the premises (*m*). A Unfastened door.

shown that he was aware of the illegal seizure (*Freeman v. Rosher* (1849), 13 Q. B. 780); and if the landlord when the fact of illegal acts committed by the bailiff comes to his knowledge disclaims and repudiates such illegal acts, he is not responsible (*Hurry v. Rickman and Sutcliffe* (1831), 1 Mood. & R. 126). But a slight recognition by the landlord of what has been done may amount to adoption and ratification; and the presence of the landlord with the bailiff immediately after premises had been forced open by the latter and fixtures torn down was regarded as sufficient evidence of knowledge and adoption by the landlord (*Moore v. Drinkwater* (1858), 1 F. & F. 134).

(*g*) Thus, a bailiff was held liable to recoup the landlord compensation paid to the tenant for an excessive distress (*Megson v. Mapleton* (1883), 49 L. T. 744) and to pay for the value of goods distrained and lost through the bailiff's negligence (*White v. Heywood* (1888), 5 T. L. R. 115).

(*h*) *Hutch v. Hale* (1850), 15 Q. B. 10.

(*i*) *Buller's Case* (1587), 1 Leon. 50.

(*k*) *Cuckson v. Winter* (1828), 2 Man. & Ry. (K. B.) 313.

(*l*) *Long v. Clarke*, [1894] 1 Q. B. 119, C. A.: "A landlord may enter the demised premises to levy a distress, and may commit in so doing an act which in anyone else would be a trespass, provided he does not break open any outer door" (*ibid.*, per LOPES, L.J., at p. 122); *American Concentrated Must Co. v. Hendry* (1893), 68 L. T. 742, C. A.

A peculiar case which is not likely to recur, and in which the entry of the landlord was not regarded as amounting to a trespass, was that of *Gould v. Bradstock* (1812), 4 Taunt. 562. There the landlord occupied an apartment over a mill demised to his tenant from which his apartment was separated only by a boarded floor without any plastered ceiling, and it was held that he might lawfully take up the floor of his own apartment and enter through the aperture to distrain for his rent. The reason was that the parties were regarded as tenants in common of the floor, and one tenant in common cannot bring trespass against the other.

(*m*) *Ryan v. Shilcock* (1851), 7 Exch. 72, 75.

SECT. 10.
Levying the
Distress.

licence to enter is implied from a door being left unfastened though closed (*n*). Thus, the latch of the door may be lifted, or a key left outside of the door turned, or a bolt on the outside drawn back (*o*). But the distrainer may not put his hand through a hole and remove a bar which bars an outer door and thus effect an entry (*p*).

Outer door
must not be
broken open.

312. An outer door must not be broken open (*q*). This immunity from being broken open extends to the outer door of any building whatever, including an outhouse within the curtilage (*r*), as well as a barn, stable, or outhouse not within the curtilage of the dwelling-house (*s*). It would seem that entry through an outer door which had been broken open by an independent third party on his own account would not be illegal (*t*). An inner door is not, however, part of the wall to a man's "castle," and once a distrainer has properly obtained admission to a building he is justified in breaking open an inner door or lock to find goods which are distrainable (*a*).

Entering by
window.

313. An open window is a legitimate means of access for the purpose of distraining (*b*), so is an open skylight (*c*), and when partially open it may be further opened for the purpose of obtaining admission (*d*). But as a window is not the usual means of obtaining access to a house a distrainer may not open a closed but unfastened window, for to do so is a breaking into the house (*e*).

(*n*) *Nash v. Lucas* (1867), L. R. 2 Q. B. 590, *per LUSH, J.*, at p. 593.

(*o*) *Ryan v. Shilcock* (1851), 7 Exch. 72; *Eldridge v. Stacey* (1863), 15 O. B. (N. S.) 458. Where a distress was levied in a stable which had been entered for that purpose by pulling out a staple placed in the woodwork of the door, to which staple a padlock was attached, the entry was held lawful; but there was evidence that the owner and everyone else ordinarily opened the door to obtain admittance by thus pulling out the staple, and the finding of the jury was that the padlock and staple were not for the purpose of keeping the door fastened, but only for keeping it closed (*Ryan v. Shilcock, supra*). The old authorities do not go so far as the modern. See *Nash v. Lucas* (1867), L. R. 2 Q. B. 590, *per COCKBURN, C.J.*

(*p*) Fitzherbert, Grand Abridgment, Distress, pl. 21.

(*q*) *Semayne's Case* (1604), 5 Co. Rep. 91; 1 Smith, L. C., 11th ed., 104; *American Concentrated Must Corporation v. Hendry* (1893), 62 L. J. (Q. B.) 388, O. A.

(*r*) *Ibid.*; see *Long v. Clarke*, [1894] 1 Q. B. 119, O. A., *per ESHER, M.R.*, at p. 121.

(*s*) *Brown v. Glenn* (1851), 16 Q. B. 254.

(*t*) See *Nash v. Lucas, supra*; *Sandon v. Jervis* (1858), 27 L. J. (Q. B.) 279, 282.

(*a*) *Browning v. Dann* (1736), Buller, Nisi Prius, 81; *Lee v. Gansel* (1774), 1 Cowp. 1, 8.

(*b*) *Nixon v. Freeman* (1860), 5 H. & N. 652; *Long v. Clarke, supra*.

(*c*) *Miller v. Tebb* (1893), 9 T. L. R. 515, O. A.

(*d*) *Crabtree v. Robinson* (1885), 15 Q. B. D. 312.

(*e*) *Ibid.*; *Nash v. Lucas, supra*. The principle that you may open a closed but unfastened door "will not apply to a closed but unfastened window. Again, it has been said that you may go in at an open window to make a distress. But it is nowhere said you may open a window for the purpose. . . . Therefore the authorities are limited in application either to the case, where the door is shut but can be opened without violence, or where the window is open and can be entered without doing any violence. But if the window be shut, you are doing violence if you open it, when neither directly nor impliedly is the entry made by the licence of the owner of the house" (*ibid.*, *per COCKBURN, C.J.*).

Much less can he obtain admission by breaking open a window (*f*) or undoing the hasp (*g*).

SECT. 10.
Levying the
Distress.
Gates.

314. Gates may not be broken open or inclosures broken down (*h*), but the distrainer may climb over a wall or fence from the adjoining premises (*i*).

315. After an entry has been made and not abandoned, but the distrainer has been forcibly expelled or driven away by the tenant's violence, he may obtain the assistance of a peace officer and break open the outer door, even after a considerable interval (*k*).

Forcible
re-entry.

On the same principle a forcible re-entry may be made where the man in possession voluntarily goes away for an unavoidable purpose, and not with the intention of abandoning the distress, and on his return finds the door locked. In such a case he may break open the door (*l*).

When a bailiff after having been evicted re-enters for the purpose of his distress he should confine himself to the goods originally seized (*m*).

SUB-SECT. 4.—Seizure.

316. To complete a distress a seizure of the chattels is necessary. A seizure may be either actual or constructive (*n*). It is actual by laying hands on the article, or on one of several articles, and

Seizure of
chattels.

(*f*) *Attack v. Bramwell* (1863), 3 B. & S. 520, followed in *Grunnell v. Welch*, [1906] 2 K. B. 555, C.A.

(*g*) *Hancock v. Austin* (1863), 14 C. B. (N. S.) 634.

(*h*) Co. Litt. 161 a.

(*i*) *Eldridge v. Stacey* (1863), 15 C. B. (N. S.) 458; *Long v. Clarke*, [1894] 1 Q. B. 119, C. A., overruling *Scott v. Buckley* (1867), 16 L. T. 573.

(*k*) *Eagleton v. Gutteridge* (1843), 11 M. & W. 465; *Eldridge v. Stacey*, *supra*. The interval in that case was three weeks. There must have been a complete entry in the first instance. And where a person has merely got his foot and arm between the door and the lintel, or by putting a stick or other article between the door and the lintel has prevented the door being closed, that is not such an entry as will entitle him afterwards to break open a door or window to distrain (*Boyd v. Profaze* (1867), 16 L. T. 431).

(*l*) *Bannister v. Hyde* (1860), 2 E. & E. 627. It is always a question of fact whether the delay in attempting to re-enter amounts to an abandonment (*Eldridge v. Stacey*, *supra*; *Bagshawes, Ltd. v. Deacon*, [1898] 2 Q. B. 173, C. A.). In a case in which a broker's man after taking possession of property under a distress and remaining in possession two days left the house in a state of excitement bordering on insanity, and the landlord, thinking that the man's leaving had been procured by the drugging of his liquor by the parties in the house (but which was not proved), six days afterwards broke into the house and took away the goods without any previous demand of admission, it was held that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them (*Russell v. Rider* (1834), 6 C. & P. 416). But in another case of forcible eviction the jury found a three weeks' interval was not an abandonment (*Eldridge v. Stacey*, *supra*). Permitting a third person to remove the goods for a temporary purpose is not an abandonment of them (*Kerby v. Harding* (1851), 6 Exch. 234); and compare *Jones v. Biernstein*, [1900] 1 Q. B. 100, C. A.

(*m*) *Smith v. Torr* (1862), 3 F. & F. 505.

(*n*) *Cramer v. Mott* (1870), L. R. 5 Q. B. 357, *per* COOKBURN, C.J., at p. 359. As to what amounts to a seizure, see *Central Printing Works, Ltd. v. Walker and Nicholson* (1907), 24 T. L. R. 88, where the remaining of a bailiff on the premises for a few hours, while money to pay the rent was collected, and was

SECT. 10
Levying the
Distress.

claiming to detain it or them until the rent is satisfied (*o*). The most proper manner of making a distress is for the person distraining to go upon any part of the premises out of which the rent issues and take hold of some personal chattel declaring that it is taken as a distress in the name of all the goods, or of so much as will satisfy the rent in arrear, and this will be a good seizure of all (*p*). No particular form of words is, however, necessary provided the intention is manifest.

Constructive
seizure.

317. A constructive seizure may occur in various ways. It is enough that the landlord or his agent interferes to prevent the removal of the article from off the premises on the ground that rent is in arrear, and he does this when he declares that the article shall not be removed until the rent is paid (*q*), and it is immaterial that the article is in fact subsequently removed (*r*).

Any acts indicative of an intention that antecedent steps should be treated as a distress and assumed by the parties to amount to a distress will be sufficient evidence of a seizure (*s*).

A mere intention to distrain which is obviously abandoned is not sufficient (*t*); and as against third parties no action will lie for removal of goods which have not been actually seized (*a*).

SUB-SECT. 5.—Notice of Distress.

Notice of
distress.

318. As soon as the seizure is complete the distrainer should make an inventory of the goods intended to be included in the distress, and give notice of the distress to the tenant. No notice is necessary at common law, because at common law all that is required to be done is to seize the goods and impound them, and, if the impounding is in a private pound, to give notice of the place to

(*o*) *Cramer v. Mott* (1870), L. R. 5 Q. B. 357, 359; *Wood v. Nunn* (1828), 5 Bing. 10.

(*p*) *Dod v. Monger* (1704), 6 Mod. Rep. 215.

(*q*) *Cramer v. Mott*, *supra*. Where the owner of a piano let on hire to the tenant came upon the premises to remove his piano, the absolute refusal of the landlord to allow him to remove the piano until the rent was paid was held a sufficient seizure without touching the piano (*ibid.*). And so where the tenant and a stranger were disputing about the removal of a lathe and the landlord laid his hand on the machine saying "I will not suffer this or any of the things to go off the premises till my rent is paid" (*Wood v. Nunn* (1828), 5 Bing. 10).

(*r*) *Werth v. London and Westminster Loan Co.* (1889), 5 T. L. R. 320.

(*s*) Where a bailiff who had entered and pressed for rent alleged to be due and the expenses of the levy received payment of them under protest, and thereupon withdrew without having touched any of the tenant's goods or made an inventory, it was held evidence of a distress. The money had been paid and received on the footing of there having been a distress (*Hutchins v. Scott* (1837), 2 M. & W. 809). Again, where the bailiff entered the demised premises and after intimating his intention to distrain walked round the premises, and without touching anything gave written notice that he had distrained and left there certain specified goods, and then went away without leaving anyone in possession, this was held to amount to a seizure (*Swann v. Falmouth (Earl)* (1828), 8 B. & C. 456).

(*t*) *Spice v. Webb* (1838), 2 Jur. 943. In this case the bailiff said he had come to make a distress, entered the house, and commenced to make an inventory, but, finding that he had mistaken his instructions, left the house without removing any of the goods, and it was held not to amount to a distress.

(*a*) *Pool v. Lewin Crawcour & Co.* (1884), 1 T. L. R. 165, O. A.

which they are taken (b). Nor need any notice now be given, unless a sale is intended (c). But the statute that attached the right of sale to a distress enacted that before the distrainer can proceed to sale he must cause notice of the fact of the distress having been made (with the cause of the taking) to be left at the chief mansion-house or other most notorious place on the premises charged with the rent distrained for (d). But it is sufficient if it is delivered personally to the tenant or owner, as the case may be, even though the delivery is not at the place specified in the statute, that is, "the chief mansion-house or other most notorious place on the premises" (e). The intention of the Act was only that the party should have notice, which is performed in this way better than leaving it at a place. As against a stranger whose goods have been seized, notice to him will satisfy the statute unless the tenant has already commenced proceedings in replevin (f).

SMOT. 10.
Levying the
Distress.

The notice must be in writing (g). An error in the name of the person on whose behalf the distress is made (h), or in the time at which the rent distrained for became due (i), is immaterial, and it is not necessary to specify when the rent became due (k).

Must be in
writing.

319. The notice should contain a statement:—(1) Of the cause of the taking, that is, of the amount of rent due (l). At common law there is no duty cast on the landlord distraining to inform the tenant what is the arrear of rent for which he distrains, as the tenant is presumed to know what things are in arrear for his land (m). Nor is he bound by an incorrect statement of the amount, since he may at common law distrain for one cause and afterwards in a replevin or other action justify for a different cause (n). But when it becomes necessary to justify the act of selling the goods it must

Contents of
notice.

Kerby v. Harding (1851), 6 Exch. 234.

(c) *Trent v. Hunt* (1853), 9 Exch. 14. For form of inventory, see *Encyclopedia of Forms*, Vol. VII., p. 700.

(d) Stat. (1689) 2 Will. & Mar., c. 5, s. 1.

(e) *Walter v. Rumbal* (1695), 1 Ld. Raym. 53.

(f) *Ibid.*

(g) *Wilson v. Nightingale* (1846), 8 Q. B. 1034. The usual and most convenient mode of framing the notice is to preface it to, or write it at the bottom of, the inventory of the goods.

(h) *Wootley v. Gregory* (1828), 2 Y. & J. 536.

(i) *Gambrell v. Falmouth (Earl)* (1835), 4 Ad. & El. 73.

(k) *Moss v. Gallimore* (1779), 1 Doug. (K.B.) 279; 1 Smith, L. C., 11th ed., 514.

(l) *Kerby v. Harding* (1851), 6 Exch. 234. "The statute requires some notice of the taking, and I think the reasonable construction of the statute is that it should inform the tenant or the person whose goods are taken by being left at the dwelling-house, and give notice of the goods taken as well as express what amount of rent is in arrear" (*ibid.*, per PARKE, B., at p. 241).

(m) *Tancred v. Leyland* (1851), 16 Q. B. 669, Ex. Ch.

(n) *Crowther v. Ramsbottom* (1798), 7 Term Rep. 654, 658; *Etherton v. Popplewell* (1800), 1 East, 139, 142; *Trent v. Hunt*, *supra*; *Phillips v. Whitesed* (1860), 29 L. J. (Q. B.) 164, per COCKBURN, C.J., at p. 165. The mere fact of distraining for more rent than is due is not *per se* actionable (*Tancred v. Leyland*, *supra*, overruling *Taylor v. Henniker* (1840), 12 Ad. & El. 488) if the goods taken are not more than sufficient to satisfy the rent actually due (*ibid.*; *French v. Phillips* (1856), 1 H. & N. 564). Nor will an allegation that the excessive distress was maliciously made render it actionable in the absence of special damage (*Stevenson v. Newnham* (1853), 13 C. B. 285, Ex. Ch.).

SECT. 10.
Levying the
Distress.

be shown that the landlord has given a notice showing the cause of the distress (o); (2) of the goods taken (p), containing such information as will enable the tenant to know exactly what particular goods have been seized (q); (3) of the cause of the taking (r); (4) of the place of impounding if the goods are impounded off the premises (s); and (5) of the time when the goods will be sold unless replevied or the rent and charges paid (t).

SECT. 11.—Proceedings between Seizure and Sale.

SUB-SECT. 1.—Impounding.

Impounding.

320. Consequent upon the seizure follows the necessity to imprison and secure the chattels for safe custody until the cause of distress is satisfied or the period has elapsed at the expiration of which the chattels can be lawfully sold by reason of the tenant failing to replevy them (a). This imprisonment, called impounding, places the goods in the custody of the law, and thenceforward the custodian is a legal gaoler and protected in his possession as an officer of the law. If before the chattels are impounded the tenant

(o) *Whitworth v. Maden* (1847), 2 Car. & Kir. 517.

(p) This is generally done by furnishing a copy of the inventory as before mentioned. The distress must be restricted to the articles comprised in the inventory (*Sims v. Tuffs* (1834), 6 C. & P. 207), and the fact that goods not comprised in the inventory have been discovered after the notice was given will not justify including them in the distress (*Bishop v. Bryant* (1834), 6 C. & P. 484). The mere fact that articles not distrainable, e.g., fixtures, are included in the list does not give rise to a cause of action (*Beck v. Denbigh* (1860), 6 Jur. (N. S.) 998).

(q) *Kerby v. Harding* (1851), 6 Exch. 234. In one case a notice referring to an inventory naming one article and adding "and any other goods and effects that may be found in and about the said premises" was held sufficient where the intention was to distrain everything (*Wakeman v. Lindsey* (1850), 14 Q. B. 625). But the decision was arrived at reluctantly, and ERLE, J., observed, "I think brokers would act very incautiously were they to adopt a general form of notice which the court now holds to be sufficient with great reluctance." And a notice concluding with the words "and all other goods, chattels, and effects on the premises that may be required to satisfy the above rent with the necessary expenses" after a specific enumeration was held too vague to include anything beyond the articles enumerated (*Kerby v. Harding, supra*).

(r) *Whitworth v. Maden* (1847), 2 Car. & Kir. 517; *Trent v. Hunt* (1853), 9 Exch. 14.

(s) Omitting to state that the goods are impounded will not make the impounding void (*Tennant v. Field* (1857), 8 E. & B. 336).

(t) The omission to give the requisite notice makes it irregular to sell, but does not render the distress illegal (*Trent v. Hunt, supra*; *Lucas v. Tarleton* (1858), 3 H. & N. 116; *Robinson v. Waddington* (1849), 13 Q. B. 753), so that if, notwithstanding the want of notice, the landlord sells, the person aggrieved thereby shall recover for any special damage he may have sustained (Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 19).

(a) In former times when a distress could only be detained as a pledge the period of detention was indefinite and dependent upon the will of the tenant to redeem the chattels. When the statutory right of sale was given in respect of goods distrained it was provided, in order to enable the tenant to replevy, that the goods should not be sold for at least five days after seizure and notice given of the distress (2 Will. & Mar., c. 5, s. 1) extended to fifteen days (see p. 182, *post*). In the meantime the law requires the landlord to see that the goods are kept safely.

tenders a sufficient amount for rent and costs, it will be unlawful to proceed further with the distress (*b*).

Chattels may either be impounded on the premises or removed to a pound off the premises (*c*). A pound is either overt (open overhead) or covert (covered overhead).

SECT. 11.
Proceedings
between
Seizure
and Sale.

321. There are two exceptions to the right to impound off the premises. First, sheaves or cocks of corn, or corn loose or in the straw, or hay cannot be removed from the premises, but must be impounded where found (*d*); and, secondly, growing crops must after they are cut be placed in a proper place on the premises, and cannot be removed except in default of there being a proper place on the premises (*e*). In that case notice of the place where the thing distrained is deposited must, within one week after the depositing thereof in such place, be given to the tenant or left at his last place of abode (*f*).

Exceptions to
impounding
off the
premises.

322. When chattels are impounded off the premises the seizure and removal to the pound are distinct acts with an appreciable interval between, and it is possible to say when the chattels reach the inside of the pound. When the goods are impounded on the premises the seizure and the impounding are practically concurrent acts, and if when a distress has been made and inventory taken a man is left in possession, it is sufficient evidence of an impounding, though the goods are otherwise undisturbed (*g*).

What
constitutes
impounding.

323. When goods are impounded on the premises the landlord ought not to deprive the tenant of the whole house, but should put all the goods seized into one or more rooms, unless the tenant consent to their being left in their ordinary position, of which consent very slight evidence will be sufficient (*h*).

Impounding
on the
premises.

Cattle may be impounded in the open field by properly securing the gate (*i*).

(*b*) *Vertus v. Beasley* (1831), 1 Mood. & R. 21; see p. 153, *ante*.

(*c*) Formerly the practice was to remove goods to the public pound, as a distress could only be impounded on the premises with the consent of the tenant. The Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 10, authorises impounding on the premises. And now distresses are usually impounded on the premises unless the tenant otherwise requests, as public pounds have practically ceased to exist except as dilapidated curiosities.

(*d*) Stat. (1689) 2 Will. & Mar., c. 5, s. 2.

(*e*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 8.

(*f*) *Ibid.*, s. 9.

(*g*) *Johnson v. Upham* (1859), 2 E. & E. 250; *Jones v. Biernstein*, [1899] 1 Q. B. 470, *per* CHANNELL, J., at p. 473, affirmed [1900] 1 Q. B. 100, C. A.; and see *Firth v. Purvis* (1793), 5 Term Rep. 432.

(*h*) *Tennant v. Field* (1857), 8 E. & B. 336; *Washborn v. Black* (1774), 11 East, 405, n. (the only evidence of consent in the latter case was that the tenant's wife said how much obliged she was to the bailiff, who had acted like a gentleman). And in no case should the whole house be locked up to the exclusion of the tenant unless it is necessary to the safe keeping of the distress (*Woods v. Durrant* (1846), 16 M. & W. 149; *Cox v. Painter* (1837), 7 C. & P. 767; *Etherton v. Popplewell* (1800), 1 East, 139; *Walker v. Woolcott* (1838), 8 C. & P. 352). Even in an extreme case, rather than lock up the whole of the premises the goods should be removed to some convenient place off the premises (*Smith v. Ashforth* (1860), 29 L. J. (ex.) 259).

(*i*) *Castleman v. Hicks* (1842), Car. & M. 266. Where the landlord's agent

SECT. 11.
Proceedings
between
Seizure
and Sale.

Impounding
off the
premises.

324. In impounding off the premises the distrainer must select a suitable pound. Cattle may be impounded in a pound overt, but furniture and goods liable to be damaged by wet weather or to be stolen must be placed in a house or other pound covert (*k*).

Impounding is for safe custody, and the distrainer is answerable for the condition of the pound at the time the chattels are put in. He must at his peril take care that the place (even though it may be a public pound) is in a fit and proper state, and he is liable for the loss of or injury to the distress if it is not (*l*). If cattle are tied in the pound and strangle themselves the landlord will be liable, but he is not liable if they die by the act of God (*m*).

Using the
distress.

325. Whether impounded on or off the premises, the landlord may not use or work the goods or cattle impounded. To this rule there is the exception of chattels in respect of which use is necessary for the preservation of the thing distrained and is really for the benefit of the owner, as in the case of milch cows, which may be milked (*n*). The distrainer may permit the tenant to use the chattels while impounded, and even license their removal for a temporary purpose (*o*).

Nature of
possession
to be kept.

326. When the landlord impounds the goods upon the premises, merely leaving them there without anyone in possession is sufficient custody, for they are in the custody of the law (*a*). If he abandons them, then the possession reverts to the tenant. Whether or not his acts amount to an abandonment is always one of fact when the point arises (*b*). If he puts a bailiff in possession it is not necessary that such bailiff should retain continuous physical possession (*c*).

SUB-SECT. 2.—Appraisement.

Appraise-
ment.

327. An appraisement of the chattels distrained as a condition precedent to a sale (*d*) is only necessary, first, when the tenant or

went into a field where the cattle were and placed his hand on one of them saying he distrained the whole, and counted them, and next morning left with the tenant a notice stating that he had distrained the cattle thereunder mentioned and had impounded them on the premises, this was held to constitute an impounding (*Thomas v. Harries* (1840), 1 Man. & G. 695).

(*k*) Co. Litt. 47 b. It seems doubtful if chattels can be brought back to the premises for the purpose of impounding after they have once been impounded off the premises (*Smith v. Wright* (1861), 30 L. J. (EX.) 313, *per* BRAMWELL, B., at p. 315).

(*l*) *Wilder v. Speer* (1838), 8 Ad. & El. 547; *Bignell v. Clarke* (1860), 5 H. & N. 485.

(*m*) *Vaspor v. Edwards* (1702), 12 Mod. Rep. 658. See also title ANIMALS, Vol. I., pp. 382 *et seq.*, as to the procedure of impounding cattle; and as to feeding impounded cattle, see *ibid.*, p. 384.

(*n*) *Bagshawe v. Goward* (1607), Cro. Jac. 147; Bac. Abr. tit. Distress, D.

(*o*) *Kerby v. Harding* (1851), 6 Exch. 234.

a *Swann v. Falmouth (Earl)* (1828), 8 B. & C. 456.

b *Lumsden v. Burnett*, [1898] 2 Q. B. 177, C. A.

Bannister v. Hyde (1860), 2 E. & E. 627; *Jones v. Biernstein*, [1899] 1 Q. B. 470; affirmed [1900] 1 Q. B. 100, C. A.; and see *Kemp v. Christmas* (1898), 79 L. T. 233, C. A.

(*d*) Under stat. (1689) 2 Will. & Mar., c. 5, s. 1, before a distress could be sold the distrainer was required with the sheriff or under-sheriff or

owner of the chattels by writing requires such appraisement to be made (e); and, secondly, in the case of growing crops (f). When appraisement is still necessary to be resorted to, the appraisers must be reasonably competent, though not necessarily professional, appraisers (g), and they must be disinterested persons (h).

Two appraisers are necessary, whatever the amount of the rent, unless the tenant consent to one acting (i). The appraisement, which is usually written at the foot of the inventory, must be properly stamped (k).

SMOT. 11.
Proceedings
between
Seizure
and Sale.

SECT. 12.—*Effect of Bankruptcy, Winding-up, Execution and Receivership.*

SUB-SECT. 1.—*Bankrupt Tenant.*

328. The bankruptcy of a tenant does not place his goods in *custodia legis* so as to prevent a distress by the landlord (l). It merely restricts the right of distress so far as antecedent rent is concerned (m). Under the Bankruptcy Acts (n), after the commencement of the bankruptcy the landlord can only distrain upon the goods and chattels of the bankrupt for six months' rent accrued due prior to the date of the order of adjudication, but the landlord may prove under the bankruptcy for any surplus for which the distress may not have been available (o).

Bankruptcy
of tenant

329. The right to distrain upon the goods of a stranger is not affected by the Bankruptcy Acts, consequently the landlord's right

Effect of, as
regards goods
of a stranger.

the constable of the hundred to cause the goods to be appraised by two sworn appraisers. So much of the Act as required the assistance of the sheriff, under-sheriff, and constable was repealed by the Parish Constables Act, 1872 (35 & 36 Vict. c. 92), s. 13, and the repeal of the rest of the requirement of the Act as to appraisement at all except upon a requirement was effected by the statute mentioned in the next note.

(e) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 5. For forms of request and appraisement, see *Encyclopædia of Forms*, Vol. VII., p. 702.

(f) The reason for appraisement in this case is the statute which makes growing crops distrainable (Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 8), which provides that they are to be appraised when cut and gathered and not before, and the abolition of appraisement which was effected by a qualified repeal of stat. (1689) 2 Will. & Mar., c. 5, does not refer to the later statute.

(g) *Roden v. Eyton* (1848), 6 C. B. 427.

(h) Thus the landlord cannot be one of the appraisers (*Lyon v. Weldon* (1824), 2 Bing. 334), nor can the bailiff who made the distress (*Westwood v. Cowne* (1816), 1 Stark. 172; *Rocke v. Hills* (1887), 3 T. L. R. 298). But where the broker has to save expense valued the goods at the instance of the person distrained upon, the latter cannot afterwards complain of it (*Bishop v. Bryant* (1834), 6 C. & P. 484).

(i) *Allen v. Flicker* (1839), 10 Ad. & El. 640.

(k) See Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 24, and schedule.

(l) *Briggs v. Soury* (1841), 8 M. & W. 729, 739.

(m) *Re Mackenzie, Ex parte Hertfordshire (Sheriff)*, [1899] 2 Q. B. 566, 573, C. A.

(n) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 42; and Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 28. As to the commencement of a bankruptcy, see *Re Bumpus, Ex parte Whyte*, [1908] 2 K. B. 330.

(o) See, further, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 221, 291 *et seq.*; and *Re Griffith, Ex parte Official Receiver* (1897), 66 L. J. (Q. B.) 763.

SECT. 12.
Effect of
Bankruptcy.
Winding-up
etc.

Rights
unaffected by
bankruptcy.

to distrain upon such goods extends to the full period of six years' arrears (*p*). And inasmuch as the discharge of a bankrupt is merely to release the bankrupt, and not to extinguish the debt or collateral remedies, it does not prevent the landlord from realising goods of a stranger distrained on the premises of the bankrupt after his discharge (*q*).

330. The landlord may distrain at any time while the goods remain on the premises, even after they have been sold, if not removed (*r*). A person who at the request of the creditors pays off a distress after and even with notice of the bankruptcy may be recouped out of the estate before the creditors receive any dividend (*s*).

Payment of rent to the landlord under a threat of distress, even after an act of bankruptcy, is unimpeachable (*t*), and even though there are at the time no goods upon the premises which the landlord could distrain (*a*).

In the case of a distress made before the bankruptcy the landlord may lose the benefit of it, if, after seizure, he allows the goods to remain on the premises so as to be in the reputed ownership of the tenant at the commencement of his bankruptcy (*b*).

SUB-SECT. 2.—Company in Liquidation.

Company in
liquidation.

331. Where a company is being wound up by the court or subject to the supervision of the court, any distress put in force against the estate or effects of the company after the commencement of the winding-up is void if levied without the leave of the court (*c*). In the case of a company being wound up voluntarily the court also has the same power as in a compulsory winding-up, upon the application of the liquidator, to control the landlord's exercise of his right of distress (*d*). In all cases persons seeking leave to distrain must show good reason why they should be allowed to do so (*e*).

(*p*) *Brocklehurst v. Lawe* (1857), 7 E. & B. 176; *Railton v. Wood* (1890), 15 App. Cas. 363, P. O.

(*q*) *Newton v. Scott* (1842), 9 M. & W. 434; 10 M. & W. 471, Ex. Ch.

(*r*) *Ex parte Plummer* (1739), 1 Atk. 103.

(*s*) *Re Humphreys, Ex parte Kennard* (1870), 21 L. T. 684; *Re Ayshford, Ex parte Lovering* (1887), 35 W. R. 652; *Re Jermyn, Ex parte Elliott* (1838), 3 Mont. & A. 664.

(*t*) *Stevenson v. Wood* (1805), 5 Esp. 200.

(*a*) *Mavor v. Croome* (1823), 1 Bing. 261.

(*b*) *Re Deane, Ex parte Shuttleworth* (1832), 1 Deac. & Ch. 223. As to the effect of execution before bankruptcy, see p. 176, *post*.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 211; *Re Exhall Coal Mining Co., Ltd.* (1864), 4 De G. J. & Sm. 377, C. A.; *Re Lancashire Cotton Spinning Co., Ex parte Carnelly* (1887), 35 Ch. D. 656, C. A. The leave is always necessary, for the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10, which imports certain bankruptcy rules into winding-up, does not extend the provisions of the Bankruptcy Acts so as to give the landlord a right as of course to distrain for six months' rent in arrear before the winding-up order (*Re Coal Consumers Association* (1876), 4 Ch. D. 625; *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250, C. A.).

(*d*) *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373, C. A.

(*e*) *Re Higginsshaw Mills and Spinning Co.*, [1896] 2 Ch. 644, C. A.

332. Where the distress has already been levied, but not completed by sale before the commencement of the winding-up, the court favours the landlord, and the distress will be allowed to proceed, unless there are special reasons rendering this course inequitable (*f*).

SECT. 12.
Effect of
Bankruptcy,
Winding-up
etc.

333. The principles upon which leave to proceed with a distress have been granted or refused are as follows:—

Uncompleted
distress may
proceed.

(1) Leave will not be given to distrain for rent accrued due before the commencement of the winding-up, if the landlord is a legal creditor, and can prove for the rent in the winding-up (*g*).

When leave
to distrain
given or
refused.

(2) The fact that the liquidator retains possession afterwards for the purpose of winding-up will not entitle the landlord to distrain for rent accrued at the commencement of the winding-up, though it may entitle him to distrain for the subsequent rent (*h*).

(3) For rent accrued after the commencement of the winding-up leave to distrain will be given, if the liquidator has retained possession for the purpose of winding-up, or if he has used the property for the purpose of carrying on the company's business, or has kept the property in order to sell it or to do the best he can with it (*i*). But it is not sufficient that the liquidator has merely abstained from any effort to get rid of the property (*k*); nor will leave be given because the liquidator has derived some indirect advantage from the tenancy (*l*). And if the liquidator has kept possession by arrangement with the landlord and for his benefit, as well as for the benefit of the company, and there is no agreement with the liquidator that he shall pay rent, the landlord is not allowed to distrain (*m*).

(*f*) *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373, C. A.

(*g*) *Re Coal Consumers Association* (1876), 4 Ch. D. 625; *Re North Yorkshire Iron Co.* (1878), 7 Ch. D. 661; *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181. But the court cannot restrain a distress where the company is not the tenant of the landlord, as where the company has taken possession of the premises under an agreement for an assignment (*Re Lundy Granite Co., Ex parte Heaven* (1871), 6 Ch. App. 462), or where the lease is held by a trustee for the company (*Re Regent United Service Stores* (1878), 8 Ch. D. 616, C. A.; *Re Traders' North Staffordshire Carrying Co., Ex parte North Staffordshire Rail. Co.* (1874), L. R. 19 Eq. 60, 65), or the company is an undertenant (*Re Carriage Co-operative Supply Association, Ex parte Clemence* (1883), 23 Ch. D. 154). And where the landlord is not a legal creditor of the company he cannot be deprived of his right of distress by an offer by the liquidator to allow him to prove for the rent (*Re Regent United Service Stores, supra*).

(*h*) *Re North Yorkshire Iron Co., supra*; *Re Brown, Bayley, and Dixon, Ex parte Roberts and Wright* (1881), 18 Ch. D. 649; *Re South Kensington Co-operative Stores* (1881), 17 Ch. D. 161.

(*i*) *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322, 330, C. A.; *Re Lundy Granite Co., Ex parte Heaven* (1871), 6 Ch. App. 462; *Re North Yorkshire Iron Co., supra*; *Re Silkstone and Dodworth Coal and Iron Co.* (1881), 17 Ch. D. 158. In such a case the rent is considered one of the expenses of the winding-up. And placing a caretaker on the property in the hope of obtaining a better price for it by waiting and with a view to preventing it from suffering damage, but not of carrying on the business or selling it as a going concern, is sufficient reason for leave being given (*Re Blazer Fire Lighter, Ltd.*, [1895] 1 Ch. 402).

(*k*) *Re Oak Pits Colliery Co., supra*, at p. 331.

(*l*) *Re House and Land Investment Trust, Ex parte Smith* (1894), 42 W. R. 572.

(*m*) *Re Oak Pits Colliery Co., supra*, per LINDLEY, L.J., at p. 330; *Re Progress*

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Winding-up
etc.

When
winding-up
occurs during
a quarter or
half-year.
Rent in
advance.

Where
company is
not the
tenant.

Collateral
security.

Preferential
payments.

Execution
tenant

334. Where the winding-up occurs during the currency of a quarter or half-year the rent is apportioned, and leave to distrain will generally be limited to so much of the rent as has accrued since the commencement of the winding-up, leaving the landlord to prove for the rest (*n*). But where the landlord has a power of re-entry for rent in arrear and claims to exercise his power unless his rent is paid in full, the liquidator, if he remains in possession, will be ordered to pay the rent in full (*o*).

Rent payable in advance may be distrained for after the winding-up. But this is apportionable, and the liquidator must pay in full in respect of the time he continues in occupation, and the landlord must prove in the winding-up for the rest (*p*).

335. The landlord's distress will not be interfered with, whether the rent accrued before or after the winding-up, if there is no privity between the landlord and the company, *e.g.*, when the chattels of the company are merely on the premises of the tenant (*q*), nor where the company is not the legal tenant of the premises (*r*), nor where the goods are those of a stranger to the landlord on the company's premises (*s*). Where the goods for all practical purposes have ceased to be the goods of the company, as when the goods to be distrained are mortgaged to debenture-holders to an amount exceeding their value, the landlord is entitled to distrain (*t*), and it makes no difference to the landlord's right that the debenture-holders are willing to release their security (*a*).

It is doubtful whether leave to distrain will be given where the landlord has taken a collateral security, such as a promissory note, from the tenant (*b*).

336. There is the same postponement to preferential payments in the case of a winding-up as in the case of bankruptcy (*c*).

SUB-SECT 3.—Execution against Tenant.

337. The levying of an execution upon the goods of a tenant places them in *custodia legis* and protects them from seizure by the

Assurance Co., Ex parte Liverpool Exchange Co. (1870), L. R. 9 Eq. 370; *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181.

(*n*) *Re South Kensington Co-operative Stores* (1881), 17 Ch. D. 161; *Shackell & Co. v. Chorlton & Sons*, [1895] 1 Ch. 378.

(*o*) *Re Silkstone and Dodworth Coal and Iron Co.* (1881), 17 Ch. D. 158; *General Share and Trust Co. v. Wetley Brick and Pottery Co.* (1882), 20 Ch. D. 260, C. A.

(*p*) *Shackell & Co. v. Chorlton & Sons*, *supra*.

(*q*) *Re Traders' North Staffordshire Carrying Co., Ex parte North Staffordshire Rail. Co.* (1874), L. R. 19 Eq. 60.

(*r*) See p. 173, note (*g*), *ante*.

(*s*) *Re Traders' North Staffordshire Carrying Co., Ex parte North Staffordshire Rail. Co.* (1874), L. R. 19 Eq. 60, per JESSEL, M.R., at p. 68.

(*t*) *Re New City Constitutional Club, Ex parte Purcell* (1887), 34 Ch. D. 646, C. A.; *Re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731.

(*a*) *Re New City Constitutional Club, Ex parte Purcell*, *supra*.

(*b*) *Re Harpur's Cycle Fittings Co.*, *supra*.

(*c*) See title COMPANIES, Vol. V.

landlord (*d*), except in the case of distress by the Crown (*e*) or when the execution is collusive (*f*). But the execution creditor may waive his rights (*g*).

SECT. 12.
Effect of
Bankruptcy,
Winding-up
etc.

Goods cannot
be removed
if rent
unsatisfied.

Exceptions.

338. In general goods seized by the sheriff under High Court process cannot be removed until any arrears of rent (not exceeding one year) have been paid by the execution creditor. This in effect impounds the goods on the premises for the benefit of the landlord until the rent is paid (*h*).

The provision does not apply to executions at the suit of the landlord (*i*), nor to executions against a sub-lessee, so as to enable a ground landlord to claim the benefit of the Act on an execution against an underlessee (*k*). But a sequestration has been treated as an execution within the equity of the statute (*l*). The provision is not confined to goods and chattels which are distrainable in point of law, but casts the duty upon the sheriff to take care that the goods seized are not removed until the Act is complied with (*m*). But inasmuch as the goods of a stranger are not liable to execution, the statute confers on the sheriff no power to seize such goods or to apply the proceeds of sale thereof in payment of the rent (*n*). Should he seize and remove goods belonging to a stranger, he will be liable for a year's arrears of rent, as he has taken off the premises that which the landlord had the right to distrain (*o*), and he will also be liable to account to the real owner whether he has paid the landlord or not (*p*).

339. If two executions are levied the landlord cannot have a year's rent on each (*q*).

Two execu-
tions.

340. Further, it may be taken to be now established: (1) That the restriction upon removal does not apply except in the case of a subsisting tenancy (*r*). But, provided it be subsisting, it may be a tenancy created by an attornment in a mortgage deed (*s*), or by a

When restric-
tion upon
removal
obtains.

(*d*) *Re Mackenzie, Ex parte Hertfordshire (Sheriff)*, [1899] 2 Q. B. 566, 573, C. A.; see Co. Litt. 47 a; Gilbert on Distresses, 44, 45; *Wharton v. Naylor* (1848), 12 Q. B. 673.

(*e*) *R. v. Cotton* (1751), Park. 112, confirming *R. v. Dale* (1719), cited *ibid.*, p. 141; *A.-G. v. Leonard* (1888), 38 Ch. D. 622; see also *R. v. Hill* (1818), 6 Price, 19.

(*f*) *Smith v. Russell* (1811), 3 Taunt. 400.

(*g*) *Seven v. Mihill* (1756), 1 Keny. 370.

(*h*) Landlord and Tenant Act, 1709 (8 Ann. c. 14 (Ruff. c. 18 in Revised Statutes, s. 1)). As to a receiver being "a landlord" within s. 1, see *Cox v. Harper* (1910), 26 T. L. R. 264, C. A.

(*i*) *Taylor v. Lanyon* (1830), 6 Bing. 536, 544.

(*k*) *Bennet's Case* (1727), 2 Stra. 787; but see *Thurgood v. Richardson* (1831), 7 Bing. 428.

(*l*) *Dixon v. Smith* (1818), 1 Swan. 457.

(*m*) *Riseley v. Ryle* (1843), 11 M. & W. 16; see *Smallman v. Pollard* (1844), 6 Man. & G. 1001, 1009.

(*n*) *Beard v. Knight* (1858), 8 E. & B. 865.

(*o*) *Forster v. Cookson* (1841), 1 Q. B. 419.

(*p*) *White v. Binstead* (1853), 13 C. B. 304.

(*q*) *Dod v. Saxby* (1735), 2 Stra. 1024.

(*r*) *Cox v. Leigh* (1874), L. R. 9 Q. B. 333; *Hodgson v. Gascoigne* (1821), 5 B. & Ald. 88. It does not, therefore, apply when the tenancy has determined before the seizure, though within six months of it (*Cox v. Leigh, supra*).

(*s*) *Yates v. Ratledge* (1860), 5 H. & N. 249.

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Effect of
Bankruptcy.
Winding-up
etc.

stipulation in a purchase agreement under which the purchaser takes possession and pays a fixed yearly rent until completion (*t*). (2) The tenancy must be one to which the right of distress is incident—that is to say, it must be at a rent certain and presently distrainable for (*a*). (3) The rent must be rent actually due at the time of seizure (*b*), and not that which accrues afterwards, though possession be retained by the sheriff (*c*). If it is due it is immaterial that it is reserved payable in advance (*d*), and the full rent may be claimed though the landlord has been accustomed to remit portion to the tenant (*e*). If the landlord is induced to withdraw a distress on the tenant's false assurance that a particular debt is satisfied, and subsequently execution is levied for the debt, the landlord is entitled to his year's rent under the statute (*f*). The landlord protected by the Act is the person immediately entitled to the rent, or the person who has a title upon which he can recover in ejectment (*g*).

When
execution is
followed by
bankruptcy.

341. When an execution is followed by the bankruptcy of the tenant, the latter does not deprive the landlord of his right acquired under the Act. Therefore the sheriff who sells the goods of a judgment debtor is justified in paying to the landlord a year's arrears of rent, notwithstanding he has had notice of bankruptcy proceedings before he had notice of the landlord's claim (*h*). The only exception is where the execution is rendered void by the bankruptcy, and the landlord has not distrained (*i*). Where the sale does not take place until after notice of the bankruptcy, the sheriff should decline to proceed with the execution until the landlord has been satisfied (*j*).

Removal of
goods by
sheriff.

342. The sheriff does not infringe the statute unless he removes or permits the removal of the goods without satisfying the rent (*k*). There must be an actual or constructive removal. It is not sufficient that the goods have been seized and sold if there has been no removal (*l*). The statute is, however, infringed by the removal

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- (*t*) *Saunders v. Musgrave* (1827), 6 B. & C. 524.
 (*a*) *Riseley v. Ryle* (1843), 11 M. & W. 16, 25.
 (*b*) *Gwilliam v. Barker* (1815), 1 Price, 274.
 (*c*) *Hoskins v. Knight* (1813), 1 M. & S. 245; *Reynolds v. Barford* (1844), 7 Man. & G. 449; *Re Benn Davis, Ex parte Pollen (Trustees)* (1885), 55 L. J. (Q. B.) 217.
 (*d*) *Harrison v. Barry* (1819), 7 Price, 690.
 (*e*) *Williams v. Lewsey* (1831), 8 Bing. 28.
 (*f*) *Wollaston v. Stafford* (1854), 15 O. B. 278.
 (*g*) *Colyer v. Speer* (1820), 2 Brod. & Bing. 67; and an action may be brought by the administrator of the landlord (*Palgrave v. Windham* (1719), 1 Stra. 212), provided administration has been granted and demand of the rent made before the goods have been removed (*Waring v. Dewberry* (1718), 1 Stra. 97).
 (*h*) *Re Mackenzie, Ex parte Hertfordshire (Sheriff)*, [1899] 2 Q. B. 566, O. A.; *Re Driver, Ex parte Official Receiver* (1899), 80 L. T. 841, n., O. A. See generally as to the effects of bankruptcy, p. 171, *ante*, and title **BANKRUPTCY AND INSOLVENCY**, Vol. II. pp. 221, 291 *et seq.*
 (*i*) *Re Mackenzie, Ex parte Hertfordshire (Sheriff)*, *supra*, at p. 576, commenting on *Lee v. Lopes* (1812), 15 East, 230; *Gethin v. Wilks* (1833), 2 Dowl. 189.
 (*j*) *Re Driver, Ex parte Official Receiver*, *supra*.
 (*k*) *Re Benn Davis, Ex parte Pollen (Trustees)*, *supra*.
 (*l*) *Smallman v. Pollard* (1844), 6 Man. & G. 1001; *White v. Binstead* (1863), 13 O. B. 304.

of any portion of the goods seized (*m*), and if once removed the wrong cannot be purged by the subsequent return of the goods to the premises (*n*). A landlord waives the benefit of the statute by consenting to the removal, even if given upon the faith of an undertaking to pay the rent which is unfulfilled (*o*).

Effect of
Bankruptcy,
Winding-up
etc.

343. If the sheriff relinquishes possession of the goods, the possession reverts to the original owner, and they may be distrained (*p*), and so they are distrainable if not removed within a reasonable time after sale by the sheriff (*q*).

Relinquishing
possession.

344. The sheriff is under no obligation to inquire whether any rent is in arrear, and he is under no liability to the landlord for not keeping the goods, unless informed that rent is due (*r*). But if the sheriff has notice before the goods are removed that rent is due to the landlord, and nevertheless does not keep the goods on the premises, but sells them without paying the landlord, the sheriff becomes liable to the landlord for the wrongful removal (*s*). And express notice is not necessary, it is sufficient if he have knowledge of the claim (*t*); and if he be informed by notice that rent is due the form of the notice is not material (*u*). The notice is in time while the goods or the proceeds of sale remain in the sheriff's hands (*b*). When the claim is made by the landlord the sheriff must ascertain that the relationship of landlord and tenant exists, and that rent is really due, and he is entitled to see the lease if there is one (*c*). If the relationship is established, slight proof of rent in arrear will

What is
sufficient
notice to
sheriff.

(*m*) *Colyer v. Speer* (1820), 2 Brod. & Bing. 67.

(*n*) *Lane v. Crockett* (1819), 7 Price, 566, Ex. Ch.; *Wren v. Stokes*, [1902] 1 I. R. 167, O. A.

(*o*) *Rothery v. Wood* (1811), 3 Camp. 24.

(*p*) *Ackland v. Paynter* (1820), 8 Price, 95; *Bagshawes, Ltd. v. Deacon*, [1898] 2 Q. B. 173, O. A.; *Re Mackenzie, Ex parte Hertfordshire (Sheriff)*, [1899] 2 Q. B. 566, O. A., at p. 575. In *Cropper v. Warner* (1883), Cab. & El. 152, where a landlord knew that a sheriff had withdrawn merely temporarily under an arrangement between a claimant and an execution creditor, and that interpleader proceedings were still pending, he was held entitled to distrain. In *Blades v. Arundale* (1813), 1 M. & S. 711, a sheriff's officer was held not to be in possession when he had locked the writ in a drawer and gone away with the key without leaving anyone in charge. In *St. John's College (Oxford) v. Murcott* (1797), 7 Term Rep. 259, where a sheriff's officer was in possession under an outlawry, but made a distress for the landlords, and the outlawry was rescinded, the officer was held bound to pay the proceeds of the distress to the distrainors.

(*q*) *Re Benn Davis, Ex parte Pollen (Trustees)* (1885), 55 L. J. (C. B.) 217; *Peacock v. Purvis* (1820), 2 Brod. & Bing. 362, at p. 367; *Wright v. Dewes* (1834) 1 Ad. & El. 641.

(*r*) *Re Mackenzie, Ex parte Hertfordshire (Sheriff)*, *supra*, at p. 574; *Waring v. Dewberry* (1718), 1 Stra. 97; *Palgrave v. Windham* (1719), 1 Stra. 212; *Arnitt v. Garnett* (1820), 3 B. & Ald. 440.

(*s*) *Re Mackenzie, Ex parte Hertfordshire (Sheriff)*, *supra*; *Riseley v. Ryle* (1843), 11 M. & W. 16; *Andrews v. Dixon* (1820), 3 B. & Ald. 645.

(*t*) *Ibid.* For form of notice to sheriff, see *Encyclopædia of Forms*, Vol. VII., p. 706.

(*u*) *Colyer v. Speer*, *supra*.

(*b*) *Arnitt v. Garnett*, *supra*.

(*c*) *Augustine v. Challis* (1847), 1 Exch. 279; *Keightley v. Birch* (1814), 3 Camp. 621.

SMOT. 12.
Effect of
Bankruptcy,
Winding-up
etc.

Goods not
 to be sold
 after notice,
 until rent
 paid.

generally be accepted, but he is bound as between himself and the execution creditor to ascertain whether the rent is due (*d*).

345. Where notice has been given to the sheriff by the landlord that rent is due, the sheriff should call upon the execution creditor to pay it, and should refuse to sell any of the goods until it is paid; even if there are goods upon the demised premises of a value many times exceeding the amount of rent due his duty is the same, and he should refuse to sell the smallest part of the goods until the claim of the landlord is satisfied (*e*). The landlord's claim must be paid without any deduction for sheriff's fees (*f*). The sheriff is not bound to advance the money to pay the rent out of his own pocket. If the execution creditor declines to advance it, the sheriff may refuse to sell (*g*). But if the sheriff is willing to do so, he may sell and pay the landlord's rent and apply the surplus, if any, in satisfaction of the debt, and if there is no surplus may return *nulla bona* (*h*). He should not adopt the latter course if he had notice of the tenant's bankruptcy before the sale (*i*). If no one will pay the landlord's rent the sheriff can withdraw and return *nulla bona* (*k*). When the goods on the premises are not sufficient to satisfy the rent lawfully demanded the sheriff should withdraw (*l*). When he withdraws the landlord can distrain for his whole rent (*m*).

Liability of
 sheriff for
 wrongful
 removal etc.;

346. If the sheriff infringes the statute and permits the removal of the goods before the rent is paid, and in consequence the landlord loses any part of his rent, the sheriff is liable at the suit of the landlord in an action on the statute for wrongful removal without paying him (*n*).

and of
 execution
 creditor.

The landlord has no right to require the goods to be sold for his benefit, and if they are sold he cannot maintain an action against the sheriff for money had and received (*o*). No action will lie against the execution creditor, as he has nothing to do with the removal of the goods (*p*).

Measure of
 damages.

347. The measure of damages in an action against the sheriff at the suit of the landlord is *prima facie* the amount of rent (not exceeding a year) due, but it is competent to the sheriff to prove in mitigation of damages that the real value of the goods removed was

(*d*) *Frost v. Barclay* (1887), 3 T. L. R. 617.

(*e*) *Thomas v. Mirehouse* (1887), 19 Q. B. D. 563, *per* Lord ESHER, M.R., at p. 566.

(*f*) *Gore v. Gofton* (1725), 1 Stra. 643.

(*g*) *Cocker v. Musgrove* (1846), 9 Q. B. 223; *Thomas v. Mirehouse*, *supra*.

(*h*) *Ibid.*; *Wintle v. Freeman* (1841), 11 Ad. & El. 539.

(*i*) *Re Driver, Ex parte Official Receiver* (1899), 80 L. T. 840.

(*k*) *Wintle v. Freeman*, *supra*; *Re Mackenzie, Ex parte Hertfordshire (Sheriff)*, [1899] 2 Q. B. 568, 575, O. A.

(*l*) *Foster v. Hilton* (1831), 1 Dowl. 35.

(*m*) *Re Mackenzie, Ex parte Hertfordshire (Sheriff)*, *supra*.

(*n*) *Ibid.*; *Calvert v. Joliffe* (1831), 2 B. & Ad. 418.

(*o*) *Re Mackenzie, Ex parte Hertfordshire (Sheriff)*, *supra*; *Green v. Austin* (1812), 3 Camp. 260.

(*p*) *Cocker v. Musgrove*, *supra*.

not sufficient to pay the rent. All that the landlord has to prove is that the rent is in arrear, that the sheriff has had notice of this, and that he has notwithstanding removed the goods. It then lies on the sheriff to show that the value of the goods removed was less than the rent to reduce his liability (g).

SECT. 12.
Effect of
Bankruptcy.
Winding-up
etc.

348. In the case of weekly and other tenancies for less than a year the arrears of rent which may be claimed upon an execution are further limited, for no landlord of any tenement let at a weekly rent shall have a claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment (r).

Weekly
tenancies etc.

349. The statute forbidding the removal of goods by the sheriff without paying one year's rent does not authorise a distraint on goods in *custodiâ legis* (s).

Goods in
custodiâ legis.

350. Where a sheriff has, under the Sale of Farming Stock Act, 1816, sold any straw, chaff, turnips, hay, or other produce under an agreement that the purchaser will expend the crops or produce for the benefit of the land, the landlord may not distrain on any such produce which has been severed at the time of such agreement, nor on any turnips drawn or growing thus sold, nor on any horses, sheep, or other cattle or beasts, or on any waggons or other implements of husbandry kept or used on the land for the purpose of carrying out such agreement (a).

Agricultural
produce and
farming
animals.

351. Where growing crops are seized or sold by a sheriff or other officer in execution, such crops, as long as they remain on the land, are subject to distress for rent which may accrue due to the landlord after any such seizure and sale, but only in default of other sufficient distress (b).

Growing
crops.

352. The Landlord and Tenant Act, 1709, does not apply to goods taken in execution under the warrant of a county court (c).

County court
execution.

Thomas v. Mirehouse (1887), 19 Q. B. D. 563.

Execution Act, 1844 (7 & 8 Vict. c. 97), s. 67.

(s) Landlord and Tenant Act, 1709 (8 Ann. c. 18), s. 1; *Wharton v. Naylor* (1848), 12 Q. B. 673, *per* PATTERSON, J., at p. 679; see as to the effect of this also *Smallman v. Pollard* (1844), 6 Man. & G. 1001; *Riseley v. Ryle* (1843), 11 M. & W. 16; *Cocker v. Musgrove* (1846), 9 Q. B. 223; *Thomas v. Mirehouse*, *supra*.

(a) Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), ss. 1, 3, 6. This provision only applies where the crop has been severed before sale (see *Wright v. Dewes* (1834), 1 Ad. & El. 641). See also *Hutt v. Morrell* (1848), 11 Q. B. 425 and (in error) 438, Ex. Ch., as to the interpretation of this statute. See, generally, title AGRICULTURE, Vol. I., p. 254.

(b) Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), s. 2. The decision in *Wharton v. Naylor* (1848), 12 Q. B. 673, is therefore no longer law on this point.

(c) See title COUNTY COURTS, Vol. VIII., p. 563.

SECT. 12.
Effect of
Bankruptcy,
Winding-up
etc.

Admiralty
process.
Receiver in
possession.

353. Where goods are taken in execution under any process in Admiralty, and a claim is made by the landlord for rent, a judge of that division has jurisdiction to adjudicate upon the claim, and all other proceedings must be stayed (*d*).

SUB-SECT 4.—*Receiver in Possession.*

354. Where a receiver appointed by the court is in possession of the premises the rights of the landlord are not affected, except that before distraining he must apply to the court for leave to do so (*e*). If a landlord is in possession before a receiver is appointed, he need not apply for leave to proceed with the distress; and if he does apply he will not be allowed the costs of the application (*f*). No leave is necessary in a case in which a receiver in bankruptcy is in possession (*g*).

SECT. 13.—*Sale of Distress.*

SUB-SECT. 1.—*In General.*

Sale of
distress.

355. Although at common law a distress for rent could not be sold (unless the distress was levied by the Crown), being only in the nature of a pledge or security, by statute any goods distrained for rent, which have not been replevied within five days after the distress and notice thereof, may be sold for the best price that can be obtained, towards satisfaction of the rent (*h*).

Sale is optional and not imperative, and no action lies against a landlord for not selling (*i*); apparently, however, loose corn etc. and growing crops must, in default of replevy, be sold under and subject to the statutory provisions (*k*).

(*d*) Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 16.

(*e*) *Sutton v. Rees* (1863), 9 Jur. (N. s.) 456, where it was said he should issue the distress warrant with directions not to execute it without further instructions and then apply for leave; *Russell v. East Anglian Rail. Co.* (1850), 3 Mac. & G. 104, 118. The application is made by summons in chambers in the action in which the receiver was appointed (*Searl v. Choat* (1884), 25 Ch. D. 723, C. A.). See also title RECEIVERS.

(*f*) *Engel v. South Metropolitan Brewing and Bottling Co.*, [1891] W. N. 31; *Evelyn v. Lewis* (1844), 3 Hare, 472, 475.

(*g*) *Re Mayhew, Ex parte Till* (1873), L. R. 16 Eq. 97; *Re Mead, Ex parte Cochrane* (1875), L. R. 20 Eq. 282. As to receiver, see also pp. 130—131, *ante*.

(*h*) Stat. (1689) 2 Will. & Mar., c. 5, s. 1 (the provisions of this statute apply to rents seck, rents of assize and chief rents, and in fact to any kind of rent); Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 5; Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 10; Co. Litt. (ed. Hargrave and Butler) 47 b; Com. Dig. tit. Distress, D, 7; 3 Bl. Com. 14. As to replevin, see pp. 181, 199, *post*. See also p. 118, *ante*.

(*i*) *Philpott v. Lechain* (1876), 35 L. T. 855, confirming *Lear v. Edmonds* (1817), 1 B. & Ald. 157, and *Hudd v. Ravenor* (1821), 2 Brod. & Bing. 662. Otherwise a landlord could never relinquish a distress by agreement with his tenant. "Shall" and "may" in this particular statute are held to be permissive only, and not compulsory.

(*k*) See judgment of court in *Piggott v. Birtles* (1836), 1 M. & W. 441, at p. 448;

356. The existence of a distress is, until the sale, an answer to an action for rent, whether the distress be sufficient or not to satisfy the amount for which the distress is levied, for until sale, while the distress is being held, the debt from the tenant is suspended, although the property in the goods is not divested (*l*).

On the sale of the distress, the proceeds of the sale are an instantaneous executed satisfaction of the rent, vesting to that amount in the landlord, and the tenant has only an interest in the surplus (if any) (*m*). If the proceeds of the sale are insufficient to satisfy the landlord's claim the landlord can recover the balance due by action or otherwise (*n*).

SECT. 18.

Sale of
Distress.No action
before sale.Proceeds of
sale.

357. Until sale, whether the statutory five days have elapsed or not, and even if the goods have been removed from the premises, the tenant has the right to replevy them (*o*); and a landlord ought not to sell the goods after a tender of the rent and costs has been made at any time within the five days, and if he does so he will be liable in damages (*p*).

An agreement between a tenant and the distrainor relating to the disposition of the goods seized does not debar the tenant from claiming in an action damages for excessive distress (*q*).

Matters prior
to sale.

358. An irregularity in the sale will make the landlord liable to account not merely for the proceeds, but for the value of the goods, and the tenant will be entitled by way of surplus to the full value

Irregularity
in sale.

and see also, as to loose corn etc., stat. (1689) 2 Will. & Mar. c. 5, s. 2. As to time and place of sale see pp. 182—183, *post*.

(*l*) *Lehain v. Philpott* (1875), L. R. 10 Exch. 242 (in which the earlier authorities are reviewed), confirming *Edwards v. Kelly* (1817), 6 M. & S. 204, *per* BAYLEY and HOLROYD, JJ., at p. 209, and explaining *Dawson v. Cropp* (1845), 1 C. B. 961; the tenant, before sale, if he wishes to avoid sale, must take proceedings in replevin (see p. 199, *post*), and by this principle two concurrent actions on the same point are avoided. See also as to the property not being divested, *Iredale v. Kendall* (1878), 40 L. T. 362, *per* LOPES, J., at p. 363.

(*m*) *Moore v. Pyrke* (1809), 11 East, 52. An undertenant therefore cannot sue his immediate landlord for value of goods distrained as being money paid to his use.

(*n*) *Philpott v. Lehain* (1876), 35 L. T. 855; see also judgment of court in *Lehain v. Philpott* (1875), L. R. 10 Exch. 242, at pp. 245 and 246.

(*o*) *Jacob v. King* (1814), 5 Taunt. 451. At common law the goods were at all times repleviable, and the statute did not change this right, until the property passed by sale. As to replevin, see p. 199, *post*.

(*p*) *Johnson v. Upham* (1859), 2 E. & E. 250, overruling *Ellis v. Taylor*, (1841), 8 M. & W. 415 (see judgment of Lord ABINGER, C.B., at p. 418, as to malicious sale after tender). If this were otherwise the only way for a tenant to retain goods seized would be to go through a replevin action, in which he would necessarily be defeated. Moreover, since the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), seizure and impounding are, as a rule, nearly concurrent. At common law after impounding a tender is bad (*Firth v. Purvis* (1793), 5 Term Rep. 432; *Ladd v. Thomas* (1840), 12 Ad. & El. 117; *Ellis v. Taylor* (1841), 8 M. & W. 415; *Tennant v. Field* (1857), 8 E. & B. 336). The rule above stated is due to an equitable construction of the statute, see *Johnson v. Upham*, *supra*, and p. 153, *ante*.

(*q*) *Sells v. Hoare* (1824), 1 Bing. 401; *Willoughby v. Backhouse* (1824), 2 B. & C. 821; see also p. 197, *post*.

SECT. 13.
Sale of
Distress.
 —

of the goods less the rent and charges (*r*); the value in such a case is a question for the jury, and the price reached at an admittedly fair sale is not conclusive (*a*). But no damages can be recovered if no special damage has accrued (*b*), or if the sale is wholly void (*c*).

Bailiff may
 not sell to
 cover fees.

359. After a landlord has directed a bailiff to withdraw, the landlord's claim being satisfied, a bailiff may not sell any of the tenant's goods for the payment of his fees and expenses, and if he does so sell he confers no title on the purchaser (*d*).

SUB-SECT. 2.—Time for Sale.

Time for sale.

360. The sale may not be held until five days have elapsed from the taking of the distress and notice thereof (*e*); the five days must be reckoned exclusively of the day of seizure, so that the sale cannot take place until the sixth day from the seizure, from which the computation is made (*f*). These five days, however (within which the tenant or owner of the goods distrained is entitled to replevy) (*g*), will be extended to a period of not more than fifteen days, if the tenant or owner of the goods gives a written request to a landlord or other person making the levy, and also gives security for any additional cost occasioned by such extension of time. But the landlord or such person may, with the written request or consent of the tenant or such owner, sell the goods and chattels distrained or part of them at any time before the expiration of the extended period (*h*). A landlord may remain in possession for an extended

(*r*) *Biggins v. Goode* (1832), 2 Cr. & J. 364 (sale without appraisement); *Whitworth v. Maden* (1847), 2 Car. & Kir. 517 (no notice of distress); *Clarke v. Holford* (1848), 2 Car. & Kir. 540 (excessive distress); *Knight v. Egerton* (1852), 7 Exch. 407 (sale without appraisement).

(*a*) *Smith v. Ashforth* (1860), 29 L. J. (ex.) 259, *per* MARTIN, B., at p. 260.

(*b*) *Rodgers v. Parker* (1856), 18 C. B. 112; *Lucas v. Tarleton* (1858), 3 H. & N. 116, where no damage had accrued owing to a sale too soon by one day; see also *Proudlove v. Twemlow* (1833), 1 Cr. & M. 326, where nominal damages were entered owing to the form of the rule.

(*c*) *Owen v. Legh* (1820), 3 B. & Ald. 470 (a case of premature sale of standing corn and growing crops); see as to these p. 183, *post*; see also *Beck v. Denbigh* (1860), 6 Jur. (N. S.) 998.

(*d*) *Harding v. Hall* (1866), 14 L. T. 410 (here the purchaser was held liable in an action for conversion, although it was alleged that no such action lay in the particular instance, if the tenant had stood by and allowed the sale to take place without protest).

(*e*) Stat. (1689) 2 Will. & Mar. c. 5, s. 1. As to notice of distress, see p. 166, *ante*.

(*f*) *Robinson v. Waddington* (1849), 13 Q. B. 753, which brings this rule into line with the general law; compare *Young v. Higgon* (1840), 6 M. & W. 49. *Wallace v. King* (1788), 1 Hy. Bl. 13, is no longer law, nor is the statement made (as distinct from the decision) in *Harper v. Taswell* (1833), 6 O. & P. 166, where the five days were construed as meaning five times twenty-four hours from the hour of seizure.

(*g*) As to the replevy, see p. 181, *ante*; see also County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 133—145.

(*h*) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 6. The security to be given by the replevisor is settled by the county court registrar in accordance with the County Courts Act, 1888 (51 & 52 Vict. c. 43),

period at the tenant's request; such an arrangement, however, might, as affecting the rights of third parties, be found collusive (i).

361. Growing crops, cannot be sold until they are ripe, and a sale when unripe is wholly void (k).

362. A premature sale involving no actual damage is an irregularity for which no damages can be recovered in an action (l). A lodger, however, has a right of action against a landlord who sells before the requisite five days, although he has not at the time served any declaration (m). Although the landlord cannot sell until the expiration of the five clear days, he may remain upon the premises a reasonable time beyond the five days for the purpose of selling the goods distrained; the amount of such reasonable time is a question of fact to be determined (if necessary) by a jury in each individual case (n). A continuance in possession or retention of the goods for an unreasonable time may constitute a trespass, or at all events a wrongful act (o).

SECT. 18.
Sale of
Distress.

—
Growing
crops cannot
be sold until
ripe.
Premature
sale.

SUB-SECT. 3.—Place of Sale.

363. The sale of distress generally takes place where the goods and chattels are impounded (p), and if the goods are impounded on the premises chargeable with the rent they may be sold on such premises, and any person or persons whatsoever may enter on such premises for the purpose of taking part in the sale and of carrying off or removing goods on account of a purchaser (q). The

Place of sale

(i) *Harrison v. Barry* (1819), 7 Price, 690. In *Fisher v. Algar* (1826), 2 O. & P. 374, it was held that if the party distraining did not know which part of the goods seized were those of a tenant and which were those of a lodger, the tenant's request would justify a detention of the goods beyond the due date (this case has, however, been severely criticised in Bullen on Distress, 2nd ed., at p. 189).

(k) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), ss. 8, 9; see p. 133, *ante*, as to distress on growing crops under Distress for Rent Act, 1737 (11 Geo. 2, c. 19). As to the sale of loose corn under stat. (1689) 2 Will. & Mar. c. 5, s. 2, see *Piggott v. Dittles* (1836), 1 M. & W. 441. As to a right to damages, see *Owen v. Legh* (1820), 3 B. & Ald. 470; *Proudlove v. Twemlow* (1833), 1 Cr. & M. 326; *Rodgers v. Parker* (1856), 18 O. B. 112; *Lucas v. Tarleton* (1858), 3 H. & N. 116.

(l) *Lucas v. Tarleton*, *supra*, where the goods had been sold a day too soon. In this case a verdict was entered for the defendants.

(m) *Sharp v. Fowle* (1884), 12 Q. B. D. 385; and see Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 1, and p. 143, *ante*.

(n) *Pitt v. Shew* (1821), 4 B. & Ald. 208; see also *Philpott v. Lehair* (1876), 35 L. T. 855.

(o) *Griffin v. Scott* (1726), 2 Ld. Raym. 1424; *Winterbourn v. Morgan* (1809), 11 East, 395. In this case, at pp. 400, 401, Lord ELLENBOROUGH, C.J., had great doubt whether on the construction of the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 19, the mere personal remaining of the party on the premises without any disturbance of the plaintiff's possession would constitute the distrainer a trespasser. In any event, by so remaining he would not become a trespasser *ab initio*. In this case the possession extended for fifteen days (the last four of which were occupied with removing goods, since sold).

(p) As to impounding, see p. 168, *ante*.

(q) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 10. See *Wood v. Manley* (1839), 11 Ad. & El. 34, as to a tenant's licence for any purchaser to enter his premises to fetch away goods sold.

SECT. 13.
Sale of
Distress.
—

tenant or owner of the goods or chattels distrained may by written request, however, require them to be removed to a public auction room, or to some other fit and proper place specified in such request, and to be there sold, the person making such request bearing the costs and expenses attending such removal and any damage to the goods and chattels arising therefrom (*r*).

Sheaves of
corn etc.
must be sold
where found.

364. Sheaves of corn and loose corn must be locked up or detained and sold on the land where they are found (*s*), while growing crops must likewise be cut, gathered, and laid up in barns or other proper places on the premises, unless in default of there being such barns or proper place the landlord procures a barn or other place of storage in the neighbourhood, and when these are sold the sale must be at the place of storage (*a*).

SUB-SECT. 4.—Price at Sale.

Best price
must be
obtained.

365. The goods must be sold at the best price that can be obtained for them (*b*); no condition may be imposed at the sale that may restrict the best price from being obtained, even though the tenant himself was bound by the condition in his own user of the goods (*c*), the landlord by the sale of distress waiving any covenant in the lease restraining such user (*d*). In any action for not selling at the best price evidence may be given of mismanagement in connection with the handling of the goods at the sale (*e*).

SUB-SECT. 5.—Mode of Sale.

Mode of sale.

366. Although the goods and chattels distrained are generally sold by auction, there is no statutory provision that an auction must be held (*f*). In any event, where the distress is for an amount less than £20, the auctioneer need not for the purpose of such sale take out an auctioneer's licence (*g*). In order, however, that the

(*r*) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 5; see this section discussed in Bullen on Distress, 2nd ed., at pp. 306, 307. A request for removal does not estop the plaintiff from complaining of an original wrongful seizure of the goods (see *Masters v. Fraser* (1901), 85 L. T. 611). For form of request, see *Encyclopædia of Forms*, Vol. VII., p. 703.

(*s*) Stat. (1689) 2 Will. & Mar., c. 5, s. 2. See as to distraining these, p. 133, *ante*.

(*a*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 8. See as to distraining these, p. 133, *ante*.

(*b*) Stat. (1689) 2 Will. & Mar., c. 5, s. 1.

(*c*) *Hawkins v. Walrond* (1876), 1 C. P. D. 280, which finally decided the point contrary to *Abbey v. Petch* (1841), 8 M. & W. 419, in accordance with expression of doubt in *Frusher v. Lee* (1842), 10 M. & W. 709, and following *Ridgway v. Stafford (Lord)* (1851), 6 Exch. 404; see also *Roden v. Eytton* (1848), 6 C. B. 427, *per WILDE, C.J.*, at p. 429. The covenants referred to were by the tenant not to carry off farm produce from the farm, but to consume on the premises. It was held that the Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 11, only applies to purchasers from tenants.

(*d*) *Hawkins v. Walrond*, *supra*, *per* LINDLEY, J., at p. 285.

(*e*) *Poynter v. Buckley* (1833), 5 O. & P. 512. In this case evidence was admitted that the goods were left to stand in the rain, and also had not been properly lotted.

(*f*) Neither in stat. (1689) 2 Will. & Mar., c. 5, s. 1, nor in the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21).

(*g*) Auctioneers Act, 1845 (8 & 9 Vict. c. 15), s. 5. As to the auctioneer's

property may pass there must be an actual sale to a third person, and the landlord for this purpose cannot take the goods to himself or be the purchaser thereof (*h*). Should the landlord purchase himself, even if the form of a sale by auction be gone through, the goods do not vest in him so as to deprive a third party of their ownership. Apparently, however, the tenant by agreement with the landlord may cede his own goods which have been seized in satisfaction or part satisfaction of the sum distrained for (*h*). A true sale, however, although irregular, passes the property in the subject-matter of the distress (*i*). So long as the party selling acts *bond fide* there is no rule regulating the order in which the goods must be sold, and apparently all goods not privileged need not be exhausted before goods conditionally privileged are disposed of (*k*).

SECT. 13.
Sale of
Distress.

Order of sale.

367. The overplus after the sale, *i.e.*, the residue after the payment of the rent and of the reasonable charges of distress, appraisement, and sale (if any), should, in strict law, be left in the hands of the sheriff, under-sheriff, or constable for the owner's use (*l*); but in practice such overplus is generally paid over to the tenant direct (*m*). A jury, however, may be required to find whether the tenant has or has not received the balance in satisfaction of the real overplus, and in such an action the reasonableness of the charges is open to question (*n*).

Overplus

368. The tenant's remedy, if he suffers damage owing to the provisions of the statute not being carried out, is by an action on the case under the statute, and not for money had and received (*o*); nor has an undertenant, whose goods have been distrained, an action against the immediate tenant, who owed the rent, to recover the surplus paid over as money paid to his use (*p*);

Tenant's
remedy for
infringement
of statute.

position under a distress, see title AUCTION AND AUCTIONEERS, Vol. I., p. 520, and *Payne v. Eladen* (1901), 17 T. L. R. 161, that an auctioneer purporting to sell under a distress warrant does not give an implied warranty of title in so selling.

(*h*) *King v. England* (1864), 4 B. & S. 782; *Moore, Nettlefold & Co. v. Singer Manufacturing Co.*, [1903] 2 K. B. 168; [1904] 1 K. B. 820, O. A. In the former case the landlord, without any actual sale, took the goods at their appraised value; this was held not to pass the property therein, as there was no sale. In the latter case an auction was held, and, although it was argued that the auctioneer acted as agent for both parties, it was decided that the formal act of sale was void, as any sale by the landlord to himself would open the door to great abuses.

(*i*) *King v. England*, *supra*, per BLACKBURN and MELLOR, JJ.; see also *Lyon v. Weldon* (1824), 2 Bing. 334, confirming *Wallace v. King* (1788), 1 Hy. Bl. 13.

(*k*) *Jenner v. Yolland* (1818), 6 Price, 3. As to conditional privilege, see p. 141, *ante*.

(*l*) Stat. (1689) 2 Will. & Mar., c. 5, s. 1.

(*m*) *Stubbs v. May* (1823), 1 L. J. (o. s.) (c. p.) 12; *Taylor v. Harrison* (1832), 1 L. J. (K. B.) 155; *Lyon v. Tomkies* (1836), 1 M. & W. 603, where Lord ABINGER, C.B., at p. 606, explained that any technical irregularity in the payment without special damage gave no cause of action in accordance with the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 19.

(*n*) *Lyon v. Tomkies*, *supra*.

(*o*) *Yates v. Eastwood* (1861), 6 Exch. 805. Otherwise a duty would be cast on the landlord to find the owner of the goods and to pay him the surplus.

(*p*) *Moore v. Pyrke* (1809), 11 East, 52.

SECT. 13.
Sale of
Distress.

nor is a landlord liable to inquire into or act on any notice of claim by a third party either to the surplus proceeds or to the surplus goods. In regard to the latter, although no provision is made by statute, it is the landlord's duty to return unsold goods, which have been removed, to the place from which they were taken (q).

SECT. 14.—Expenses of Distress.

Expenses of
distress.

369. No person is entitled to any fees, charges, or expenses for levying a distress for rent, or for doing any act or thing in relation thereto, other than those specified in the appendix annexed to the rules made pursuant to the Law of Distress Amendment Act, 1888 (r).

In case of any difference the fees, charges, and expenses are to be taxed by the registrar of the district in which the distress is levied; the registrar may make such order as he thinks fit as to the costs of such taxation (s). A bailiff levying a distress must, at the tenant's request, produce a copy of the table containing these scales (a).

Costs etc.,
where rent
due does not
exceed £20.

370. Where the rent demanded and due does not exceed £20, no person distraining or connected with the making of a distress may

(q) *Evans v. Wright* (1857), 2 H. & N. 527. By so returning the goods the landlord was not held liable to conversion in an action by a party who had given notice of claim. Possibly (see judgment of *WARSON, B.*, at p. 533) the landlord may put the surplus goods into some convenient place and give the tenant notice thereof.

(r) 51 & 52 Vict. c. 21, s. 8; Distress for Rent Rules, 1888 ([1888] W. N., pp. 439, 440, 563), rr. 15, 16. These rules are dated August 31st, 1888.

Scale I.—Distresses for rent where the sum demanded and due shall exceed £20. For levying distress: 3 per cent. on any sum exceeding £20, and not exceeding £50; 2½ per cent. on any sum exceeding £50, and not exceeding £200; and 1 per cent. on any additional sum. For man in possession: 5s. per day, to provide his own board in every case. For advertisements: the sum actually and necessarily paid. For commission to the auctioneer: on sale by auction, 7½ per cent. on the sum realised not exceeding £100; 5 per cent. on the next £200; 4 per cent. on the next £200; and on any sum exceeding £500 3 per cent. up to £1,000; and 2½ per cent. on any sum exceeding £1,000; a fraction of £1 to be in all cases reckoned as £1. Reasonable fees, charges, and expenses (subject to r. 17) where distress is withdrawn or where no sale takes place, and for negotiations between landlord and tenant respecting the distress. For appraisement, on tenant's written request, whether by one broker or more: 6d. in the pound on the value as appraised, in addition to the amount for the stamp.

Scale II.—Distresses for rent where the sum demanded and due shall not exceed £20. For levying distress: 3s. For man in possession: 4s. 6d. per day, to provide his own board in every case. For appraisement, on the tenant's written request, whether by one broker or more: 6d. in the pound on the value as appraised, in addition to the amount for the stamp. For all expenses of advertisements, if any: 10s. Catalogues, sale and commission, and delivery: 1s. in the pound on the net produce of the sale. For removal at tenant's request: the reasonable expenses (subject to r. 17) attending such removal.

(s) *Ibid.*, r. 17. By a Treasury order dated September 15th, 1888, the fee for taxation is 5s. where the rent does not exceed £20, and 10s. where the rent is in excess of this sum.

(a) *Ibid.*, r. 18. The table is also to be posted up by the registrar in a conspicuous part of his office. The landlord is not liable for the bailiff's neglect in this respect; see *Hart v. Leach* (1836), 1 M. & W. 560.

SECT. 14.
Expenses
of Distress.

take from the produce of the distress, or from the tenant or landlord or any other person, any more costs or charges in respect of the distress or anything done therein than are set forth in the said appendix; and no person whatever may make any charge for any act, matter, or thing mentioned in the appendix, unless such act has been really done (*b*): especially must the possession charged for be real or actual to enable the full charges to be made (*c*). The parties may, however, by special bargain contract themselves out of the benefit of this statutory provision, so as to enable a bailiff to charge the landlord a commission in excess of the scheduled charges, or for a tenant to get rid of a man in actual possession by an agreement to pay full possession fees for constructive possession only (*d*).

371. If the tenant pays the broker's charges in consideration of his forbearing to sell, he can recover back the amount of any of the charges which were improper (*e*). Recovery of improper charges.

372. The penalty for taking (whether out of the produce of the distress or not) charges in excess of the prescribed amount, or for any act not really done, is treble the amount of the moneys unlawfully taken, together with full costs, to be recovered under a magistrate's summary jurisdiction. A landlord is, however, not liable for this penalty unless he has personally levied the distress (*f*). Penalty for taking improper charges.

373. The fee for levying distress is one which the distraining bailiff may retain out of the proceeds of the distress by way of remuneration (*g*). Retention of fee.

(*b*) Distress (Costs) Act, 1817 (57 Geo. 3, c. 93), s. 1. By the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), and the Statute Law Revision (No. 2) Act, 1890 (53 & 54 Vict. c. 51), considerable portions of this Act are repealed; the remainder is still law and was so treated in *Lumsden v. Burnett*, [1898] 2 Q. B. 177, O. A., and *Robson v. Biggar*, [1907] 1 K. B. 690, the schedule under the Distress for Rent Rules, 1888, being in the case of rent substituted for the schedule under the statute. As to the application of the Distress (Costs) Act, 1817 (57 Geo. 3, c. 93), to distress for rates, see *Coster v. Headland*, [1906] A. C. 286.

(*c*) *Ex parte Arnison* (1868), L. R. 3 Exch. 56, where an attempt failed to charge full possession fees for the technical possession of growing crops; *Lumsden v. Burnett*, *supra*, where so-called "walking possession" by one man of more than one house at a time was in question. Possession of the goods need not be possession on the premises where they were seized (*Scott v. Denton*, [1907] 1 K. B. 456).

(*d*) *Robson v. Biggar*, *supra*; this decision was appealed against, but the appeal was dismissed on the ground that it was a "criminal cause or matter" and that no appeal lay, [1908] 1 K. B. 672, O. A. In the divisional court DARLING, J., dissented; see also *Lumsden v. Burnett*, *supra*, per A. L. SMITH, L.J., at p. 185, and CHITTY, L.J., at p. 186.

(*e*) *Hills v. Street* (1825), 5 Bing. 37.

(*f*) Distress (Costs) Act, 1817 (57 Geo. 3, c. 93), ss. 3, 4; see, however, *Megson v. Mapleton* (1883), 49 L. T. 744, where it was held that the landlord was liable for the wrongful act of his bailiff within the scope of, although in excess of, his authority.

(*g*) *Phillips v. Rees* (1889), 24 Q. B. D. 17, O. A., overruling *Coodo v. Johns* (1886), 17 Q. B. D. 714. Although this decision was actually on the schedule under the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61)

**SECT. 15.
Second
Distress.**

SECT. 15.—Second Distress.

No second
distress for
same rent.

374. The remedy by distress must not be used in an oppressive manner, and the general rule is that a landlord may not split one entire demand and distrain twice for the same rent when he might have taken enough on the first occasion (*h*).

Instalments.

The rule is limited to a second distress made for the same rent. Separate rents may be reserved under one lease in respect of separate parcels and separately distrained for (*i*). And where the rent in arrear consists of several instalments of rent falling due on different days, there may be a separate distress for each (*j*). It is immaterial that the first distress is taken for the rent which last became due (*k*). And the same goods, after being replevied, may be distrained upon a second time for another instalment of rent (*l*).

Exceptions.

375. This general rule is subject to the following exceptions:—

(1) If there are not sufficient goods on the premises on the first occasion (*m*). (2) If the goods taken on the first occasion are of an uncertain or imaginary value, as pictures, jewels, or racehorses, and the landlord has reasonably mistaken their value (*n*). (3) If the conduct of the tenant has prevented the landlord realising the fruits of the distress (*o*). (4) Or if cattle die in the pound by the act of God. In any of these cases a second distress may be taken.

Voluntary
abandonment.

376. The rule against a second distress applies where the landlord having distrained enough voluntarily abandons the distress, that is to say, where he surrenders or forbears to exercise his power of making the distress fruitful (*p*). Abandonment is a question of fact for a jury (*q*). Merely quitting possession of goods after the distress is not necessarily an abandonment (*r*); nor is failure to resume immediate possession upon being forcibly expelled (*s*), nor is

(since repealed by the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28)), the reasoning applies equally to the schedule under the Distress for Rent Rules, 1888 (see especially the judgment of LOPES, L.J., at p. 23).

(*h*) If he levies for too small a sum or seizes goods of inadequate value when he had a fair opportunity to seize more it is his own fault, and he cannot repair it by a second levy (*Dawson v. Cropp* (1845), 1 C. B. 961; *Wallis v. Savill* (1701), 2 Lut. 1532; *Hutchins v. Chambers* (1758), 1 Burr. 579, 589; *Owens v. Wynne* (1855), 4 E. & B. 579; *Bagge v. Mawby* (1853), 8 Exch. 641; *Grunnell v. Welch*, [1905] 2 K. B. 650, *per* KENNEDY, J., at p. 653).

(*i*) *Shep. Touch*. 81.

(*j*) *Gambrell v. Falmouth (Earl)* (1835), 4 Ad. & El. 73.

(*k*) *Palmer v. Stanage* (1661), 1 Lev. 43.

(*l*) *Hefford v. Alger* (1808), 1 Taunt. 218; see *Wilton v. Wiffen* (1830), 8 L. J. (o. s.) (K. B.) 303.

(*m*) *Wallis v. Savill*, *supra*.

(*n*) *Hutchins v. Chambers*, *supra*.

(*o*) *Bagge v. Mawby*, *supra*; *Lee v. Cooks* (1858), 3 H. & N. 203, Ex. Ch. In that case the first distress was rendered abortive by the person whose goods were distrained preventing the removal of the goods after sale.

(*p*) *Bagge v. Mawby*, *supra*; *Dawson v. Cropp*, *supra*; *Smith v. Goodwin* (1833), 4 B. & Ad. 413.

(*q*) *Eldridge v. Stacey* (1863), 15 C. B. (N. S.) 458; *Lumsden v. Burnett*, [1898] 2 Q. B. 177, C. A.

(*r*) *Bannister v. Hyde* (1860), 2 E. & E. 627; *Jones v. Biernstein*, [1899] 1 Q. B. 470; affirmed, [1900] 1 Q. B. 100, C. A.

(*s*) *Eldridge v. Stacey*, *supra*.

allowing the goods of a stranger which have been distrained to be removed for a temporary purpose (t).

An exception to the application of the rule in the case of voluntary abandonment is where the landlord is induced in good faith to withdraw the distress by the procurement of the tenant (a). But the procurement must have been that of the tenant, and not of a stranger (b).

SECT. 15.
Second
Distress.
—
Exception.

When first
distress
unlawful.

377. The proceedings in the first distress must have been such as if carried out would have resulted in the landlord getting what he got in the second proceedings; and where a purported first distress was a mere trespass and void *ab initio* as a distress, so that the landlord could not satisfy his claim for rent by means of that proceeding, he may lawfully distrain again for the same rent (c).

SECT. 16.—*Fraudulent Removal.*

378. When the tenant fraudulently or clandestinely removes from the demised premises his goods or chattels to prevent the landlord from distraining them, the landlord, or any person empowered by him, may within thirty days after such removal seize such goods and chattels, wherever the same shall be found, and sell them as if they had actually been distrained upon such premises (d); provided they shall not have been sold *bonâ fide* and for a valuable consideration before such seizure to any person not privy to the fraud (e).

Fraudulent
removal.

379. The statute only applies in the following cases:—

When statute
applies.

First, when the removal was fraudulent or clandestine. This is a question for the jury, for the removal may be fraudulent though made openly with the landlord's knowledge (f). The burden of proof of fraud is on the landlord (g).

Secondly, the removal must have been to avoid a distress (h). Even if the tenant admits that it was, it is still open to him to

(t) *Kerby v. Harding* (1851), 6 Exch. 234.

(a) The following are instances of a second distress rendered lawful on this ground; where the landlord withdrew the distress at the request and for the accommodation of the tenant (*Bagge v. Mawby* (1853), 8 Exch. 641, *per* PARKE, B.; *Crosse v. Welch* (1892), 8 T. L. B. 401, 709, C. A.), or was induced to withdraw by the false representation of the tenant (*Wollaston v. Stafford* (1854), 15 C. B. 278), or by an arrangement which he failed to carry out (*Thwaites v. Wilding* (1883), 12 Q. B. D. 4, C. A.). For form of consent to second distress, see *Encyclopædia of Forms*, Vol. VII., p. 703.

(b) So, where a landlord withdrew his distress in consequence of a creditor stating that he was proceeding against the tenant in bankruptcy and warning the landlord not to sell, a second distress was illegal, as he should have disregarded the warning (*Bagge v. Mawby*, *supra*).

(c) *Grunnell v. Welch*, [1905] 2 K. B. 650; affirmed, [1906] 2 K. B. 555, C. A. In that case the first distress was a trespass, and upon the authority of *Attack v. Bramwell* (1863), 3 B. & S. 520, was void *ab initio*.

(d) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 1. At common law there was nothing to prevent a tenant from clandestinely and fraudulently removing his goods to avoid their being distrained.

(e) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 2.

(f) *Opperman v. Smith* (1824), 4 Dow. & Ry. (K. B.) 33.

(g) *Inkop v. Morchurch* (1861), 2 F. & F. 501.

(h) *Parry v. Duncan* (1831), 7 Bing. 243.

SECT. 16.
Fraudulent
Removal.

contest the fraud, and he may show that the removal was made in the *bonâ fide* belief that the landlord had no legal right to distrain (i), though the mere fact of removing goods without leaving sufficient to satisfy the rent is evidence of fraud (k). The tenant's participation in the removal need not be shown. It is sufficient if done with his privity (l).

Thirdly, the landlord must show that no sufficient distress remains on the premises after the removal (m).

Fourthly, the removal must have taken place after the rent has fallen due (though not necessarily in arrear), that is, on or after the day fixed for payment (n), though it is not necessary to show that the landlord contemplated a distress at the time of removal (o).

Fifthly, the goods must have been those of the tenant and not of a stranger or lodger (p).

Sixthly, the goods must have been distrainable by the landlord either at common law or under the Landlord and Tenant Act, 1709 (q), if they had remained on the premises (r). So that if the landlord had parted with his reversion (s), or if the tenancy had determined and the tenant had given up possession (t), or if there was no demise at an ascertained rent (a), the landlord could not follow them, nor can he follow and distrain the goods until after the rent is actually in arrear.

Seventhly, the removal must have been on behalf of the tenant. If a mortgagee creditor or other person having a charge on the goods with the privity and sanction of the tenant removes the goods in assertion of his title to them, the statute does not apply (b).

Eighthly, in case the removed goods are claimed by a *bonâ fide* purchaser not privy to the fraud he must prove his title to them (c).

Penalty.

380. To deter the tenant from making a fraudulent removal, as well as others from aiding him, it is provided that if a tenant fraudulently remove and convey away (d) his goods or chattels

(i) *John v. Jenkins* (1832), 1 Cr. & M. 227.

(k) *Opperman v. Smith* (1824), 4 Dow. & Ry. (κ. B.) 33; *Welch v. Myers* (1816), 4 Camp. 368.

(l) *Lister v. Brown* (1823), 3 Dow. & Ry. (κ. B.) 501.

(m) *Parry v. Duncan* (1831), 7 Bing. 243. This has, however, been questioned. See *Gillam v. Arkwright* (1850), 16 L. T. (o. s.) 88; *Gegg v. Perrin* (1845), 9 J. P. 619.

(n) *Rand v. Vaughan* (1835), 1 Bing. (N. C.) 767; *Dibble v. Bowater* (1853), 2 E. & B. 564; *Watson v. Main* (1799), 3 Esp. 15.

(o) *Stanley (Bart.) v. Wharton* (1822), 10 Price, 138.

(p) *Thornton v. Adams* (1816), 5 M. & S. 38; *Fletcher v. Marillier* (1839), 9 Ad. & El. 457; *Postman v. Harrell* (1833), 6 O. & P. 225; *Foulger v. Taylor* (1860), 5 H. & N. 202.

(q) 8 Ann. c. 14 (Ruff. c. 18 in Statutes Revised), ss. 6, 7.

(r) *Gray v. Stait* (1883), 11 Q. B. D. 668, O. A.

(s) *Ashmore v. Hardy* (1836), 7 O. & P. 501; *Angell v. Harrison* (1847), 17 L. J. (Q. B.) 25.

(t) *Gray v. Stait*, *supra*.

(a) *Anderson v. Midland Rail. Co.* (1861), 3 E. & E. 614.

(b) *Bach v. Meats* (1816), 5 M. & S. 200; *Tomlinson v. Consolidated Credit and Mortgage Corporation* (1889), 24 Q. B. D. 135, O. A.

(c) *Williams v. Roberts* (1852), 7 Exch. 618.

(d) His actual participation in the removal is not necessary if such removal

SECT. 16.
Fraudulent
Removal.

as aforesaid, or if any person wilfully and knowingly aids or assists (e) him in such fraudulent conveying away or carrying off of any part of his goods or chattels or in concealing the same, every person so offending shall forfeit to the landlord double the value of the goods or chattels by him carried off or concealed as aforesaid, to be recovered by action (f).

Evidence.

It is not necessary in the action to show that a distress was in progress or even contemplated (g), or to prove the amount of rent as alleged in the claim (h). In an action against a third person the acts and orders of the tenant are admissible evidence of the fraud of the defendant if by other evidence he is proved to have contributed to the proceeding, and circumstances of suspicion may be adduced to prove a fraudulent co-operation between them (i). An action under the statute is a penal one, so that the plaintiff is not entitled to obtain discovery by delivering interrogatories to the defendant (k), and must prove his case strictly (l).

Where goods
removed do
not exceed
£50.

381. An alternative remedy is provided where the goods fraudulently carried off or concealed do not exceed the value of £50. In that case the landlord or his agent may exhibit a complaint in writing against the offender before two or more justices of the county or division (m), not being interested in the lands whence such goods were removed, who may determine in a summary way whether the parties are guilty, inquire as to the value of the goods fraudulently removed, and order the offender to pay double their value to the landlord; and on default they may by warrant levy the same by distress and sale of the offender's goods, and for want of such distress may commit the offender to prison (n).

Appeal.

382. Any person aggrieved by the order of the justices may appeal to the general or quarter sessions (o). And if the appellant is effected by a third person with his privity (*Lister v. Brown* (1823), 3 Dow. & Ry. (K. B.) 501).

(e) In the case of a third person he must be shown to have actually assisted the tenant and to have been privy to his fraudulent intent (*Brooke v. Noakes* (1828), 8 B. & C. 537).

(f) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 3.

(g) *Stanley (Bart.) v. Wharton* (1821), 9 Price, 301.

(h) *Gwinnet v. Phillips* (1790), 3 Term Rep. 643.

(i) *Stanley (Bart.) v. Wharton* (1822), 10 Price, 138.

(k) *Hobbs & Co. v. Hudson* (1890), 25 Q. B. D. 232.

(l) *Brooke v. Noakes*, *supra*. Except in the case of a public authority a defendant may plead not guilty by statute, and by so doing put in issue all the facts; *Jones v. Williams* (1838), 4 M. & W. 375; R. S. C., Ord. 19, r. 12; Ord. 21, r. 19; Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

(m) Or a stipendiary magistrate (Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 1).

(n) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 4. Even when the goods are under the value of £50 the landlord may elect to proceed by action instead of before the magistrates (*Stanley (Bart.) v. Wharton* (1821), 9 Price, 301; (1822) 10 Price, 138; *Bromley v. Holden* (1828), Mood. & M. 175; see *Horsefall v. Davy* (1816), 1 Stark. 169). To give the magistrates jurisdiction it is essential that the value of the goods should not exceed £50, that there should be a complaint in writing, and that the examination should be upon oath; all the rest is for their judgment (*Coster v. Wilson* (1838), 3 M. & W. 411).

(o) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 5; see *R. v. Cheshire*

SECT. 16.
Fraudulent
Removal.

Forcible
 entry to
 remove goods.

enter into a recognisance with one or two sufficient surety or sureties in double the sum ordered to be paid, the order will not be executed against him in the meantime (*p*).

383. Where any goods fraudulently or clandestinely removed are put in any house, barn, or place locked up or otherwise secured, so as to prevent such goods from being seized as a distress for arrears of rent, the landlord may seize such goods as a distress for rent, first calling to his assistance the constable or other peace officer of the hundred, borough, parish, district, or place where the same shall be suspected to be concealed, who are required to assist therein; and, in the case of a dwelling-house oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods are therein, in the daytime to break open and enter into such house, barn, or place to seize such goods (*q*).

A previous request is unnecessary in order to give the landlord the right to break into the premises for the purpose of seizing the goods (*r*).

Constable
 must be
 present.

There must be a constable present at the breaking in (*s*), but he may be a special constable appointed by a warrant for the particular occasion (*a*).

Power of
 Metropolitan
 Police.

384. Within the Metropolitan Police district any constable may stop and detain, until due inquiry can be made, all carts which he shall find employed in removing the furniture of any house or lodging between the hours of eight in the evening and six in the following morning, or whenever the constable shall have good grounds for believing that such removal is made for the purpose of evading the payment of rent (*b*).

SECT. 17.—Rescue and Poundbreach.

SUB-SECT. 1.—The Offences.

Rescue and
 poundbreach.

385. Inasmuch as a distress does not until sale divest the tenant of the property in the chattels, or, in point of law, vest the possession of such chattels in the landlord, the latter cannot, in case the goods are taken away or otherwise interfered with, maintain an action against the tenant or a stranger either for conversion or trover (*c*). His remedy is in respect of the rescue or poundbreach, as the case may be. Both are offences at common law, for which an action of trespass will lie, and for which an additional and more satisfactory remedy has been provided by statute (*d*).

Justices (1833), 5 B. & Ad. 439; but the notice of appeal must be given within seven days of the decision (*E. v. Shropshire Justices* (1881), 6 Q. B. D. 669).

(*p*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 6.

(*q*) *Ibid.*, s. 7.

(*r*) *Williams v. Roberts* (1852), 7 Exch. 618.

(*s*) *Rich v. Woolley* (1831), 7 Bing. 651.

(*b*) *Cartwright v. Smith* (1833), 1 Mood. & B. 284.

(*a*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 67.

(*c*) *R. v. Cotton* (1751), 2 Ves. Sen. 288, 294; *Moneux v. Goreham* (circa 1741), 2 Selwyn, Nisi Prius, 9th ed., 1384; 10th ed., 1351; *Wilbraham v. Snow* (1669), 2 Saund. 47; and see *Turner v. Ford* (1846), 15 M. & W. 212.

(*d*) Stat. (1689) 2 Will. & Mar., c. 5, and see p. 194, *post*. As to rescue and poundbreach in respect of distress damage feasant, see title **ANIMALS**, Vol. I., p. 385.

386. Goods distrained are from the seizure regarded as being taken by a process of law, and not merely by an assertion of a private right of the distrainor, and the taking of them out of the custody of the distrainor before they are impounded is regarded in the light of a resistance of lawful authority, and is termed a rescue or rescous (*e*). There can be no rescue until the thing is actually distrained. To prevent a distress being made is not a rescue, but to prevent it being impounded is (*f*). There may be a rescue without any act of the owner in bringing about the escape of cattle, if he resists their recapture; as, for example, when a man has taken a distress, and the cattle distrained (as he is driving them to the pound) go into the house of the owner, then if the distrainor demands them of the owner, and he refuses to deliver them, this is a rescue in law (*g*). But in any case in which the distrainor abandons or quits possession of the chattels, the retaking by the owner is not a rescue (*h*).

SECT. 17.
Rescue and
Pound-
breach.
Rescue.

387. Poundbreach is the retaking from the custody of the law of a chattel which has been impounded. If a distress be taken and impounded, though without just cause, the owner cannot break the pound and take away the distress (*i*). It is immaterial whether the goods are impounded on or off the premises; they cannot be removed against the will of the distrainor without a poundbreach being committed, and if impounded on the premises the offence is no less committed because a bailiff has not continued in actual possession (*k*). Force is not necessary to constitute the offence, which is committed by the removal of the chattels, though the pound is unfastened (*l*). If either the tenant or a stranger does that which, if the goods were the property of or in the possession of the landlord, would as against him amount to conversion or trover, the offender is guilty of poundbreach (*m*).

Poundbreach.

(*e*) Com. Dig. tit. Distress, D, 3. Rescous is a taking away and setting at liberty against law a distress taken or a person arrested by the process or course of law (Co. Litt. 160 b).

(*f*) Where a bailiff, going to distrain, found an auctioneer on the premises, who, after the bailiff had made an inventory and done that which in the opinion of the court amounted to a seizure, proceeded to sell the goods which the tenant handed over to the purchasers, it was held that the distrainor could maintain an action for rescue against the auctioneer (*Iredale v. Kendall* (1878), 40 L. T. 362).

(*g*) Co. Litt. 161 a.

(*h*) *Dod v. Monger* (1704), 6 Mod. Rep. 215, 216. So where a plaintiff had distrained the defendant's cattle damage feasant and went to apprise the defendant, and during his absence the cattle escaped for half an hour into the defendant's shrubbery, whence the plaintiff on his return drove them to his own yard, it was held that there had been an abandonment of the distress, and the defendant was not guilty of rescue for taking them from the plaintiff's yard (*Knowles v. Blake* (1829), 5 Bing. 499).

(*i*) *Alwayes v. Brooms* (1695), 2 Lut. 1259, 1262.

(*k*) *Jones v. Biernstein*, [1899] 1 Q. B. 470.

(*l*) *Ibid.*

(*m*) Thus, granting a replevin without authority may constitute poundbreach (*Trevannian's Case* (1704), 11 Mod. Rep. 32), and where a bailiff who was the sheriff's officer while in possession of goods under a landlord's distress received a *fi. fa.* from the sheriff and sold the goods under it, it was held that the sheriff was liable for poundbreach and rescue at the suit of the landlord, for the bailiff was

SECT. 17. **388.** Rescue may be justified in certain cases where the distress is unlawful (*n*). Poundbreach is an offence against the dignity of the law, and can never be justified (*o*). If the distrainer himself takes the distress out of the pound for the unlawful purpose of using it, the owner may retake possession of it from him, without being guilty of either rescue or poundbreach (*p*).

Rescue and Poundbreach.
Justifying rescue etc.

SUB-SECT. 2.—The Remedies.

Remedies. **389.** The remedies in the case of both offences are either by recaption or action, and in the case of poundbreach by indictment also.

Recaption. **390.** The right of recaption, that is, to pursue and retake the goods wherever the landlord may happen to find them, obtains in each case (*q*), but in exercising the right he must not commit a breach of the peace; and in the case of a rescue the recaption must be "upon a fresh pursuit," that is, without delay (*r*), and there is authority for saying that the same limitation applies in the case of poundbreach (*s*).

Action. **391.** The landlord has a common law right of action in the case of rescue and poundbreach (*t*). But the action is generally a special action upon the case under the Distress Act, 1689 (*a*), to recover treble damages against the offender, or against the owners of the goods distrained, in case the same have come into his possession (*b*). This action is maintainable by the landlord without proof of any special damage (*c*), and it is not necessary that notice of the distress shall have been given (*d*). Tender of the rent and costs after the goods have been impounded is no defence (*e*). The action is a penal one, and the plaintiff is not entitled to an affidavit of documents (*f*).

filling two characters, and in selling under the execution it was precisely as if he had taken the goods from himself as a third person (*Reddell v. Stowey* (1841), 2 Mood. & B. 358; *Turner v. Ford* (1846), 15 M. & W. 212). But where a bailiff was in possession of goods under a distress, and the sheriff's officer seized them but did nothing more than prevent their removal from the premises, this was held not to make the sheriff liable for poundbreach (*Story v. Finnis* (1851), 6 Exch. 123).

(*n*) See p. 209, *post*.

(*o*) *Cotsworth v. Betison* (1696), 1 Ld. Baym. 104; *Parrett Navigation Co. v. Stower* (1840), 6 M. & W. 564; *Firth v. Purvis* (1793), 5 Term Rep. 432; Co. Litt. 47 a.

(*p*) *Smith v. Wright* (1861), 6 H. & N. 821.

(*q*) *Rich v. Woolley* (1831), 7 Bing. 651.

(*r*) *Ibid.*, at p. 681.

(*s*) See *Turner v. Ford* (1846), 15 M. & W. 212.

(*t*) But not in trespass or trover (*R. v. Cotton* (1751), 2 Ves. Sen. 288, 294).

(*a*) Stat. (1689) 2 Will. & Mar., c. 5, s. 3.

(*b*) See *Berry v. Huckstable* (1850), 14 Jur. 718. Instead of treble costs, which were given by the Act, but are abolished, the landlord is entitled to a full and reasonable indemnity as to all costs and charges in and about the action (Limitation of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), s. 2).

(*c*) *Kemp v. Christmas* (1898), 79 L. T. 233, O. A.

(*d*) *Belasyse v. Burbridge* (1695), 1 Lut. 213.

(*e*) *Firth v. Purvis*, *supra*.

(*f*) *Jones v. Jones* (1859), 22 Q. B. D. 425.

392. The landlord has the same remedy for rescue and pound-breach whether the chattels are impounded on or off the premises (*g*). But it is doubtful whether an action can be maintained under the statute in the case of goods fraudulently removed and distrained on the premises of a third person and afterwards rescued by him (*h*). The fact that the goods are found in the possession of a person who has previously claimed to be owner of them is not sufficient to render him liable without proof that the pound was broken by him (*i*). The action lies at the instance of the landlord, and not of the bailiff, and if the bailiff has suffered injury the landlord can recover in respect of such injury (*k*).

SECT. 17.
Rescue and
Pound-
breach.

Goods on
premises of
third person.

393. In either case the offence is a common law misdemeanour, but though an indictment will lie against the offender for pound-breach (*l*), it will not lie for every case of rescue (*m*).

Indictment.

SECT. 18.—*Illegal, Irregular, or Excessive Distress, and the Remedies therefor.*

SUB-SECT. 1.—*Illegal Distress.*

394. An illegal distress is one which is wrongful in the very outset, that is to say, either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. In such a case the distrainer is a trespasser *ab initio* (*n*). As he has in himself no right to seize the particular chattels he can confer no title to them upon a person to whom, under colour of the distress, they may purport to have been sold.

Illegal
distress.

The following are instances of illegal distress :—

A distress by a landlord after he has parted with his reversion (*o*).

A distress by a landlord in whom the reversion was not vested when the rent accrued due (*p*).

A distress when no rent is in arrear (*q*); or for a claim or debt which is not rent, as a payment for the hire of chattels (*r*).

A distress made after a valid tender of rent has been made (*s*).

(*g*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 10; *Firth v. Purvis* (1793), 5 Term Rep. 432.

(*h*) *Harris v. Thirkell* (1852), 20 L. T. (o. s.) 98.

(*i*) *Castleman v. Hicks* (1842), Car. & M. 266.

(*k*) *Alwayes v. Broome* (1695), 2 Lut. 1259, 1263.

(*l*) *R. v. Butterfield* (1893), 17 Cox, C. C. 598.

(*m*) *R. v. Bradshaw* (1835), 7 C. & P. 233.

(*n*) When a man under colour of legal authority does that which makes him a trespasser *ab initio*, he is in the same position as if he was a perfect stranger, and it does not lie in his mouth to say that he has applied the goods which he has so wrongfully taken for the advantage or benefit of the person from whom he had taken them, e.g., to say that the liability to pay the rent due has been discharged by his appropriation of the goods in satisfaction of the rent (*Attack v. Bramwell* (1863), 3 B. & S. 520).

(*o*) See p. 157, *ante*.

(*p*) See p. 124, *ante*.

(*q*) Co. Litt. 160 b; and see p. 123, *ante*.

(*r*) See p. 122, *ante*.

(*s*) Co. Litt. 160 b; *Bennett v. Dayes* (1860), 5 H. & N. 391; and see p. 153, *ante*.

SECT. 18. Illegal, Irregular, or Excessive Distress etc.	<p>A second distress for the same rent (<i>t</i>).</p> <p>A distress off the premises or on the highway (<i>a</i>).</p> <p>A distress in the night, that is, between sunset and sunrise (<i>b</i>).</p> <p>A distress made in an unlawful manner, as by breaking open an outer door or opening a closed window (<i>c</i>).</p> <p>Distraining things privileged from distress (<i>d</i>).</p> <p>Distraining goods contrary to an agreement with the tenant (<i>e</i>) or with a stranger (<i>f</i>).</p> <p>A distress levied or proceeded with contrary to the Law of Distress Amendment Act, 1908 (<i>g</i>).</p> <p>Selling goods not distrained, or not included in the inventory (<i>h</i>).</p> <p>Where the act done is wrongful, but is so merely as to part of the goods, no wrong being done as to the residue, the wrong-doer is a trespasser as to that part of the goods only in respect of which the wrongful act is done (<i>i</i>).</p>
Remedies.	<p>The remedies for an illegal distress are rescue, replevin, or action for damages (<i>j</i>).</p>

SUB-SECT. 2.—*Irregular Distress.*

Irregular distress.	<p>395. A distress is irregular when, although the levy was legal and in order, the subsequent proceedings have been conducted in an unlawful manner. The following are instances of irregular distress :—</p> <p>Selling without having served notice of the distress with copy of inventory on the tenant (<i>k</i>).</p> <p>Selling within the five or fifteen days allowed to replevy (<i>l</i>).</p> <p>Selling growing crops before they are gathered (<i>m</i>).</p>
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- (*t*) See p. 154, *ante*.
- (*a*) See p. 155, *ante*. When a distress is illegal because it is taken in the highway the proper remedy is rescue (see p. 209, *post*), and if the injured party seeks relief by action he should rely on the Statute of Marlbridge, 1267 (52 Hen. 3, c. 15), which enacts that no man shall take distresses in the King's highway, nor on the common street, but only the King or his officers having special authority to do the same. Formerly the aggrieved person was obliged to bring his action on the statute.
- (*b*) Co. Litt. 142 a; and see p. 149, *ante*.
- (*c*) *Attack v. Bramwell* (1863), 3 B. & S. 520; and see p. 163, *ante*.
- (*d*) *Keen v. Priest* (1859), 4 H. & N. 236; *Swire v. Leach* (1865), 18 O. B. (N. s.) 479; and see p. 133, *ante*.
- (*e*) *Giles v. Spencer* (1857), 3 O. B. (N. s.) 244.
- (*f*) *Horsford v. Webster* (1835), 1 Cr. M. & R. 696; and see p. 155, *ante*.
- (*g*) 8 Edw. 7, c. 53, s. 2; and see p. 147, *ante*.
- (*h*) See p. 168, *ante*. If things be removed or sold which were not seized under the distress in the first instance, nor included in the inventory, the distrainer is as to such things an absolute trespasser (*Sims v. Tufts* (1834), 6 O. & P. 207; *Bishop v. Bryant* (1834), *ibid.* 484).
- (*i*) *Harvey v. Pocock* (1843), 11 M. & W. 740.
- (*j*) As to rescue, see p. 209, *post*; as to replevin, p. 199, *post*; and as to action, p. 204, *post*.
- (*k*) See p. 166, *ante*.
- (*l*) See p. 182, *ante*.
- (*m*) *Proudlove v. Twemlow* (1833), 1 Cr. & M. 326; *Rodgers v. Parker* (1856), 18 O. B. 112.

Selling without appraisement when it is still requisite (*n*).

Selling for otherwise than the best price (*o*).

Improper dealing with any overplus (*p*).

Detaining (*q*) or removing (*r*) the chattels distrained when a tender of rent and costs is made after distress and before impounding.

Selling the distress when a tender of rent and costs is made after impounding but within the time allowed for replevin (*s*).

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Distrainor
not a
trespasser.

396. For a distress that is only irregular, and not illegal at the outset, the distrainor is not treated as a trespasser *ab initio*, and the tenant can only recover the special damage he has suffered (*t*). But no tenant can recover in any action for irregularity if tender of sufficient amends is made by the party distraining or his agent before such action is brought (*a*). If such amends be tendered the landlord need not pay the money into court (*b*). Tender of amends is not an answer to a claim in respect of independent wrongful acts, as, for instance, where the landlord turned the tenant's family out of possession and continued in possession after the rent was paid (*c*).

397. A person who purchases goods under a distress which is merely irregular acquires a good title to the goods, for in such a case trover would not lie against the landlord, and the remedy of the tenant is in damages as against his landlord (*d*).

Purchaser's
right to
goods.

SUB-SECT. 3.—*Excessive Distress.*

398. The distrainor must be careful not to seize more goods than are reasonably sufficient to satisfy the rent in arrear and the costs of the distress (*e*). An excessive distress is illegal both at common law and by statute (*f*).

What is
excessive
distress.

(*n*) See p. 171, *ante*.

(*o*) *Poynter v. Buckley* (1833), 5 C. & P. 512; *Walter v. Rumball* (1695), 4 Mod. Rep. 390; *Clarke v. Holford* (1848), 2 Car. & Kir. 540; *Rapley v. Taylor* (1883), Cab. & El. 150.

(*p*) See p. 185, *ante*.

Loring v. Warburton (1858), E. B. & E. 507.

Vertue v. Beasley (1831) 1 Mood. & R. 21.

Johnson v. Upham (1859), 2 E. & E. 250.

Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 19; *Rodgers v. Parker* (1856), 18 C. B. 112. If the plaintiff fails, the defendant recovers his full costs under s. 21 of the Act. At common law there was no distinction between an illegal and an irregular distress, and any irregularity in the conduct of the distress rendered the entire proceedings void and the party distraining a trespasser *ab initio* (*Six Carpenters' Case* (1610), 8 Co. Rep. 146 a; 1 Smith, L. C., 11th ed., 132). This was found to occasion hardships to landlords and was remedied by the Distress for Rent Act, 1737 (11 Geo. 2, c. 19). See *Attack v. Bramwell* (1863), 3 B. & S. 520.

(*a*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 20.

(*b*) *Jones v. Gooday* (1842), 9 M. & W. 736.

(*c*) *Etherton v. Popplewell* (1800), 1 East, 139.

(*d*) *Wallace v. King* (1788), 1 Hy. Bl. 13; *Whitworth v. Smith* (1832), 1 Mood. & R. 193.

(*e*) Where rent has been reduced by the payment of land tax and other liabilities which the tenant is entitled to pay and deduct from the rent, if the landlord distrains for the whole rent, the tenant may properly sue for an excessive distress (*Carter v. Carter* (1829), 5 Bing. 406).

(*f*) "Distress shall be reasonable and not too great, and they that take

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Excess is relative. The value of the goods seized must be obviously disproportioned to the rent and costs, taking into consideration the conditions under which a forced sale of the effects must take place (g). To avoid an excess all that is required is that the distrainer should exercise a reasonable and honest discretion in estimating what the goods will realise at a broker's sale by auction without considering what value the tenant himself could have obtained for them or what an incoming tenant in the same line of business would pay for them. The landlord is authorised to protect himself by seizing what any reasonable man would think adequate to the satisfaction of the claim (h). Where the goods have been appraised before sale, that is not conclusive against the tenant as to their real value (i), for the best means may not have been taken to ascertain their value (k). And though the price realised at an auction is *prima facie* evidence of value as regards excess (l), it is not conclusive (m). The question of excess is one for the jury (n), and an action will lie for an excessive distress although the sale, less the expenses, did not equal the arrears of rent (o). The mere fact that the chattels were sold at an under-value does not necessarily show that the distress was an excessive one (p). An action will lie for an excessive distress of growing crops when the probable produce is capable of being estimated at the time of seizure (q).

The distrainer is not bound to calculate very nicely the value of the property seized. He must take care that a reasonable proportion is kept between the value of the property and the sum for which he is entitled to take it (r).

unreasonable and undue distresses shall be grievously amerced for the excess of such distresses" (2 Co. Inst. 107); stat. (1266) 51 Hen. 3, c. 4; Statute of Marlbridge, 1267 (52 Hen. 3, c. 4); *Dayliss v. Fisher* (1830), 7 Bing. 153; *Piggott v. Birtles* (1836), 1 M. & W. 441, *per PARKE, B.*, at p. 447. Blackstone, however, says: "An action of trespass is not maintainable on this account, it being no injury at common law" (3 Bl. and Com. 12); see *Lynne v. Moody* (1729), 2 Stra. 851.

(g) *Field v. Mitchell* (1807), 6 Esp. 71. "The sale is a compulsory one, and therefore you may look at the price likely to be realised on a sale by auction, and this is a good practical test. The plaintiff must make out that more goods were seized than was reasonably necessary for the purpose of realising at a sale by auction the amount of rent in arrear and expenses" (*Rapley v. Taylor* (1883), Cab. & El. 150, *per CAVE, J.*).

(h) *Roden v. Eytton* (1848), 6 C. B. 427; *Wells v. Moody* (1835), 7 C. & P. 59.

(i) *Cooke v. Corbett* (1875), 24 W. R. 181, C. A.; and see p. 170, *ante*.

(k) *Clarke v. Holford* (1848), 2 Car. & Kir. 540.

(l) *Rapley v. Taylor*, *supra*.

(m) *Smith v. Ashforth* (1860), 29 L. J. (EX.) 259. If so, probably no distress could be deemed excessive (*ibid.*, *per MARTIN, J.*, at p. 260), for the goods may have been improperly lotted or allowed to stand in the rain, or otherwise sold under unfair conditions, so that they have not been sold at the best price (*Poynter v. Buckley* (1833), 5 C. & P. 512).

(n) *Smith v. Ashforth*, *supra*.

(o) *Ibid.*

(p) *Thompson v. Wood* (1843), 4 Q. B. 493.

(q) *Piggott v. Birtles*, *supra*.

(r) *Willoughby v. Backhouse* (1824), 2 B. & C. 821, 823; *Roden v. Eytton*, *supra*. Thus, to distress two or three oxen for 12d., or a horse or an oxen

Taking a single chattel, though of considerably greater value than the rent, is not excessive if there is no other distress on the land which can be taken, or even if there are other articles, but of an aggregate value less than sufficient to satisfy the distress (*s*). If the distrainer has the opportunity of taking goods of smaller value than he really takes and which would be sufficient to cover the rent, he is wrong (*a*).

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etc.

399. Claiming and distraining for a greater amount of rent than is actually due does not give a right of action if the distress is not excessive for the rent really due (*b*). But if more goods are seized than are necessary to satisfy the actual arrears, the right of action arises (*c*). An action will not lie for merely distraining for more rent than is in arrear, although it is alleged that the distress was made maliciously (*d*).

Excessive
claim without
excessive
distress.

In case of excessive distress the tenant cannot sue the person into whose possession the goods have come; his remedy is against his landlord (*e*).

Remedy
against
landlord only.

SUB-SECT. 4.—*Replevin*.

400. Replevin is a process to obtain a redelivery to the owner of chattels which have been wrongfully distrained or taken from him, upon his finding sufficient security for the rent and costs of action, and undertaking that he will pursue an action against the distrainer to determine the right to distrain (*f*). And wherever the object of proceedings is to procure the restitution of the specific chattels taken instead of compensation in damages, the proper course is an action of replevin (*g*). The term "replevin" is

Replevin
defined.

for a small sum when a sheep or swine may be had, is an excessive distress, because a beast of less value might have been taken (2 Co. Inst. 107). But it is not for every trifling excess that this action is maintainable; it must be disproportionate to some extent, and if disproportionate to an excess the action is clearly maintainable (*Field v. Mitchell* (1807), 6 Esp. 71, *per* Lord ELLENBOROUGH, at p. 72).

(*a*) 2 Co. Inst. 107; *Avenell v. Croker* (1828), Mood. & M. 172; *Field v. Mitchell*, *supra*.

(*a*) If there were several things which might have been seized, some of which singly would have been adequate for the distress and others more than adequate, the distrainer might be liable to an action for seizing that which was clearly more than adequate, as, for instance, if there were several horses and the distrainer seized one of much more value than the others, when there were others of sufficient value for the distress (*Roden v. Eyton* (1848), 6 C. B. 427).

(*b*) *Tancred v. Leyland* (1851), 16 Q. B. 669, Ex. Ch.; *French v. Phillips* (1856), 1 H. & N. 564, Ex. Ch.; *Glynn v. Thomas* (1856), 11 Exch. 870, Ex. Ch.; *Phillips v. Whitsea* (1860), 29 L. J. (Q. B.) 164.

(*c*) *Crowder v. Self* (1839), 2 Mood. & R. 190.

(*d*) *Stevenson v. Newnham* (1853), 13 C. B. 285, Ex. Ch. But if the tenant pay the excess he may recover it back in an action for excessive distress (*Fell v. Whittaker* (1871), L. R. 7 Q. B. 120); but not in an action for money had and received (*Glynn v. Thomas*, *supra*).

(*e*) *Whitworth v. Smith* (1832), 5 C. & P. 250.

(*f*) Co. Litt. 145 b; Bac. Abr. tit. Replevin. For form of request for extension of time, see *Encyclopædia of Forms*, Vol. VII., p. 701.

(*g*) *Gibbs v. Cruikshank* (1873), L. R. 8 C. P. 454, 459; *Mennie v. Blake* (1856), 6 El. & B. 842. "The party whose goods have been wrongfully seized has a choice of remedies open to him. He may bring trespass to recover damages for the taking of the goods, but it may be that this remedy is

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Distress
etc.

When
available.

Who may
proceed and
against
whom.

applied both to the redelivery of the goods and the action in which the right is tried.

401. Replevin is not available where the distress was originally lawful (*h*). But whenever there has been a distress which is wholly illegal, and not merely irregular or excessive, the tenant has his remedy by replevin. Thus it lies where the relationship of landlord and tenant did not exist (*i*); where there was occupation but no demise at a fixed rent (*k*); where no rent was in fact due, or was released before distress, or where the tenant has satisfied the rent by payments on behalf of the landlord necessary to protect his own possession (*l*) (and if the rent distrained for is not due though other rent is due (*m*)); where the title of the person distraining has expired and he is not entitled to the rent (*n*); where the entry was illegal (*o*); where the goods have been detained after tender of rent and costs before the impounding (*p*); or where the things distrained are privileged (*q*). It may be resorted to in order to obtain the return of all goods and cattle which may be lawfully distrained, but not of fixtures (*r*), animals *feræ naturæ*, and other things which from their nature cannot be the subject of distress (*s*).

402. Proceedings in replevin consist of two independent parts, namely, the replevy, which is the tenant giving security that he will prosecute an action of replevin, whereupon the goods are restored; and the action so undertaken to be brought, in which the right to the goods is tried. The tenant may replevy so long as the goods remain unsold (*a*), but only within six years (*b*).

The proceedings must be brought by the owner of the goods,

inadequate, and the immediate recovery of the goods themselves may be of greater consequence to him than the recovery of damages" (*Gibbs v. Cruikshank* (1873), L. R. 8 C. P. 454, *per* BOVILL, C.J., at p. 459). If on replevin the sheriff was unable to find the distrained goods, so could not deliver them to the owner, he was authorised to seize goods of the distrainer of a like nature and value, and to keep them until the distress was brought back, this was termed a taking in *withernam*. See also title ACTION, Vol. I., p. 43.

(*h*) *Johnson v. Upham* (1859), 28 L. J. (q. b.) 252, *per* Lord CAMPBELL, at p. 256. Thus it will not lie if any part of the rent claimed was due, for in such a case the distress is not illegal (*White v. Greenish* (1861), 11 C. B. (n. s.) 209, a case in which a person who was entitled only to a moiety of rent had distrained for the whole).

(*i*) *Walker v. Giles* (1848), 6 C. B. 662.

(*k*) *Hegan v. Johnson* (1809), 2 Taunt. 148; *Dunk v. Hunter* (1822), 5 B. & Ald. 322; *Regnart v. Porter* (1831), 7 Bing. 451.

(*l*) *Sapsford v. Fletcher* (1792), 4 Term Rep. 511; *Taylor v. Zamira* (1816), 8 Taunt. 524; *Davis v. Gyde* (1835), 2 Ad. & El. 623; *Cooper v. Robinson* (1842), 10 M. & W. 694 (release).

(*m*) *Roskrige v. Caddy* (1852), 7 Exch. 840.

(*n*) *Downs v. Cooper* (1841), 2 Q. B. 256.

(*o*) *Tunncliffe v. Wilmot* (1848), 2 Car. & Kir. 626.

(*p*) *Evans v. Elliott* (1836), 5 Ad. & El. 142.

(*q*) *Eaton v. Southby* (1739), Willes, 131.

(*r*) *Gibbs v. Cruikshank*, *supra*.

(*s*) *Niblet v. Smith* (1792), 4 Term Rep. 504; *Darby v. Harris* (1841), 10 L. J. (q. b.) 294, *per* PATTERSON, J., at p. 295.

(*a*) *Jacob v. King* (1814), 5 Taunt. 451.

(*b*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3. See title LIMITATION OF ACTIONS.

that is, the person who has the property, absolute or qualified, in the goods (c). A special property in them, such as that of a bailee or pledgee, is sufficient (d). An executor may sue in replevin to recover his testator's goods (e).

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—

The action will lie either against the person actually making the distress, or the person who has authorised the distress, or both of them (f).

403. Proceedings in replevin are now commenced in the county court. For this purpose the claimant must before the sale of the goods takes place give notice of his intention to replevy to the registrar of the county court of the district in which the goods subject to replevin have been seized. The registrar is empowered to approve of replevin bonds, to grant replevins, and to issue all necessary process in relation thereto, which process is executed by the high bailiff. The registrar, at the instance of the party whose goods are seized, must cause the same goods to be replevied to such party upon his giving security to prosecute an action against the distrainer, either in the High Court or in the county court (g). If the replevisor wishes to proceed in the High Court, he must give security to cover the alleged rent in respect of which the distress was made, and the probable costs of the action, conditioned to commence his action within one week from the date of giving security, and to prosecute such action with effect and without delay; and be prepared to prove (unless judgment be obtained by default) that he had good ground for believing either that the title to some corporeal or incorporeal hereditament the rent or value whereof exceeded £20 by the year, or to some toll, market, fair, or franchise, was in question, or that such rent or damage or the value of the goods seized exceeded £20 (h). If he elects to sue in the county court the replevisor must give security for the alleged rent and the probable costs of the action, conditioned to commence his action within one month from the date of the security (i).

The replevy.

In either case the security is conditioned to prosecute the action with effect (k) and without delay (l), and to make return of

The security.

(c) Co. Litt. 145 b; *Peacock v. Purvis* (1820), 2 Brod. & Bing. 362; *Fenton v. Logan* (1833), 9 Bing. 676.

(d) Co., Litt. 145 b.

(e) *Arundell v. Trevill* (1662), 1 Sid. 81.

(f) Bullen on Distress, 2nd ed., 279; see *Clerk v. Berwick Corporation* (1825), 4 B. & C. 649.

(g) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 134.

(h) *Ibid.*, s. 135. See title COUNTY COURTS, Vol. VIII., p. 429.

(i) *Ibid.*, s. 136.

(k) This means to a successful termination (*Tummons v. Ogle* (1856), 6 E. & B. 571; *Morgan v. Griffith* (1740), 7 Mod. Rep 380; *Perreau v. Bevan* (1826), 5 B. & C. 284; *Jackson v. Hanson* (1841), 8 M. & W. 477; *Tunncliffe v. Wilmot* (1848), 2 Car. & Kir. 626).

(l) This means with due diligence, for though the condition is satisfied if a suit is commenced and carried on according to the ordinary practice of the court, want of due diligence may constitute a breach of the condition (*Gent v. Cutts* (1847), 11 Q. B. 288; *Morris v. Matthews* (1841), 2 Q. B. 293; *Harrison v. Wardle* (1833), 5 B. & Ad. 146; see *Axford v. Perrett* (1828), 4 Bing. 586). If

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the goods if a return thereof shall be adjudged (*m*). The security is in the form of a bond with sureties to the distrainer (*n*), or a deposit of a sum, equal to the amount of the security which would be required, with the registrar if the security is required to be given in the county court, or with a master if required to be given in the High Court (*o*). The registrar gives notice to the distrainer of the replevisor's mode of security and the day for completion of the security, and—unless it is objected to—the security is then completed. Replevin bonds are no longer exempt from stamp duty. Security being given, the registrar issues his warrant to the high bailiff to redeliver the goods to the replevisor (*p*), which the high bailiff does, and makes a return accordingly (*q*). When the goods have been replevied the lien of the distrainer is determined (*r*).

The action.

404. In the replevin action the replevisor is plaintiff and the distrainer defendant, and after the issue of the plaint or writ the action proceeds in the same way as any other action (*s*). No other cause of action can be joined with it in the county court (*t*), but that restriction does not apply in the High Court (*u*). If brought in the county court, the plaintiff must in the ordinary manner deliver particulars specifying and describing the chattels taken and the distress or taking of which he complains. The action may be removed by *certiorari* to the High Court upon the application of the defendant, and upon his giving security for such an amount, not exceeding £150, as the master may think fit, when the defendant is prepared to prove that he had good ground for believing either that the title to some corporeal or incorporeal hereditament the rent or value whereof exceeded £20 a year, or to some toll, market, fair, or franchise, was in question, or that the rent in respect of which the distress was taken, or the value of the goods seized, exceeded £20 (*x*). Unless so removed the county court has full jurisdiction whatever the amount of the rent, and though title come in question (*a*). If the rent or value of the goods seized exceeds £20, but not otherwise, except with the leave of the judge, there is

the plaintiff in replevin be hindered from prosecuting his suit by the default of the defendant the latter will be restrained from proceeding on his bond (*Evans v. Bowen* (1849), 7 Dow. & L. 320).

(*m*) See Forms 287 and 288 to the County Court Rules, 1903.

(*n*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 108.

(*o*) *Ibid.*, s. 109; County Court Rules, 1903, Ord. 29.

(*p*) County Court Rules, 1903, Form 289.

(*q*) Upon delivery they become liable to distress for subsequent rent, and will pass to the tenant's trustee in bankruptcy (*Bradyll v. Ball* (1785), 1 Bro. C. C. 427; *Wilton v. Wiffen* (1830), 8 L. J. (o. s.) (k. b.) 303).

(*r*) County Court Rules, 1903, Ord. 29, r. 1. Formerly the sheriff was liable to an action if he accepted insufficient sureties (see *Scott v. Waithman* (1822), 3 Stark. 168; *Plumer v. Brisco* (1847), 11 Q. B. 46), but it is apprehended that the registrar is not so liable.

(*s*) *Bradyll v. Ball*, *supra*. For form of claim, see Bullen & Leake on Pleading, 6th ed., 471.

(*t*) County Court Rules, 1903, Ord. 34, r. 1.

(*u*) R. S. C., Ord. 18, r. 1.

(*x*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 137.

(*a*) *Fordham v. Akers* (1863), 4 B. & S. 578; *R. v. Baines* (1853), 1 E. & B.

an appeal from the county court upon a question of law or the admission or rejection of evidence (*b*).

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etc.
—
Damages.

405. If the plaintiff succeed in the action, as the goods are restored on the replevin, the plaintiff is generally awarded the expenses of the replevy and no other damages. But he is entitled to recover any special damage suffered by reason of the wrongful taking or detention of the goods (*c*), including annoyance and injury to reputation if alleged and proved (*d*). After judgment for the plaintiff in replevin he is precluded from bringing any other action for damages for taking the same goods in respect of which the replevin was brought (*e*), but the bar does not extend to other causes of action arising out of the same distress, such as trespass to the land (*f*). A new trial will only be granted under special circumstances (*g*).

406. If the defendant succeeds in the action he is entitled when suing in the High Court to a return of the goods distrained and his costs (not including the costs of distress) (*h*), for which he will have a *fi. fa.* When suing in the county court the successful defendant may require the court or the jury (if the action is tried with a jury) to find the value of the goods distrained, and if the value be less than the amount of rent in arrear judgment is given for such value, but if the amount of rent in arrear be less than the value so found, judgment is given for the amount of such rent, and may be enforced in the same manner as any other judgment of the court (*i*).

If defendant
succeeds.

407. If the replevisor break the condition of the bond, as by non-prosecution of the action, the distrainer may bring his action claiming either the specific amount of the replevin bond or damages. If he claim the former, and judgment go by default, such judgment is final and not interlocutory and no writ of inquiry is necessary to assess damages, but the defendant may apply for a stay of proceedings on payment of the amount really due, and costs, with a reference to ascertain the amount due (*k*). If he claim damages the judgment by default is interlocutory and followed by a writ of inquiry or as the court or a judge directs (*l*). The action may be in the county court (*m*). The sureties are only liable for rent actually in

Breach of
security
bond.

(*b*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120; see *Smith v. Enright* (1893), 63 L. J. (Q. B.) 220.

(*c*) *Gibbs v. Cruikshanks* (1873), L. R. 8 O. P. 454.

(*d*) *Smith v. Enright*, *supra*; compare *Dixon v. Calcraft*, [1892] 1 Q. B. 458, C. A.

(*e*) *Gibbs v. Cruikshanks*, *supra*.

(*f*) *Ibid.*

(*g*) *Parry v. Duncan* (1831), 7 Bing. 243; see *Edgson v. Cardwell* (1873), L. R. 8 O. P. 647.

(*h*) *Jamieson v. Trevelyan* (1855), 10 Exch. 748. If the goods are not returned the defendant may, possibly, still obtain a *capias in withernam* requiring the sheriff to take other equal distress of the plaintiff and deliver it to the defendant to keep until the original distress is restored (Bullen on Distress, 2nd ed., 9, 288). The process has never been abolished, but is, perhaps, to be regarded as obsolete.

(*i*) County Court Rules, 1903, Ord. 34, r. 4, Form 290.

(*k*) R. S. C., Ord. 27, r. 2.

(*l*) *Dix v. Groom* (1880), 5 Ex. D. 91; R. S. C., Ord. 27, r. 4.

(*m*) County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 108, 186.

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arrear at the date of the distress and the costs of the replevin action (*n*), and in no case can their liability exceed the amount of the penalty and the costs of the action on the bond (*o*). The fact that the distrainer has obtained in the replevin action a judgment for the amount of the rent which is unsatisfied is no defence to the action on the bond (*p*).

When goods of an undertenant, lodger or stranger are taken an order can, in certain cases, be obtained for their restoration (*q*).

SUB-SECT. 5.—Action for Damages.

408. An action for damages lies for any wrongful distress whether it is illegal, irregular, or excessive (*r*).

Illegal
 distress.

An action for illegal distress should be brought against the bailiff who committed the act complained of, and not against the landlord, unless it be shown that the latter authorised the wrongful act or sanctioned and ratified it after it came to his knowledge, or unless he chooses to take upon himself without inquiry the risk of any irregularity which the bailiff may have committed and to adopt all his acts (*s*).

When
 landlord
 liable.

409. When the landlord detains goods privileged from distress, and therefore must have knowledge of the illegality, he will be deemed to have ratified the bailiff's act (*t*), and his presence on the demised premises at or immediately after the commission of the illegal act is some evidence that he assented to it (*u*). But the mere receipt of the proceeds of sale without inquiry and without knowledge of anything illegal done by the bailiff is not sufficient to make the landlord liable; for if the landlord had no knowledge that a trespass had been committed and received the money in the belief that his warrant had been lawfully executed the receipt is no evidence of assent (*v*); and if, when he knows the circumstances, he repudiates the act he will not be liable (*w*). The landlord will, however, be liable where he has authorised a distress when he has no right to distrain; but it must be shown that he has in fact authorised it (*x*). An agent of the landlord who authorises an illegal distress will be liable personally (*y*) if he is

When agent
 liable.

(*n*) *Ward v. Hurly* (1827), 1 Y. & J. 285; *Dix v. Groom* (1880), 5 Ex. D. 91.

(*o*) *Hefford v. Alger* (1808), 1 Taunt. 218; *Branscombe v. Scarbrough* (1844), 6 Q. B. 13.

(*p*) *Turnor v. Turner* (1820), 2 Brod. & Bing. 107.

(*q*) See p. 147, *ante*.

(*r*) As to penalties under the Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 2, see p. 147, *ante*.

(*s*) *Lewis v. Read* (1845), 13 M. & W. 834; *Moore v. Drinkwater* (1858), 1 F. & F. 134; and see p. 161, *ante*. For an instance of ratification, see *Carter v. St. Mary Abbots, Kensington, Vestry* (1900), 64 J. P. 548, C. A.

(*t*) *Gauntlett v. King* (1857), 3 C. B. (N. S.) 59.

(*u*) *Moore v. Drinkwater*, *supra*.

(*v*) *Lewis v. Read*, *supra*; *Freeman v. Rosher* (1849), 13 Q. B. 780; *Green v. Wroe*, [1877] W. N. 130.

(*w*) *Hurry v. Bickman and Sutcliffe* (1831), 1 Mood. & B. 126.

(*x*) *Jones v. Buckley* (1838), 2 Jur. 204; *Crabb v. Killick* (1834), 6 C. & P. 216.

(*y*) *Bennett v. Bayes* (1860), 5 H. & N. 391.

the person actually ordering the thing to be done, but not where he is a mere transmitter of authority from the landlord to the bailiff and not interfering further (z).

SMOT. 18.
Illegal,
Irregular,
or Excessive
Distress
etc.

410. In the case of an irregular distress the action will lie at the election of the plaintiff either against the bailiff or his employer, and it makes no difference that the act is done without the employer's knowledge or subsequent sanction (a). If thought fit the landlord and bailiff may be made co-defendants (b).

Irregular
distress.

411. In like manner an action for an excessive distress may be brought either against the bailiff or the landlord (c). And where an excessive distress has been made the landlord may compensate the tenant and recover the amount against the bailiff (d).

Excessive
distress.

412. For any form of wrongful distress an action will lie at the suit of the tenant, or the owner of the goods, or of a person having the mere enjoyment and use of the chattels (e).

Who may
sue.

413. The indorsement on the writ may be for "damages for improperly distraining," which will be sufficient whether the distress complained of be wrongful, or excessive, or irregular, and whether the claim be for damages only or for double value (f).

Claim.

414. By way of defence to an action for illegal, excessive, or irregular distress, the defendant may plead "not guilty by statute" (g). This defence not only admits proof of all matters

Defence.

(z) *Bennett v. Bayes* (1860), 5 H. & N. 391.

(a) *Haseler v. Lemoyne* (1858), 5 C. B. (N. S.) 530. "Where I send a man to distrain and he distrains something else than I authorised him to distrain I am not liable; but if he does distrain on the things I authorised him to distrain it is then my business to see that he does what is requisite to make it a good distress of such things; and if I do not see to it myself I am answerable for any irregularity he may commit" (*ibid.*, per COCKBURN, C.J., as reported 28 L. J. (C. P.) 103, at p. 104).

(b) *Child v. Chamberlain* (1834), 5 B. & Ad. 1049.

(c) *Megson v. Mapleton* (1883), 49 L. T. 744.

(d) *Ibid.*

(e) *Swire v. Leach* (1865), 18 C. B. (N. S.) 479 (illegal distress); *Kerby v. Harding* (1851), 6 Exch. 234 (irregular distress); *Fell v. Whittaker* (1871), L. R. 7 Q. B. 120; *Fisher v. Algar* (1826), 2 C. & P. 374; *Wilkinson v. Ibbett* (1860), 2 F. & F. 300 (excessive distress).

(f) R. S. O., Appendix A., Part III., s. 4. The statement of claim will be a short statement of the facts showing that a wrong has been committed, and whether it is complained of as a common law tort or a breach of a statutory duty. Where the cause of action is that the landlord has retained the overplus, the tenant must not sue as for money had and received for his use, but in tort for the breach of the statutory obligation to pay over the surplus to the sheriff or under-sheriff (*Yates v. Eastwood* (1851), 6 Exch. 805; *Evans v. Wright* (1857), 2 H. & N. 527).

(g) This right, which was given by the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 21, is preserved by the R. S. O., subject to this restriction, that if the defendant so plead, he shall not plead any other defence to the same cause of action without the leave of the court or a judge (Ord. 19, r. 12), and he must state the Act and section of the Act upon which he relies in the margin of his pleading (Ord. 21, r. 19), thus, "By stat. Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 21 (public Act)"; see also *Gambrell v. Falmouth (Earl)* (1836), 5 Ad. & El. 403. In the case of a public authority the right to plead "not guilty by statute" was abolished by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2; see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

SNOT. 18.
Illegal,
Irregular,
or Excessive
Distress
etc.

of justification, but puts in issue the tenancy and ownership of the goods, and also the irregularities complained of (*h*), and, in fact, entitles the defendant to give in evidence everything he might lawfully do in order to make the distress (*i*). And under this plea the defendant may also give evidence of a tender of amends (*k*) and need not pay the amount into court (*l*). The plea is only available where the distress is made upon the premises chargeable with the rent, and not where a distress on other premises is justified on the ground of a fraudulent removal (*m*).

Damages
recoverable
for illegal
distress.

415. In the case of an illegal distress the distrainor is a trespasser *ab initio*, and the full value of the goods which have been lost to the plaintiff, without any deduction for rent, is recoverable as damages (*n*), unless there are circumstances of mitigation which the jury ought to take into consideration (*o*); and where the landlord has placed a man in possession, the plaintiff is entitled to damages, although he has had the use of the goods all the time (*p*). Where the wrong complained of is the removal of fixtures the measure of damages is not the amount of the proceeds of their sale after being severed, but may be their value to an incoming tenant (*q*), or may be their cost to the tenant. If the distress is lawful as to part and illegal as to part (as where privileged goods are included in the seizure) the plaintiff is only entitled to damages in respect of the illegal part (*r*). In the case of goods privileged from distress and improperly seized an ordinary action for conversion lies, and the plaintiff is entitled to recover the full value of the goods, though he may be only a bailee thereof (*a*).

For irregular
distress.

An action for irregularity in dealing with a distress cannot be maintained without proof of special damage, on failure of which the plaintiff is not entitled to a verdict for even nominal damages, but

(*h*) *Williams v. Jones* (1841), 11 Ad. & El. 643; *Ross v. Clifton* (1841), 11 Ad. & El. 631.

(*i*) *Eagleton v. Gutteridge* (1843), 11 M. & W. 465, *per* PARKE, B., at p. 469. Thus, in an action in trespass for illegal distress the defendant was held entitled under this plea to give in evidence that he entered under a warrant of distress for rent, was forcibly turned out of possession, and thereupon broke open the outer door of the house and re-entered to seize the goods (*ibid.*; *Bannister v. Hyde* (1860), 2 E. & E. 627).

(*k*) Under s. 20 of Distress for Rent Act, 1737 (11 Geo. 2, c. 19); see p. 197, *ante*.

(*l*) See *Jones v. Gooday* (1842), 9 M. & W. 736.

(*m*) *Vaughan v. Davis* (1794), 1 Esp. 257; *Furneaux v. Fotherby and Clarke* (1815), 4 Camp. 136; *Postman v. Harrell* (1833), 6 O. & P. 225.

(*n*) *Attack v. Bramwell* (1863), 3 B. & S. 520; *Keen v. Priest* (1859), 4 H. & N. 236; *Grunnell v. Welch*, [1906] 2 K. B. 555, O. A.

(*o*) *Edmondson v. Nuttall* (1864), 17 O. B. (N. S.) 280, *per* WILLES, J., at p. 294; see *Smith v. Enright* (1893), 63 L. J. (Q. B.) 220; *Harvey v. Pocock* (1843), 11 M. & W. 740, where the tenant had part satisfaction by return of the goods. If after action commenced the landlord returns the goods, the tenant may yet give evidence to show their damaged condition (*M'Grath v. Bourne* (1876), 10 I. R. C. L. 160); and see *Lamb v. Wall* (1859), 1 F. & F. 503; *Hogarth v. Jennings*, [1892] 1 Q. B. 907, O. A.

(*p*) *Bayliss v. Fisher* (1830), 7 Bing. 153.

(*q*) *Moore v. Drinkwater* (1858), 1 F. & F. 134.

(*r*) *Harvey v. Pocock*, *supra*; see *Bail v. Mellor* (1850), 19 L. J. (EX.) 279.

(*a*) *Swire v. Leach* (1865), 18 O. B. (N. S.) 479.

the defendant is entitled to the verdict (*b*). Neither can the plaintiff recover in any event if tender of amends have been made and refused before action (*c*). If he succeeds he will recover, where such damage is shown to have accrued and not otherwise, the full value of the goods, less the rent in arrear and charges (*d*).

For an excessive distress, the damages, in case of a sale of the goods, are the fair value of the goods after deducting rent and costs (*e*). If no sale has taken place the plaintiff is entitled to nominal, though he prove no actual, damage, since the law will presume damages from a man being prevented from dealing with his property (*f*). If the distress is made for more rent than is in arrear, and the tenant pays the sum to get rid of the distress, he may recover the excess he was obliged to pay and damages for the annoyance he may have suffered (*g*). Whether impounded on the premises or off the premises, the tenant is entitled to recover such actual damage as he has sustained through loss of the use and enjoyment of the excess taken, or of the power of disposing freely thereof, or through the inconvenience and expense in procuring sureties to a larger amount than he otherwise would have required on replevying (*h*). He is also entitled to the excess of the value of the goods above the rent and the expenses of distress. But not to extra costs of a replevin action beyond those allowed on taxation (*i*).

SECT. 18.
Illegal,
Irregular,
or Excessive
Distress
etc.

For excessive
distress.

416. An action for irregular, excessive, or illegal distress when the amount claimed is under £100 may be brought in the county court (*k*).

Jurisdiction
of county
court.

SUB-SECT. 6.—*Action for Double Value.*

417. Beyond the remedy provided by the common law for an illegal distress, in the particular instance of a distress for rent when no rent is in arrear followed by a sale of the goods the legislature has provided a punitive remedy for the owner of the goods, in the shape of compensation in double value of the goods taken and sold, with full costs (*l*).

Action for
double value.

(*b*) *Lucas v. Tarleton* (1858), 3 H. & N. 116; *Rodgers v. Parker* (1856), 18 C. B. 112; *Proudlove v. Twemlow* (1833), 1 Cr. & M. 326.

(*c*) See p. 197, *ante*.

(*d*) See cases cited in note (*n*), p. 206, *ante*; and *Knotts v. Curtis* (1832), 5 C. & P. 322; *Rocke v. Hills* (1887), 3 T. L. R. 298.

(*e*) *Wells v. Moody* (1835), 7 C. & P. 59. And the tenant does not waive his right of action by entering into an agreement with the distrainer respecting the sale of the goods seized; for a right of action once vested can only be a release or receipt of something in satisfaction of the wrong (*Willoughby v. Backhouse* (1824), 2 B. & O. 821; *Sells v. Hoars* (1824), 1 Bing. 401). For a case where part of the goods belonged to a third party, see *Bail v. Mellor* (1850), 19 L. J. (EX.) 279.

(*f*) *Chandler v. Doulton* (1865), 3 H. & C. 553.

(*g*) *Fell v. Whittaker* (1871), L. R. 7 Q. B. 120.

(*h*) *Piggott v. Birtles* (1836), 1 M. & W. 441.

(*i*) *Grace v. Morgan* (1836), 2 Bing. (N. C.) 534.

(*k*) If the holding is one to which the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), applies the jurisdiction of the county court is unlimited, see title COUNTY COURTS, Vol. VIII., p. 625.

(*l*) Stat. (1889) 2 Will. & Mar., c. 5, s. 4. Only the owner of the goods can sue, see *Chancellor v. Webster* (1893), 9 T. L. R. 568. "Full costs"

SECT. 18.
Illegal,
Irregular,
or Excessive
Distress
etc.

The offence is not complete unless a sale of the chattels actually takes place (*m*).

The provision is absolute, so that less damages than double value cannot be awarded to a successful plaintiff (*n*).

SUB-SECT. 7.—*Injunction to Restrain a Distress.*

Injunction
to restrain
distress.

418. An injunction may be granted in an action commenced by the tenant (*o*) where he complains either that a distress made is wrongful (*p*) or that a wrongful distress is threatened (*q*). Inasmuch, however, as the right of a landlord to distrain for rent is a legal right enabling him if the rent is in arrear to obtain security for its payment, the court will not generally interfere by injunction (unless it is a flagrant case) except upon the condition of the applicant paying the amount claimed for rent into court (*r*). The courts do not favour an interference with the right of distress by injunction. But in a proper case the plaintiff frequently obtains the relief formerly only obtainable by replevin, that is, possession of the goods while the question as to the right to distrain is being tried. And when the goods seized are not distrainable he may obtain relief for which replevin is not available.

SUB-SECT. 8.—*Summary Proceedings in Special Cases.*

Within
Metropolitan
Police
district.

419. For any form of wrong committed during a distress within the Metropolitan Police district, where the tenancy is weekly or monthly, or the rent is under £15, a complaint may be made to any of the police magistrates, and if it appears that such distress was improperly taken or unfairly disposed of, or that the charges made by the party having distrained, or attempted to distrain, are contrary to law, or that the proceeds of the sale of such distress have not been duly accounted for to the owner, the magistrate may order the distress, if not sold, to be returned to the tenant on payment of the rent at such time as the magistrate shall appoint; or, if the distress shall have been sold, to order payment to the tenant of the value thereof, deducting thereout the rent which shall appear to be due, such value to be determined by the magistrate; and such landlord, or party complained against, in default of compliance with any such order, will forfeit to the party aggrieved the value of such

only means the usual party and party costs (*Avery v. Wood*, [1891] 3 Ch. 115, C. A.).

(*m*) *Masters v. Farris* (1845), 1 C. B. 715. But the statute was held to apply where the goods were distrained after judgment had been obtained for the rent, though the judgment had not been satisfied (*Potter v. Bradley & Co.* (1894), 10 T. L. R. 445).

(*n*) *Masters v. Farris*, *supra*.

(*o*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); see title INJUNCTION.

(*p*) *Walsh v. Lonsdale* (1882), 21 Ch. D. 9, C. A.

(*q*) *Shaw v. Jersey (Earl)* (1879), 4 C. P. D. 120, 359, C. A.

(*r*) *Shaw v. Jersey (Earl)*, *supra*; *Carter v. Salmon* (1880), 43 L. T. 490, C. A. In *Sanster v. Foster* (1841), Cr. & Ph. 302, which was an action by a tenant of a farm to restrain the enforcement of a penal rent reserved by the lease, Lord COTTENHAM, L.O., laid down the principle since observed, that "the court ought not to interfere for the purpose of preventing a party from enforcing a legal claim without securing to itself the means of putting him in the same position in the event of his turning out to be right as if the court had not interfered."

distress, not being greater than £15, such value to be determined by the magistrate (s).

420. The wearing apparel and bedding of the tenant or his family, and the tools and implements of his trade to the value of £5, are exempt from distress (a). A court of summary jurisdiction, on complaint that goods or chattels so exempt from distress for rent have been taken under a distress, may, by summary order, direct that the goods and chattels so taken, if not sold, be restored, or if they have been sold, that such sum as the court may determine to be the value thereof shall be paid to the complainant by the person who levied the distress or directed it to be levied (b).

SECT. 18.
Illegal,
Irregular,
or Excessive
Distress
etc.

Wearing
apparel etc.
under £5.

421. In the case of any holding to which the Agricultural Holdings Act, 1908 (c), applies, there are special provisions for settling any dispute arising in respect of any distress having been levied contrary to the provisions of the Act.

Agricultural
holdings.

SUB-SECT. 9.—*Rescue.*

422. Although a rescue (d) is generally a breach of the law, there are some cases in which it is a legal remedy of an aggrieved person, that is to say, when a distress is wholly wrongful and not merely irregular or excessive (e). The rescue must take place before the goods are impounded, for after the impounding, whether the distress was lawful or not, the goods cannot be retaken (f), unless after impounding the distrainer abuse the distress by working it (g).

Rescue.

Rescue in such cases can only be legally made by the tenant or the owner of the chattels or his servant or agent, and not by a stranger (h), so that if the goods of two persons be wrongfully taken in one distress each can rescue only his own goods, inasmuch as he is a stranger as regards the other goods (i).

When rescue
may be made.

SUB-SECT. 10.—*Recaption.*

423. A writ of recaption was the peculiar remedy which formerly existed for one particular kind of wrongful distress, namely, a second

Recaption.

(s) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 39.

(a) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4; see p. 139, *ante*.

(b) Law of Distress Amendment Act, 1895 (58 & 59 Vict. c. 24), s. 4.

(c) 8 Edw. 7, c. 28. This Act consolidated the provisions of the earlier Acts relating to agricultural holdings in England and Wales. It made no alteration in the law. See title AGRICULTURE, Vol. I., p. 257, where the procedure under the earlier Acts is dealt with.

(d) See p. 192, *ante*.

(e) Instances of such a remedy being lawful occur where the distress has been made for a payment which is not rent, or where no rent is due or where the distress is made after a proper tender of arrears and costs, or the distress is taken on the highway, or in the night time (p. 196, *ante*). So if the distress is wrongful in part, the rescue may take place as to that part, as where a distress may be lawfully levied but the distrainer takes things absolutely privileged or conditionally privileged by reason of other distrainable goods being on the premises (*Keen v. Priest* (1859), 4 H. & N. 236).

(f) *Cotsworth v. Betison* (1696), 1 Ld. Raym. 104.

(g) *Smith v. Wright* (1861), 6 H. & N. 821.

(h) 1 Roll. Abr. 673.

(i) Fitz. Nat. Brev. 102.

SECT. 18.
 Illegal,
 Irregular,
 or Excessive
 Distress
 etc.

distress of the cattle or beasts of the same person for the same rent after they had been replevied and returned to the owner, but before the action of replevin was tried (*k*).

The remedy is practically obsolete, for, though not abolished, it is not clear what provision the Judicature Acts have made for enforcing it. But in the rare event of the offence being committed the plaintiff would probably apply in the replevin action for an injunction to restrain the distrainer, or move to commit him for contempt.

Part III.—Distress for Rates and Taxes.

SECT. 1.—*Poor Rate.*

How right to
 distrain
 arises.

424. The right of distress in respect of rates and taxes and to enforce the order of justices as ancillary to their jurisdiction stands in many respects upon a footing different to the rights we have previously considered. It does not arise under the common law or by virtue of a contract. It is purely statutory. In its nature it is somewhat analogous to an execution levied to enforce a legal money liability.

Extent of
 power.

425. The goods of any person assessed and refusing to pay money assessed for the relief of the poor may be levied by warrant of distress from two justices (*l*), and that not only in the place for which such assessment was made, but in any other place within the same county or precinct; and if sufficient distress cannot be found within the said county or precinct, on oath made thereof before a justice of any other county or precinct (which oath shall be certified under the hand of such justice on the said warrant), such goods may be levied in such other county or precinct by virtue of such warrant and certificate (*m*).

If a person rated to the poor rate does not pay his quota during the year of office of the overseers he can be compelled to pay by any subsequent overseers (*n*).

(*k*) Gilbert on Distresses, 223, 225; see title ANIMALS, Vol. I., p. 385.

(*l*) Poor Relief Act, 1601 (43 Eliz. c. 2), s. 2. The justices may also include the costs in the warrant (Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 1).

(*m*) Poor Relief Act, 1743 (17 Geo. 2, c. 38), s. 7. Only the goods of the party assessed can be taken under the distress. The words of the statute of Elizabeth are "distress and sale of the offender's goods," and this Act says the "goods of any person assessed" (*Stevens v. Evans* (1761), 2 Burr. 1152, 1159), differing in this respect from assessed taxes (*Juson v. Dixon* (1813), 1 M. & S. 601). But the goods of one overseer are as liable to be seized under a distress made by the order of the other overseers as those of any other person (*Skingley v. Surridge* (1843), 11 M. & W. 503).

(*n*) *East Dean Overseers v. Everett* (1861), 3 E. & E. 574; Poor Relief Act, 1743 (17 Geo. 2, c. 38), s. 11. This enables the overseers to recover where by reason of an incorrect demand not too little has been paid in previous years (*R. v. Blenkinsop*, [1892] 1 Q. B. 43). See, generally, title POOR LAW.

426. Certain preliminaries are necessary to the issue of a distress warrant. In the first place there must be a demand for payment of the rate. The demand must be for the precise sum actually due (o). The demand should be made upon the ratepayer or left upon the premises. If the occupier is not living on the premises, nor in the parish for which the rate is made, or the owner, if assessed for such rate in the place of the occupier, is not living in such parish, the demand may be delivered to the person having the custody of the premises, or if no such person can be found, then affixed upon some conspicuous part of the premises, and where the residence of the person assessed is not known, and cannot be ascertained upon inquiry at the premises, the summons for the non-payment of the rate may be served in like manner (p).

SECT. 1.
Poor Rate.
Demand.

How made.

Where the overseers have served a demand in writing of the whole rate on the occupier of a hereditament let to him for a term not exceeding three months, and he claims the right to pay the rate by instalments, a distress warrant may be issued for the second instalment without a second demand in writing (q).

Rent payable
by instal-
ments.

In the case of any corporation aggregate, joint stock or other company, or any conservators or other public trustees, the demand may be made by letter sent through the post addressed to the clerk or secretary or other principal officer of the corporation, company, conservators, or trustees at the office of such corporation, company, conservators, or trustees, or made personally upon such clerk, secretary, or officer at such office, and a summons for the non-payment of such rate may be served in like manner (r).

Companies
etc.

427. If the rate when demanded be not paid within seven days, the overseers, or any one of them, may make complaint thereof to a justice of the peace and obtain a summons (s) for the ratepayer to appear before the justices to show cause why the distress warrant should not issue (t).

Summons

Where several rates are due from the same person they may be included in the same information, complaint, summons, order etc., which are to be construed as several as to each, so that its invalidity as to one rate will not affect its validity as to others, and

(o) *Hurrell v. Wink* (1818), 8 Taunt. 369. In this respect it differs from a distress for rent (*ibid.*); and where the amount comes to a fraction of a farthing it must be omitted from the demand (*Morton v. Brammer* (1860), 8 C. B. (N. S.) 791). It is not necessary that there should have been a personal demand by the collector or a personal refusal by the person distrained upon (*R. v. Ford* (1835), 2 Ad. & El. 588). Nor is a demand of the precise amount necessary where the ratepayer having gone out of occupation is only liable for a proportionate part of the rate (*Mansel v. Ichen Overseers*, [1906] 1 K. B. 221).

(p) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 39.

(q) *Walton-on-the-Hill Overseers v. Jones*, [1893] 2 Q. B. 175.

(r) *Ibid.*, s. 40.

(s) Poor Relief Act, 1814 (54 Geo. 3, c. 170), s. 12. The summons may be in the form prescribed by the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 5, or in a form to the like effect, and may be served by delivering it to the party personally or by leaving the same with some person for him or her at his or her place of abode (*ibid.*).

(t) *R. v. Benn and Church* (1795), 6 Term Rep. 198.

SECT. 1. if several rates can be so included, no costs shall be allowed for more than one complaint, summons etc. (a).

Poor Rate.

Procedure.

428. Justices sitting to hear an application for the issue of a distress warrant for the non-payment of poor rates sit as a court of summary jurisdiction, and are not merely exercising a ministerial duty (b).

Evidence.

In support of the application the overseer must produce the book purporting to contain the poor rate with the allowance of the rate by the justices, and this, if the rate is made in the form prescribed by law, will be *prima facie* evidence of the due making and publication of such rate (c). If the party summoned appear and fail to show cause for non-payment, the distress warrant must issue.

Validity of rate.

The justices have no right to inquire into the validity of the rate; and where the rate is good on the face of it, and the person summoned is the actual occupier of the rated property, and the rate has not been appealed against, the justices are bound to issue their warrant notwithstanding the ratepayer appears and raises an objection which would be a good ground of appeal against the rate (d). No action can be brought against the justices by reason of any irregularity or defect in the rate or by reason of any person named in the rate not being liable to be rated therein (e).

(a) Poor Rates Recovery Act, 1862 (25 & 26 Vict. c. 82), s. 1; and in the metropolis, see Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 18. A poor rate and a general district rate may be included in one summons (*R. v. Glover, Ex parte Hornsey District Council* (1900), 35 L. J. 269).

(b) Formerly it was different, inasmuch as the justices for this purpose did not sit as a court of summary jurisdiction, and did not make an order on complaint within the meaning of ss. 6 and 35 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), so as to make the poor rates civil debts within the meaning of those sections (*R. v. Price* (1880), 5 Q. B. D. 300). Since 1884 the justices in sitting to hear applications for the issue of a distress warrant for poor rates are a court of summary jurisdiction (Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 7; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (11); *Fourth City Mutual Building Society v. East Ham (Churchwardens and Overseers)*, [1892] 1 Q. B. 661).

(c) Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 18; *Ex parte Binney* (1851), 16 J. P. 22.

(d) *R. v. Kingston Justices and Philips* (1858), E. B. & E. 256, followed in *Cheney v Tallowin*, [1904] 2 K. B. 763; *R. v. Bradshaw* (1860), 2 E. & E. 836; *Manchester Overseers v. Headlam* (1888), 21 Q. B. D. 96; *Ex parte May* (1862), 31 L. J. (M. C.) 161. See also *St. Stephen (Churchwardens) v. Great Northern and City Rail. Co.* (1902), 86 L. T. 390. But in the "passive resistance" cases it was held that where a ratepayer tenders a portion of the poor rate which is refused, and upon the hearing of the complaint before the justices the portion which had been previously refused is again tendered in court and refused by the overseers, the justices are not bound to issue a distress warrant for more than the balance beyond the amount tendered (*R. v. Gillespie*, [1904] 1 K. B. 174), though if they think fit they can issue a warrant for the full amount (*Ex parte Wiles* (1903), 90 L. T. 225).

(e) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 4. Formerly the justices frequently refused to grant a warrant of distress where it was feared that the granting of it would subject them to an action of trespass. And the courts would not grant a mandamus to compel them to grant a warrant where there was a probability that an action would be brought against them for doing so (*R. v. Greame* (1835), 2 Ad. & El. 615; *R. v. Mirehouse* (1835), 2 Ad. & El. 632).

429. Though the justices act ministerially in the sense that they have no right to go behind a rate which is good on the face of it (*f*), objection may be taken that in the particular instance the rating authority had no jurisdiction to make a rate upon the person or upon the property in question, for the justices cannot enforce an illegal rate (*g*); and they may inquire into the validity of the objections taken by the party summoned, and may state a case for the opinion of the High Court (*h*).

SECT. 1.
Poor Rate.
Objections
available.

430. It is illegal to assess a man for property which he does not occupy, and it may be shown in opposition to an application for a distress warrant that the rate on the face of it shows that he is rated for property of which he is not the occupier (*i*).

Non-
occupation.

If one entire assessment is made in terms upon property which he does occupy and upon other property which he does not occupy, so that upon the true state of facts being ascertained it is impossible to satisfy the description in the rate book without including property which he does not occupy, the rate is bad and will not be enforced by distress (*j*).

Where the ratepayer has only been in occupation for part of the period covered by the rate, the distress warrant can only issue for

(*f*) *Bates v. Plumstead Overseers* (1895), 72 L. T. 393; *Sandgate Local Board v. Pledge* (1885), 14 Q. B. D. 730.

(*g*) *Westminster Corporation v. Army and Navy Auxiliary Co-operative Supply, Ltd.*, [1902] 2 K. B. 125, 134; *St. Stephen (Churchwardens) v. Great Northern and City Rail. Co.* (1902), 86 L. T. 390; *Birmingham (Churchwardens) v. Shaw* (1849), 10 Q. B. 868, 879. "If the objection raised in answer to the application for a distress warrant is 'you have no jurisdiction to make us liable in respect of this rate at all,' that is an objection which can be taken, but if, on the other hand, it is 'you ought not to have assessed us in respect of this property at this amount,' or on some other ground which is a ground for an appeal, that cannot be taken" (*St. Stephen (Churchwardens) v. Great Northern and City Rail. Co.*, *supra*, per Lord ALVERSTONE, C.J., at p. 392). Thus, an objection may be taken that upon the construction of a statute the ratepayer did not become liable to be rated in respect of the particular property (*ibid.*), but not an objection that the ratepayer is entitled to a statutory exemption (*Birmingham (Churchwardens) v. Shaw, supra*), nor that the rate is in part retrospective, because made after the commencement of a half-year to meet the expenses of the whole year (*Cheney v. Tallwin*, [1904] 2 K. B. 763; *R. v. Kingston Justices and Philips* (1858), E. B. & E. 256), nor that it is made for too long a period in advance (*Durrant v. Boys* (1796), 6 Term Rep. 580). In addition to what is apparent on the face of the rate, the defence may be raised that the rate has not been published in accordance with the Poor Rate Act, 1743 (17 Geo. 2, c. 3), s. 1, and is, therefore, a nullity (*Beeson v. Derby Overseers* (1903), 89 L. T. 47; *R. v. Neucomb* (1791), 4 Term Rep. 368).

(*h*) *Fourth City Mutual Building Society v. East Ham (Churchwardens and Overseers)*, [1892] 1 Q. B. 661; and see *R. v. London (Lord Mayor) and Brown* (1887), 57 L. T. 491; and see note (*b*) on p. 212, *ante*.

(*i*) *Milward v. Caffin* (1779), 2 Wm. Bl. 1330; *Bristol Poor (Governors) v. Wait* (1834), 1 Ad. & El. 264.

(*j*) *Manchester Overseers v. Headlam* (1888), 21 Q. B. D. 96, per WILLS, J., at p. 98; *London and North-Western Rail. Co. v. Buckmaster* (1874), L. R. 10 Q. B. 70; and it makes no difference that the ratepayer has already appealed to the quarter sessions on the ground that he is rated for what he does not occupy and that the appeal has been dismissed (*Milward v. Caffin, supra*). But the rule does not apply where the person rated is actually in occupation of property which fulfils the description in the rate book (*Manchester Overseers v.*

SECT. 1.
Poor Rate. — the proportionate part of the rate (*k*), and the justices may ascertain the proportion due and issue their distress warrant for that amount (*l*).

Occupation of servant or caretaker. **431.** The justices have jurisdiction to inquire whether the person affected by the rate is in reality the principal and responsible person in occupation of the premises, and the person summoned may show that he is only a caretaker or servant (*m*), or that the property for which he is rated is let to his wife, who is in occupation (*n*).

Property outside the rating area. Objection may be taken that the premises are not situate in the area for which the rate is made (*o*).

Limits of jurisdiction. **432.** If the party summoned fails to appear, then, upon proof of service of the summons a reasonable time before, the justices may proceed *ex parte* as if such party had appeared (*p*).

If the rate is legal the justices cannot refuse to issue the warrant however inconvenient or oppressive they may deem it (*q*).

Nor can they order that there shall be any delay in the issue of the warrant (*r*).

The warrant. **433.** The warrant may be directed to the churchwardens and overseers of the poor, or the overseers of the poor, and to the constable of the parish or township, and to any other person or persons, or to any one or more of them (*s*). One warrant of distress may be issued against any number of persons neglecting or refusing to pay the rate (*a*). Forms of distress warrants are provided by statute (*b*).

A distress warrant may issue against any one of a number of tenants in common for the whole amount which such tenants refuse to pay (*c*).

Appeal to quarter sessions. **434.** An appeal lies to quarter sessions against the issue of a distress warrant, but not before the distress has been levied (*d*).

(*k*) *Davis v. Woodfield* (1900), 81 L. T. 782; *R. v. Tempest, Ex parte Townend* (1898), 14 T. L. R. 199.

(*l*) *Mansel v. Itchen Overseers*, [1906] 1 K. B. 221.

(*m*) *R. v. Simmons* (1893), 62 L. J. (M. C.) 106.

(*n*) *R. v. Bagshawe* (1896), 75 L. T. 513. But the justices cannot go into the question of whether or not the occupation is beneficial; that is matter only for appeal (*R. v. Bradshaw* (1860), 29 L. J. (M. C.) 176).

(*o*) *Baglan Bay Tinsplate Co. v. John* (1895), 72 L. T. 805; and see *Birmingham (Churchwardens) v. Shaw* (1849), 10 Q. B. 868, 879, 880; *Bristol Poor (Governors) v. Wait* (1834), 1 Ad. & El. 264, 281.

(*p*) Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 5.

(*q*) *R. v. Hasler* (1834), 3 L. J. (M. C.) 56; *R. v. Boteler* (1864), 33 L. J. (M. C.) 101.

(*r*) *R. v. Handsley* (1881), 7 Q. B. D. 398.

(*s*) Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 8.

(*a*) *Ibid.*, s. 3.

(*b*) *Ibid.*, s. 4. The warrant need not state in terms that the refusal to pay the rate was proved upon oath; it is enough to state that it was duly proved, and a misrecital of the date of the rate is not material (*Ormerod v. Chadwick* (1847), 16 M. & W. 387).

(*c*) *Paynter v. R.* (1847), 16 L. J. (M. C.) 136, Ex. Ch.

(*d*) *R. v. London Justices*, [1899] 1 Q. B. 532.

435. The right of distress is limited to the goods of the person assessed (e). But he need not have an absolute property in such goods, and a bill of sale by way of security for the payment of money will be no protection in respect of personal chattels included in such bill of sale (f).

SECT. 1.
Poor Rate.
—
What may be
distrained.

The existence of an equitable charge on goods does not protect them from distress for poor rate (g). Moreover, common law exemptions from distress do not apply in cases where the right of distress is given by Act of Parliament; so that money as well as goods may be distrained for a poor rate (h); so may working tools in a shop, though there are other available goods (i), and beasts of the plough (k).

436. The person against whom a warrant is issued is liable to pay the costs of the warrant, and of the broker or other officer for his attendance to make the levy, although such person may tender the amount of the rate before any levy is made (l).

Costs.

The justices in issuing a distress warrant for poor rates have a discretion as to whether they will include in their warrant of distress any sum in respect of costs of obtaining the warrant (m).

437. If the return of the person having the execution of the warrant is that he can find no sufficient goods on which to levy the distress, the justices may issue a warrant of commitment against the defaulter with regard to whom such return has been made (n).

Commitment
in default of
distress.

(e) *Stevens v Evans* (1761), 2 Burr. 1152. Though in one case under the special terms of a local Act the goods of a lodger were held liable to a distress (*Peppercorn v. Hofman* (1842), 9 M. & W. 618).

(f) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 14.

(g) *Re Marriage, Neave & Co.*, [1896] 2 Ch. 663, C. A.

(h) *East India Co. v. Skinner* (1695), 1 Bott, Poor Law, 249.

(i) *Edgcomb v. Sparks* (1680), 2 Show. 126.

(k) *Hutchins v. Chambers* (1758), 1 Burr. 579.

(l) Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 1; Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 31. But the justices have a discretion as to costs (*R. v. Baker, Ex parte Guildford Overseers* (1909), 100 L. T. 522). A second distress is permitted where the distrainer has been prevented from realising the distress by the unlawful conduct of the person liable (*Les v. Cooke* (1858), 3 H. & N. 203, Ex. Ch.).

(m) Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 1; and this discretion is not fettered by anything contained in s. 6 of the Act, and after the rate is paid the justices may refuse to issue a warrant for the costs (*R. v. Baker, Ex parte Guildford Overseers, supra*). When the amount distrained for does not exceed £20, the costs allowed are those provided by the Distress (Costs) Act, 1817 (57 Geo. 3, c. 93), s. 1, as applied to rates by the Distress (Costs) Act, 1827 (7 & 8 Geo. 4, c. 17) (see p. 220, *post*), and according to the schedule to the first-mentioned Act (*Coster v. Headland*, [1906] A. C. 286). But the remedy of the person aggrieved by the bailiff deducting higher charges than those permitted by the Act is not confined to an application to justices under the first-named Act, but may be pursued in the civil courts (*R. v. Philbrick, Ex parte Edwards*, [1905] 2 K. B. 108). It is the duty of the police to execute the warrant (*Baker v. Wicks*, [1904] 1 K. B. 743, *per* Lord ALVERSTONE, C.J., at p. 747). And a constable who levied a distress and removed the goods to the police station for safe custody, where they were locked up, was held entitled to one shilling a day for "keeping possession" (*Scott v. Denton*, [1907] 1 K. B. 456).

(n) Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 2. A married woman rated in respect of her property is liable to imprisonment in default of a sufficient distress (*Re Allen*, [1894] 2 Q. B. 924). The commitment is a punitive order,

SECT. 1. But if before he is committed he pays or tenders to the church-wardens or overseers of the poor the sum so sought to be recovered, together with all costs incurred up to that time, no further proceedings can be taken (*o*).

SECT. 2.—Highway Rate.

Highway
rate.

438. For the purpose of recovering highway rates the authority by whom the same are to be collected have the same powers, remedies, and privileges, as the overseers of the poor in the parish have for the recovery of the poor rate (*p*).

As the highway rate follows the poor rate, it will be sufficient to refer to sect. 1 of this Part in those few instances in which it may still be necessary to resort to the special powers given by the Highway Act.

SECT. 3.—General District Rate.

General
district rate.

439. If a person assessed to a general district rate by any urban district council fails to pay the same when due, and for the space of fourteen days after the same has been lawfully demanded in writing, or if any person quits, or is about to quit, any premises without payment of any such rate then due from him in respect of such premises, and refuses to pay the same after lawful demand thereof in writing, any justice may summon the defaulter to appear before a court of summary jurisdiction to show cause why the rate in arrear should not be paid; and if the defaulter fails to appear, or if no sufficient cause for non-payment is shown, the court may make an order for payment of the rate, and, in default of compliance with such order, may by warrant cause the same, and the costs of the levy, to be levied by distress of the goods and chattels of the defaulter (*q*).

The court in making the order for payment acts as a court of summary jurisdiction, and the rate becomes a civil debt.

Duties of
justices.

The duties of the justices in enforcing the rate resemble their duties in enforcing a poor rate (*r*). If the rate is good on the face of it they should not refuse to make an order for payment, or attempt to go behind the rate (*s*).

and not merely a legal process to enforce payment, consequently the defaulter is not entitled on becoming bankrupt to obtain an order of discharge under s. 10 (2) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*Re Edgcome, Ex parte Edgcome*, [1902] 2 K. B. 403, C. A.). The justices cannot issue one warrant of commitment against several persons in default of distress (Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 3).

(*o*) Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 6.

(*p*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 34; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (1); Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 144, 216, 229, 230; Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 21, 25, 29. In all districts where the rural district council are the highway authority any highway expenses are to be defrayed as general expenses in the manner directed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), with respect to the expenses incurred in the execution of that Act (see titles HIGHWAYS, STREETS AND BRIDGES; LOCAL GOVERNMENT).

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 256. See title LOCAL GOVERNMENT for the constitution and functions of district councils.

(*r*) See p. 212, *ante*.

(*s*) *Sandgate Local Board v. Pledge* (1885), 14 Q. B. D. 730; though they may state a case if they think fit to do so (*ibid.*).

In default of distress the defendant may be committed to prison, but only upon proof of means given upon judgment summons (*t*).

SECT. 3.
General
District
Rate.

SECT. 4.—*Borough Rate.*

440. In the case of a borough, the borough fund is applicable for payment of the corporate expenses, as provided in the Municipal Corporations Act, 1882. If the borough fund is insufficient, the council of the borough must from time to time estimate what amount in addition will be sufficient for their purposes, and are empowered to raise the amount by a rate called the borough rate, and to assess the contributions thereto on the several parishes and parts of parishes within the borough (*u*).

Borough rate.

Where a parish is wholly in a borough the council may from time to time, if they think fit, order the overseers to pay the contribution of the parish to the borough rate out of the poor rate made or to be made for the parish. The overseers must pay the contribution to the council, or as they order. If the overseers fail to pay as ordered, the amount may be levied on the goods of them or any of them, by distress, by virtue of a warrant signed by the mayor and sealed with the corporate seal, or signed by two justices in and for the borough (*v*).

Parish
wholly in
a borough.

Any warrant required for the levy or collection of a borough rate may be issued by the mayor, signed by him, and sealed with the corporate seal (*x*).

Warrants.

SECT. 5.—*Tithe Rentcharge.*

441. Where tithe rentcharge (*y*) is in arrear the owner of the rentcharge may recover it by an order of the county court; and, where it is shown to the court that the lands are occupied by the owner thereof, the order will be executed by the appointment by the court of an officer who, subject to the direction of the court, will have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge, and no greater or other powers; and if there is no sufficient distress the person entitled to the sum ordered to be recovered may proceed to obtain possession of the land under s. 82 of the Tithe Act, 1836 (*z*).

Distress
under order of
county court.

Possession of
land in
default.

(*t*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 22; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 6, 35.

(*u*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 144.

(*v*) *Ibid.*, s. 145. See further as to the borough rate, title RATES AND RATING.

(*x*) *Ibid.*, s. 148.

(*y*) Tithe Act, 1891 (54 Vict. c. 8). But the Act does not apply to a rentcharge under the Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), nor a rentcharge payable under the Tithe Act, 1860 (23 & 24 Vict. c. 93), in respect of the tithes on any gated or stinted pasture, nor a sum or rate payable for each head of cattle or stock turned on land subject to common rights or held or enjoyed in common (see 54 Vict. c. 8, s. 2 (2)), nor, except so far as relates to the assessment and recovery of rates, does it extend to the tithe rentcharge issuing out of the lands of a railway company (*ibid.*, s. 10 (1)). See title ECCLESIASTICAL LAW, *post*, as to tithe generally.

(*z*) Tithe Act, 1891 (54 Vict. c. 8), s. 2 (2). The rentcharge must be in arrear for three months before proceedings are taken in the county court (*ibid.*, s. 2 (1)).

SECT. 5.
Tithe
Rentcharge.
Distress under
Tithe Act,
1836.

442. The right of distress given by the Tithe Act, 1836, was a power, when the rentcharge was in arrear for twenty-one days after any half-yearly day of payment, for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or any part thereof, for all arrears of the rentcharge, and to dispose of the distress when taken, and otherwise to act in relation thereto, as any landlord might for arrears of rent reserved on a common lease for years, subject to the proviso that not more than two years' arrears were at any time to be recoverable by distress (*a*).

Time for
proceedings.

443. Proceedings for recovering the rentcharge must be taken within two years from the date when the tithe rentcharge became due (*b*).

SECT. 6.—Assessed Taxes.

Assessed
taxes.

444. The taxes under the management of the Board of Inland Revenue, including the land tax, inhabited house duty, and property and income taxes, are now mainly regulated by the Taxes Management Act, 1880 (*c*), which contains provisions for enforcing by way of distress the payment of arrears of these taxes.

Power to
distrain.

445. If a person refuses to pay (*d*) the sum charged upon him in respect of any of the before-mentioned taxes on demand made by the collector, according to the assessments and warrants to him delivered by the land tax and general commissioners, such collector may distrain upon the premises charged with such sum of money, or distrain the person so charged by his goods and chattels, without any further authority from the said commissioners for that purpose than the warrant to such collector delivered on his appointment (*e*).

The power of distress may be lawfully exercised after the expiration of the year in respect of which the tax is payable, provided that, at the time of the distress, the collector has not been required to pay over the sums collected by him and deliver a schedule of arrears as provided by s. 103 (*b*) of the Taxes Management Act, 1880 (*f*). When once the account has been closed the collector would have no power to distrain without a special authorisation from the commissioners (*g*).

Company in
liquidation.

446. The right given to the Crown to distrain for income tax is not affected by the fact that the party liable to pay the tax is a company being wound up under the provisions of the Companies Consolidation Act, 1908 (*h*), for the Crown is not bound by the Act, not being specially mentioned in it (*i*).

(*a*) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 81.

(*b*) Tithe Act, 1891 (54 Vict. c. 8), s. 10 (2).

(*c*) 43 & 44 Vict. c. 19. See titles **INCOME TAX; INHABITED HOUSE DUTY; LAND TAX.**

(*d*) Non-payment after service of the demand note is evidence of refusal to pay (*Lumsden v. Burnett*, [1898] 2 Q. B. 177, C. A.).

(*e*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 86 (1).

(*f*) *Elliott v. Yates*, [1900] 2 Q. B. 370, C. A.

(*g*) *Ibid.*, per VAUGHAN WILLIAMS, L.J., at p. 375.

(*h*) 8 Edw. 7, c. 69.

(*i*) *Re Henley & Co.* (1878), 9 Ch. D. 469, 481, C. A.

447. So far as regards the duties chargeable under Sched. A of the Income Tax Acts, in case any lands charged to the said duties shall be unoccupied, and no distress can be found on the same at the time such duties shall be payable, the collector may at any time after enter upon the said lands, when there shall be any distress thereupon to be found, and seize and sell the distress under the like powers as he might have distrained on the same lands if in the occupation of such person at the time the duties became due; subject to the proviso that the said duties, or either of them, are not to be levied on any house which shall be or become unoccupied for such year, or portion of the year, as the same shall be unoccupied (*j*).

SECT. 6.
Assessed
Taxes.

Income tax,
Sched. A.

448. Where by any assessment the income tax is charged on tithes or teinds, and is not paid within the times limited by the Act, the collector and officer respectively may distrain upon such tithes or teinds, or any other goods or chattels of the owner of such tithes or teinds, wherever the same can be found, and seize, and sell so much thereof, as shall be sufficient for levying the said assessment (*k*). When any assessment to income tax is charged on any composition for tithes or teinds, or any rent or payment in lieu thereof, the occupier of the lands and premises charged with such composition, rent, or payment is answerable for the duties so charged, and may deduct the same out of the next payment on account thereof

Income tax
on tithes and
teinds.

Where any assessment is charged on the profits of manors or royalties, or of markets or fairs, or on tolls, fisheries, or any other annual or casual profits not distrainable, the owner or occupier, or receiver of the profits thereof, is answerable for the duties charged thereon, and may retain and deduct the same out of such profits; and in every such case the collector may distrain upon such persons respectively (*l*).

449. Income tax under Sched. E, on offices, which cannot be stopped in the hands of the proper officer, is to be certified in case of non-payment to the commissioners of the district where the defaulting officer resides, and they may issue their warrant to the collector to levy the same by distress (*m*).

Income tax,
Sched. E.

450. For the purpose of levying a distress a collector may, upon warrant under the hands and seals of the commissioners obtained for that purpose, break open in the daytime any house or premises, calling to his assistance any constable for the parish, group, or division where any refusal, neglect, or resistance is made.

Levying the
distress.

(*j*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 70. A collector having distrained upon the goods of the tenant for the time being for income tax under Sched. A, assessed on the premises for the previous year, when they were unoccupied, it was held that no action would lie, as the case was covered by this section, and s. 35 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), did not apply (*Reading v. Chew* (1898), 78 L. T. 681).

(*k*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 71.

(*l*) *Ibid.*, s. —

(*m*) *Ibid.*, s. 155.

SMOT. 6.
Assessed
Taxes.
—

And it is the duty of all constables, when so required, to assist the collector in the execution of such warrant and in levying the distress in the house or premises (*n*).

A levy or warrant to break open must be executed by or under the direction and in the presence of the collector (*o*).

How goods to
be dealt with.

451. Every distress levied by a collector must be kept for five days at the cost of the person so refusing to pay (*p*). If the said person does not pay the sums due within the five days, then the said distress must be appraised by two or more of the inhabitants where the said distress is taken, or other sufficient persons, and there sold by public auction by the said collector or his deputy; the overplus (if any), after deducting the said money and also the costs and charges of taking, keeping, and selling the distress (*q*), must be paid to the owner thereof (*r*).

Application
of Parish
Officers Act,
1793.

452. The provisions in regard to warrants of distress contained in the Parish Officers Act, 1793, which authorises justices to impose fines upon constables and other peace and parish officers for neglect of duty, and also makes provision for the execution of warrants of distress granted by magistrates, is made applicable to levies and distrains made by collectors for recovery of the duties on land tax (*a*).

Collector
advancing
money.

453. If a collector advances and pays over to the collector of inland revenue any sum of money for or on account of the assessed taxes on any other person, whether at his request or not, such collector may, in default of repayment to him at any time within six months after such payment, levy the duties by the like methods as

(*n*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 86 (2) (see *R. v. Clark* (1835), 4 L. J. (M. C.) 92).

(*o*) *Ibid.*, s. 86 (3).

(*p*) *Ibid.*, s. 86 (4).

(*q*) There is no Act regulating the charges by a collector for a distress for income tax where the sum distrained for exceeds £20. The practice is to charge 1s. in the pound for the levy, and 3s. 6d. per day for the man in possession (*Lumsden v. Burnett*, [1898] 2 Q. B. 177, C. A.). When the amount distrained for is under £20 the costs and charges allowed are:—

	s.	d.
Levying distress	3	0

Man in possession, per day	2	6
--------------------------------------	---	---

Appraisement 6d. in the pound on the value of the goods.

Stamp, the lawful amount thereof.

All expenses of advertisement (if any such)	10	9
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Catalogues, sale, and commission and delivery of the goods,

1s. in the pound on the net produce of the sale.

Distress (Costs) Act, 1817 (57 Geo. 3, c. 93); Distress (Costs) Act, 1827 (7 & 8 Geo. 4, c. 17). The 2s. 6d. per day for a man in possession cannot be charged unless there is an agreement to do so, if the man is only in constructive possession, that is, where he is in what is called "walking possession" (*Lumsden v. Burnett*, *supra*).

(*r*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 86 (5).

(*a*) *Ibid.*, s. 86 (6). The Parish Officers Act, 1793 (33 Geo. 3, c. 55), is repealed except as to ss. 1 and 2. S. 1 imposes fines upon constables for neglect of duty, and provides that for want of distress offenders may be committed; and s. 2, repealed by Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), provides that no persons shall be deemed trespassers on account of irregularity in proceedings.

such collector might have levied the same before such payment thereof to such collector of inland revenue, and as if the same had not been satisfied (b).

SECT. 6.
Assessed
Taxes.

Part IV.—Distress under the Summary Jurisdiction Acts.

SECT. 1.—*Jurisdiction.*

454. By the Summary Jurisdiction Acts (c) it is provided that where a conviction adjudges a pecuniary penalty or compensation to be paid, or where an order requires the payment of a sum of money, and by the statute authorising such conviction or order such penalty, compensation, or sum of money is to be levied upon the goods and chattels of the defendant by distress and sale thereof, and also in cases where a statute authorising the levy of a penalty, compensation, or sum of money provides no method for their recovery or enforcing their payment, the justices or justice making such conviction or order, or any justices or justice having jurisdiction in the same district, may issue their or his warrant of distress to levy the same (d). Jurisdiction.

If insufficient distress be found within the limits of the jurisdiction of the justice granting the warrant, the warrant, after proof on oath of the handwriting of such justice, is to be backed by a justice of another district to enable the levy or the residue thereof to be made therein (e). Distress out
of justice's
jurisdiction.

455. Whether the hearing of the information or complaint requires the attendance of one or more justices, one justice alone Issue of
warrant.

(b) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 87.

(c) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 19; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 21; Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 5; this last section extends this power to a number of statutes mentioned in the schedule, the sections of which relating to the recovery of a penalty or fine inflicted by justices are repealed. As to the recovery by distress of rent for gas, see title GAS; and of water charges or rates, see title WATER SUPPLY.

(d) The warrant must be in writing under the justice's hand and seal (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 19). The forms therefor are in the schedule to the statute; as to a justice's power to allow time etc. for payment, see Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 7; as to the practical distinction between the two parts of this section, see *Kenard v. Simmons* (1884), 50 L. T. 28 (as to what constitutes a criminal prisoner).

(e) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 19. As to the method of proof on oath, see Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 41; it may be by a solemn declaration before a justice of the peace, a commissioner for oaths, a clerk of the peace, or a registrar of a county court. The fee may not exceed 1s. As to unbacked warrants executed out of the district, see *R. v. Cumpston* (1880), 5 Q. B. D. 341, C. O. R. The backing is by signed indorsement of the warrant (form in schedule to the statute). Scotch distress warrants, when indorsed under the provisions of the Summary Jurisdiction (Process) Act, 1881 (44 & 45 Vict. c. 24), s. 5, can be executed in England, and English warrants similarly can be enforced in Scotland.

Jurisdiction. 1. can issue the distress warrant founded on such hearing as well as a warrant of commitment; nor need the justice issuing the warrant be the justice or one of the justices attending the hearing (*f*). The death of the justice or the fact of his ceasing to hold office does not avoid the warrant (*g*).

Custody pending return to warrant.

456. The justice issuing the distress warrant may either suffer the defendant to go at large or order him to be detained in custody until the return is made to the warrant, unless the defendant by recognisance or otherwise gives security to the justice's satisfaction for his appearance on the return of the distress before the justice or justices then sitting (*h*).

Postponement of warrant.

457. When an application is made to a court of summary jurisdiction for a distress warrant for non-payment of a sum ordered to be paid, or for default of sufficient distress to satisfy any sum, the court may, if it seems expedient so to do, postpone the issue of such warrant until such time and on such conditions, if any, as to the court may seem just (*i*).

Notice of forfeiture.

Where the payment of a sum secured by virtue of the Summary Jurisdiction Act, 1879, and which appears to be forfeited, is being enforced under the provisions of the statute by distress, before such warrant is issued notice of forfeiture must be served on the principal (*j*).

Distress after appeal.

Where an appeal (*k*) against a conviction or order to quarter sessions is unsuccessful, the justice or justices who made the

(*f*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 29. Such other justice issuing a warrant of distress is protected by the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 3.

(*g*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 37.

(*h*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 20. The order for imprisonment may be verbal or by written warrant. The method of enforcing the recognisances is provided by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 9; the forfeited recognisance can be enforced as a fine ascertained by a conviction; the forfeiture may also be cancelled or mitigated on due security. Apparently a fixed time should be allowed for the return; imprisonment otherwise may be an excess of jurisdiction (see *Leary v. Patrick* (1850), 15 Q. B. 266, *per* COLERIDGE, J., at p. 274, and *per* WIGHTMAN, J., at p. 275). Although, apparently, a distress warrant may be issued *ex parte*, as to the advisability of first hearing the defendant before its issue, see *Ex parte Francis*, [1903] 1 K. B. 275, and the cases therein cited.

(*i*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 21 (1). It seems doubtful whether this section allows a warrant already issued to be suspended on a question of its correctness; see *Barons v. Luscombe* (1835), 3 Ad. & El. 589. Although an appeal may not operate as a stay, justices, when notice of appeal is given, should act on this provision; see *dicta* of Lord CAMPBELL, O.J., in *Kendall v. Wilkinson* (1855), 24 L. J. (M. C.) 89, at p. 92; compare observation of the court in *R. v. Paget* (1881), 8 Q. B. D. 151, at p. 157.

(*j*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 23 (3). By the Summary Jurisdiction Rules, 1886, r. 16, the notice must be served two clear days before issue of the warrant.

(*k*) By the Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 2 (1), a case stated by quarter sessions otherwise than under the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), is deemed an appeal, while by the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 11, power is given to state a case without first appealing to the sessions. See also title MAGISTRATES.

conviction or order, or any justice possessing jurisdiction in the same district, may issue a distress warrant as if no such appeal had been brought (*l*). SECT. 1.
Jurisdiction

All sums paid or recovered by distress must appear in the accounts of the clerk of the summary jurisdiction court (*m*).

SECT. 2.—*Imprisonment in Default of Distress.*

459. Where, by conviction or by order, a person is adjudged to pay a sum of money, and in default of payment a warrant of distress is authorised to be issued, and it appears to the court to whom application is made for the warrant that there are no goods or insufficient goods for the levy of the distress, or that the levy of distress will be more injurious to such person or his family than imprisonment, such court may in its discretion order on non-payment of the sum imprisonment for a period not exceeding that which might have been ordered in default of sufficient distress (*n*). Imprisonment in default of, or less injurious than, distress.

This proviso only applies where the penalty is imprisonment in default of distress, and not where fine or imprisonment are by statute made alternative punishments (*o*). Some evidence should be produced before the justices as to the existence of absence of distress or sufficient distress, but the justices' finding of fact on this point will not be readily questioned by a superior court (*p*).

The term of commitment must in any event be reduced to the period limited by the scale, where the amount due has become diminished by part payment or by the proceeds of the distress (*q*).

460. If on the return of the distress warrant it is reported by the constable to whom its execution has been intrusted that no goods and chattels or insufficient goods and chattels to cover the sum mentioned in the warrant, together with the costs of the levy, have Committal
nulla bona.

(*l*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 27.

(*m*) Summary Jurisdiction Rules, 1886, rr. 6, 7. By r. 9 any sum received on account must be entered in an "instalment ledger."

(*n*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 21 (3). See as to this section generally, observations of BRUCE, J., in *R. v. Hopkins*, [1893] 1 Q. B. 621, at p. 627. Under the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 19, a similar power was given when the issue of a distress warrant would be ruinous to the defendant and his family.

(*o*) *Re Brown* (1878), 3 Q. B. D. 545; *Re Clew* (1881), 8 Q. B. D. 513.

(*p*) In *Re Clew*, *supra*, it was left open whether a defendant is entitled to be heard before imprisonment is ordered. In *R. v. German* (1891), 56 J. P. 358, a mandamus was refused to compel the justices to issue a distress warrant, the onus for this purpose of proof of sufficient distress being apparently on the prosecution, who must satisfy the justices on this point. On the other hand, in *R. v. Mortimer* (1906), 70 J. P. 542, it was doubted whether on *habeas corpus* it was competent to question the finding of the justices that the defendant had insufficient goods (where, however, the conviction and warrant were right in form). The justices were held herein entitled to act on a statement of defendant's solicitor asking for time, in default of which he stated defendant would have to go to prison; this admission was afterwards questioned by the defendant.

(*q*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 21 (4). As to the scale, see s. 5 in note (*s*), at p. 224, *post*; see also Prison Act, 1898 (61 & 62 Vict. c. 41), s. 9, as to incorporating its provisions by rule in the rules under Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 29.

SECT. 2.
Imprison-
ment in
Default of
Distress.

been found, the justice before whom the return is made may issue his warrant of commitment under his hand and seal to commit the defendant to gaol in such manner and for such time as shall have been directed by the statute on which the conviction or order mentioned in the distress warrant is founded, unless the sum or sums adjudged to be paid, together with the costs and charges of the distress, shall be sooner paid (r).

If the statute provides no remedy in case no goods or insufficient goods can be found on which to levy the distress (although the statute may provide for the distress to be levied), the justice may similarly issue a warrant of commitment for a term not exceeding three calendar months (s).

Where sum
 recoverable
 as civil debt.

461. Where, however, a sum of money is recoverable by complaint and not on information, such sum and the costs thereof shall be deemed to be and are recoverable only as a civil debt (t); in such case, as well as where any sum is declared to be a civil debt recoverable summarily, an order made by the court for the payment of such debt and costs (if any) may not in default of distress or otherwise be enforced by imprisonment, unless the court is satisfied that the person making default has or has had since the date of the order the means to pay such debt and has refused and neglected or refuses and neglects to pay the same (a). This rule is also applicable where

(r) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 21. The constable to whom the commitment warrant is issued need not be the constable who has distrained. The justice may add to the amount payable the costs and charges of commitment and of conveying the defendant to prison. The warrant of commitment must recite the conviction or order, the distress warrant, and the return thereto. The constable is said to make a return of *nulla bona*. In *Cook v. Plasket* (1882), 47 J. P. 265, under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74, it was held that the distress might be for 8s. (3s. being the costs of the distress), although the maximum penalty with costs was limited by the statute to 5s.

(s) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 22. By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 5, a scale of imprisonment is given limiting the imprisonment under these circumstances to—

Seven days where the amount adjudged to be paid does not exceed 10s.

Fourteen „ „ „ „ „ „ „ £1

One month „ „ „ „ „ „ „ £5

Two months „ „ „ „ „ „ „ £20

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 21, the amount adjudged for this purpose is limited to the unsatisfied balance. Hard labour also may not be awarded, unless authorised by the Act on which the conviction is founded (see *R. v. Tynemouth Justices* (1886), 16 Q. B. D. 647). Where the Summary Jurisdiction Acts are invoked by the statutes relating to revenue controlled by the Inland Revenue or Commissioners of Customs these periods may extend to three months, but not beyond six months, if the sum adjudged by conviction thereunder exceeds £50 (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 53).

(t) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 6.

(a) *Ibid.*, s. 35. In this case the provisions of the Debtors Act, 1869 (32 & 33 Vict. c. 62), are applicable; for this see title *BANKRUPTCY AND INSOLVENCY*, Vol. II., pp. 337—355. The procedure under this section is regulated by the Summary Jurisdiction Rules, 1886, rr. 20—28. By r. 22 a judgment summons may issue, although no distress warrant has been applied for. See also, as to the application of this Act to sums recoverable summarily, *R. v. Pratt* (1870), L. R. 5 Q. B. 176, and *Re Edgcote, Ex parte Edgcote*, [1902] 2 K. B. 403, C. A.

a court of summary jurisdiction can issue a distress warrant without information or complaint (b).

SECT. 2.
Imprison-
ment in
Default of
Distress.

SECT. 3.—*Execution of Warrants.*

Service of
copy or order.

462. Wherever authority is given to levy a sum by distress or to commit a person to prison for not obeying any order of a justice or justices, the defendant must be served with a copy of the minute of such order before any warrant of distress or commitment can be issued; such order or minute may not form any part of such warrant of commitment or distress (c).

463. A warrant of distress shall not be deemed void by reason only of a defect therein, if sustained by a good and valid conviction or order which is alleged therein; nor will a person acting under such warrant be deemed a trespasser from the beginning by reason only of a defect in a warrant or by any irregularity in its execution (d). Special damage caused by such defect or irregularity is still, however, recoverable (e). If the warrant is founded on a defective order the warrant is bad (f).

Defect in
warrant.

464. The execution of a distress warrant must be by or under the direction of a constable (g). Unless by the written consent of the person against whom the distress is levied, five clear days at least must intervene between the levy and the sale, which is to be by public auction (h); but in any event, unless otherwise provided by the warrant, the sale must be not later than fourteen days from the making of the distress (i). Household goods, on which a levy is made, subject to directions in the warrant, or subject to the written consent of the person distrained on, may not be removed

Execution of
warrant.

(b) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 47, and Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43). The particular section of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), referred to is not mentioned in this section.

(c) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 17; see *Ratt v. Parkinson* (1851), 20 L. J. (M. C.) 208. The order formally drawn up relates back to the date of a parol order duly pronounced; see also *Nutter v. Moorhouse* (1903), 68 J. P. 134.

(d) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 39 (4). As to trespass *ab initio*, see *Six Carpenters' Case* (1610), 8 Co. Rep. 146 a; 1 Smith, L. C., 11th ed., 132. As to the practical result and the measure of damages, see p. 204, *ante*.

(e) *Ibid.* A defendant successful in such an action after tender and payment into court is entitled to his costs on solicitor and client scale. The measure of special damage for imprisonment under an illegal warrant is the whole sum paid by a plaintiff to obtain his release (see *Norton v. Monckton* (1895), 43 W. R. 350).

(f) See *Day v. King* (1836), 5 Ad. & El. 359.

(g) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 43 (1). As to the illegality of a delegation of authority, see *Symonds v. Kurtz* (1889), 53 J. P. 727. A warrant directed to the constable of a parish cannot be executed by the county police (*R. v. Sanders* (1867), L. R. 1 C. C. R. 75).

(h) *Ibid.*, s. 43 (2). As to the five clear days, see p. 182, *ante*. The written consent may waive not only the time but the manner of sale. See as to the sale by auction, p. 184, *ante*.

(i) *Ibid.*, s. 43 (3). Of course no sale may take place if the sum levied for, together with costs and charges, is previously paid; see also Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 28, at p. 226, *post*.

SECT. 3.
Execution
of Warrants.

from the house till the day of sale, but sufficient thereof are to be impounded by affixing a conspicuous mark to the articles; the removal or defacing of goods so marked, or of the mark, may be punished on summary conviction by a fine not exceeding £5 (*k*). The constable charged with the execution of the warrant is to cause the distress to be sold, and is to render the owner any overplus there may be, after retaining the sum distrained for, together with the costs and charges of the execution of the warrant and all costs and charges actually incurred on the sale (*l*).

Payment or
tender to
avoid distress.

465. A warrant of distress must not be executed by any constable after payment or tender to such constable of the sum mentioned in the warrant, together with the costs and charges of the distress up to the date of such payment or tender; production of the receipt given by the clerk of the court by which the warrant was issued for the amount thereof, is also sufficient for this purpose (*m*).

Exemptions.

466. The wearing apparel and bedding of a person and his family, and, to the value of £5, the tools and implements of his trade, may not be taken in a distress under the Summary Jurisdiction Acts (*n*).

Where a distress is issued under the Employers and Workmen Act, 1875 (*o*), those goods are also exempt, which may not be taken under an execution issued by a county court.

Account of
costs and
charges.

467. A written account of the costs and charges incurred in respect of the execution of any warrant of distress must be sent by the constable charged with the execution of the warrant as soon as practicable to the clerk of the court issuing the warrant; this account is open without fee to the inspection of the person distrained upon within one month of the levy (*p*).

SECT. 4.—Recovery of Costs.

Costs of
appeal.

468. Costs on an appeal ordered by quarter sessions to be paid by either party are to be paid to the clerk of the peace of the court

(*k*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 43 (4). As to impounding generally, see p. 168, *ante*. The sufficiency of the household goods is "in the opinion of the person executing the warrant." The statute contains no definition of "household goods."

(*l*) *Ibid.*, s. 43 (7). As to overplus, see p. 185, *ante*. By sub-s. 5 the retention or exaction of any illegal or improper sum or charge renders the person charged with the execution of the warrant liable to a fine not exceeding £5.

(*m*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 28, and Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 43 (8). This provision also applies to the execution of a warrant of commitment. In the earlier Act a constable is instructed to cease to execute the warrant, while in the latter Act the words are "shall not execute." Detention after sufficient tender is a ground for an action of false imprisonment; see *Smith v. Sibson* (1746), 1 Wils. 153.

(*n*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 21 (2). See, for the interpretation of this section the similar provision in the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4; p. 139, *ante*.

(*o*) 38 & 39 Vict. c. 90, s. 9. See title COUNTRY COURTS, Vol. VIII., p. 560.

(*p*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 43 (6). The person distrained upon is entitled to take a copy of the account.

and by him paid to the party entitled (*q*). In default of payment within the time stated, and in default of recognisance conditioned to pay, the clerk is to grant a certificate of non-payment, and the justice for the district, on production of such certificate, may enforce payment by distress (*r*) and in default thereof by imprisonment (*r*).

SECT. 4.
Recovery of
Costs.

469. Costs awarded by the court, either to the prosecutor or complainant, on summary conviction or order are recoverable in the same manner as penalties or sums of money adjudged to be paid. Subject thereto, costs so awarded are recoverable by distress, and in default thereof by imprisonment not exceeding one calendar month, unless such costs shall be sooner paid (*s*). Moreover, where an information or complaint is dismissed with costs, such costs are similarly recoverable as against the prosecutor or complainant (*t*).

Costs
recoverable
by distress
or in default
by imprison-
ment.

By virtue of the Summary Jurisdiction Act, 1879 (*a*), costs ordered to be paid by an unsuccessful prosecutor are recoverable, not as a criminal liability, but as a civil debt, and the complainant can only be committed in default of distress on the usual proof of means to pay (*b*). Where the punishment by statute is not the payment of any money, but imprisonment, and costs are ordered to be paid by the defendant to the prosecutor or complainant, such costs, if the court think fit, are likewise recoverable by distress, and in default of distress by imprisonment not exceeding one month, such imprisonment to be at the termination of the sentence for the actual offence (*c*).

(*q*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 27. The fee for the clerk's certificate is 1s.. Even if a recognisance has been entered into by virtue of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 5, the powers under this provision are still applicable (see *R. v. Huntley* (1854), 23 L. J. (M. C.) 106, and *Freeman v. Read* (1860), 30 L. J. (M. C.) 123). As to staying distress warrant on notice of appeal, see "Postponement," at p. 222, *ante*.

(*r*) See, however, Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 47, as to treating such order as to costs as a civil debt, and therefore not enforceable without proof of means. The costs of the distress and the costs of the committal may here also be added.

(*s*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 18. The sum allowed for costs must be specified in the conviction or order, or order of dismissal. An order for costs under the Vaccination Act, 1867 (30 & 31 Vict. c. 84), falls within this section, and not within the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 6 (see *R. v. Burrows, Ex parte Wilson* (1897), 61 J. P. 724).

(*t*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 26. As to the scale of imprisonment, see Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 5, cited in note (*s*), p. 224, *ante*. As to forcing justices by mandamus to issue their distress warrant for costs, see title CROWN PRACTICE, Vol. X., p. 106; and see *R. v. Hants Justices* (1830), 1 B. & Ad. 654.

(*a*) 42 & 43 Vict. c. 49, ss. 35, 47.

(*b*) *R. v. London (Lord Mayor), Ex parte Boaler*, [1893] 2 Q. B. 146.

(*c*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 24. Of course this imprisonment will not come into operation if the costs ordered are sooner paid. Although by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 29 (1) (*c*), the Lord Chancellor may make rules in relation to the costs and charges payable under distress warrants issued by a court of summary jurisdiction, no such rules have yet been issued. See also Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 6 (5).

DISTRIBUTION.

See BANKRUPTCY AND INSOLVENCY ; DESCENT AND DISTRIBUTION.

DISTRICT COUNCILS.

See LOCAL GOVERNMENT.

DISTRICT REGISTRY.

See COURTS.

DISTRINGAS.

See EXECUTION.

DISTURBANCE OF PUBLIC ASSEMBLIES.

See CRIMINAL LAW AND PROCEDURE.

DISTURBANCE OF PUBLIC WORSHIP.

See CRIMINAL LAW AND PROCEDURE ; ECCLESIASTICAL LAW.

DISUSED BURIAL GROUND.

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DIVIDEND.

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DIVIDEND WARRANT.

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DIVINE SERVICE.

See ECCLESIASTICAL LAW.

DIVORCE.

See CONFLICT OF LAWS; HUSBAND AND WIFE.

DOCK WARRANT.

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DOCKS.

*See RAILWAYS AND CANALS; SHIPPING AND NAVIGATION; WATERS
AND WATERCOURSES.*

DOCTORS.

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See CONSTITUTIONAL LAW; COURTS.

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See CRIMINAL LAW AND PROCEDURE.

DURESS.

See CONTRACT; CRIMINAL LAW AND PROCEDURE; EQUITY; WILLS.

DURHAM, COUNTY PALATINE OF.

See CONSTITUTIONAL LAW; COURTS.

DWELLINGS.

See LOCAL GOVERNMENT; PUBLIC HEALTH ETC.

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EASEMENTS AND PROFITS À PRENDRE.

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Part I.—Nature and Characteristics of Easements.

SECT. 1. — *Definitions.*

470. An easement is a right which a person has to utilise certain land belonging to another (a) in a particular manner not involving the taking of any part of the natural produce of that land or of any part of its soil (b); or a right to prevent the owner of land from utilising his land in a particular manner (c). Definition of easement.

471. A person possesses an easement in respect of his enjoyment of some estate or interest in a particular piece of land, and the easement is said to be appurtenant to that land (d). No one can Easement appurtenant to land.

(a) *Roe v. Siddons* (1888), 22 Q. B. D. 224, 236, C. A.; *Bolton v. Bolton* (1879), 11 Ch. D. 968, 970, 971; *Harding v. Wilson* (1823), 2 B. & C. 96; see p. 242, *post*.

(b) *Manning v. Wasdale* (1836), 5 Ad. & El. 758; *Bailey v. Appleyard* (1838), 8 Ad. & El. 161; see p. 238, *post*.

(c) See *Termes de la Ley*, *sub voce* Easement; *Robins v. Barnes* (1616), Hob. 131; *Metropolitan Rail. Co. v. Fowler*, [1892] 1 Q. B. 165, C. A., *per* Lord ESHER, M.R., at p. 171; affirmed, [1893] A. C. 416; *Hewlins v. Shippam* (1826), 5 B. & C. 221, *per* BAYLEY, J., at pp. 229, 230; *Mounsey v. Ismay* (1865), 3 H. & C. 486, *per* MARTIN, B., at p. 497; *Reilly v. Booth* (1890), 44 Ch. D. 12, 26, C. A.; *Peers v. Lucy* (1694), 4 Mod. Rep. 362. And see generally *Baker v. Brereman* (1635), Cro. Car. 418. As to the distinction between easement and ownership, see *Reilly v. Booth*, *supra*; *Metropolitan Rail. Co. v. Fowler*, *supra*; *Wood v. Lake* (1751), Say. 3; *Taylor v. Waters* (1817), 7 Taunt. 374; *Jones v. Flint* (1839), 10 Ad. & El. 753; and as to the distinction between easement and possession, see *Holywell Union and Halkyn Parish v. Halkeyn Drainage Co.*, [1895] A. C. 117.

(d) An easement is never "appendant" to land. As to the distinction between the terms "appendant" and "appurtenant," see p. 338, *post*. Easements are sometimes spoken of as being "appendant" in some of the older reports,

SECT. 1.
Definitions.

Dominant
and servient
tenements.

possess an easement irrespective of his enjoyment of some estate or interest in a particular piece of land, for there is no such thing as an easement in gross (e).

472. The piece of land in respect of which an easement is enjoyed is called the dominant tenement, and that over which the right is exercised is called the servient tenement (f), and the expressions dominant owner and servient owner bear corresponding meanings. An easement confers a right over and above the ordinary general rights enjoyed by the owner of land which are annexed *jure natura* to the ownership of real corporeal property; an easement is not "of common right," but is "against common right." As regards the owner of the dominant tenement an easement involves an enhancement of his ordinary rights; as regards the owner of the servient tenement it involves a corresponding diminution in his ordinary rights (g).

Exists only
for benefit of
dominant
tenement.

473. An easement exists solely for the benefit of the dominant tenement (h). Being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner (i). But the exercise of the right may incidentally benefit the servient tenement, or it may incidentally benefit other tenements belonging to strangers (k); for it is no objection to the exercise of a lawful right that it may indirectly benefit other persons or objects which do not enjoy the same right (l).

If the owner of the dominant tenement wishes to abandon

This inaccuracy is due to the ambiguous translation of the word *pertinens* in old Latin pleadings; see, e.g., *Nicholas v. Chamberlain* (1606), Cro. Jac. 121. See also *Tyrringham's Case* (1584), 4 Co. Rep. 36 b, and title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 446, 448, 466.

(e) *Rangeley v. Midland Rail. Co.* (1868), 3 Ch. App. 306, per Lord CAIRNS, L.J., at p. 311; *Hawkins v. Rutter*, [1892] 1 Q. B. 668, per Lord COLERIDGE, O.J., at p. 671; *Ackroyd v. Smith* (1850), 10 C. B. 164, per CRESSWELL, J., at p. 188; see also p. 242, *post*. There are, however, passages in the reports which appear to assume that an easement can be enjoyed irrespective of the ownership of land; see *Great Western Rail. Co. v. Swindon and Cheltenham Extension Rail. Co.* (1882), 22 Ch. D. 677, 706, 707, O. A.; *Bailey v. Stephens* (1862), 12 C. B. (N. S.) 91, per WILLES, J., at p. 111. As to the necessity for the grantee to have an interest in the dominant tenement at the time of the grant of the easement, see p. 246, *post*.

(f) *Hawkins v. Rutter*, *supra*.

(g) *Dalton v. Angus* (1881), 6 App. Cas. 740, per Lord WATSON, at p. 830.

(h) *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 578, per COCKBURN, O.J., and *Simpson v. Godmanchester Corporation*, [1897] A. C. 696, per Lord WATSON, at p. 703. See also *Skull v. Glenister* (1864), 16 C. B. (N. S.) 81; *Lawton v. Ward* (1896), 1 Ld. Raym. 75; *Howell v. King* (1874), 1 Mod. Rep. 190; *Harris v. Flower & Sons, Ltd.* (1904), 74 L. J. (CH.) 127, O. A.; *Wimbledon and Putney Commons Conservators v. Dixon* (1875), 1 Ch. D. 362, O. A.; *Bradburn v. Morris* (1876), 3 Ch. D. 812, O. A.; *Dand v. Kingscote* (1840), 6 M. & W. 174.

(i) *Mason v. Shrewsbury and Hereford Rail. Co.*, *supra*.

(k) *Simpson v. Godmanchester Corporation*, *supra*, where the court upheld an easement entitling a corporation to enter another's land to open sluices in times of flood to protect the land of the corporation, notwithstanding the fact that the exercise of this right conferred a similar benefit to other land in favour of which the easement did not exist.

(l) *Simpson v. Godmanchester Corporation*, *supra*, at pp. 703, 708.

SECT. 1.
Definitions.
—

his easement, the owner of the servient tenement has no right, nor can he acquire any right, to insist upon a continuance of the exercise of the easement and of any incidental advantages accruing to him or his servient tenement (*m*).

Extent of
burden on
servient
tenement.

474. An easement does not usually cast any burden upon the owner of the servient tenement to commit any act upon that or any other tenement (*n*). It merely imposes an obligation to submit to the commission of some act upon the servient tenement by the dominant owner (*o*), or an obligation upon the servient owner to refrain from the commission of some act upon his own land (*p*). The servient owner cannot so deal with his tenement as to render the easement over it incapable of being enjoyed or more difficult of enjoyment by the dominant owner (*q*). Apart from any special local custom or express contract or prescriptive obligation, the owner of a servient tenement is not bound to execute any repairs necessary to ensure the enjoyment or convenient enjoyment of the easement (*r*). But special circumstances may impose upon him the duty to repair (*s*).

Devolution.

475. An easement when once validly created and actually subsisting is inseparably attached to the ownership of the dominant tenement, and so long as it continues to exist the benefit of it passes with the dominant tenement into the hands of every subsequent owner of that tenement, and the burden of it similarly passes with the servient tenement to every person into whose occupation the servient tenement comes (*t*).

Statute of
Frauds.

476. It would appear that an easement is an interest in land within the meaning of the Statute of Frauds (*u*), and that the

(*m*) *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 578.

(*n*) *Stockport and Hyde Division of the Hundred of Macclesfield Highway Board v. Grant* (1882), 51 L. J. (Q. B.) 357, *per* LOPES, J., at p. 359. See *Pomfret v. Ricraft* (1669), 1 Wms. Saund. 321, *per* TWYSDEN, J., at p. 322 a (6th ed.): "Where I grant a way over my land, I shall not be bound to repair it." But in the note to this case at p. 322c, note (3), it is said that the grantor of a private way may be bound either by express stipulation or prescription to repair it. See also *Taylor v. Whitehead* (1781), 2 Doug. (K. B.) 745, 749; *Jones v. Pritchard*, [1908] 1 Ch. 630, *per* PARKER, J., at p. 637. As to rights and duties of repairing ways, see p. 294, *post*; as to watercourses, p. 318, *post*; and as to easements created by express grant generally, p. 249, *post*.

(*o*) Thus, the owner of land over which a private right of way exists is under an obligation not to impede the exercise of the right.

(*p*) Thus, the easement of light imposes an obligation upon the servient owner not to build upon his own land in such a manner as to interfere with the dominant owner's enjoyment of light.

(*q*) *Jones v. Pritchard*, *supra*, *per* PARKER, J., at p. 637.

(*r*) *Ibid.*, and other cases cited in note (*n*), *supra*.

(*s*) There are some cases where the owners of land have been held liable to repair fences on their land under a prescriptive obligation in favour of owners of adjoining land. It has been said that such an obligation is in the nature of an easement (*Boyle v. Tamlyn* (1827), 6 B. & C. 329, *per* BAYLEY, J., at pp. 338—339; *Barber v. Whiteley* (1865), 34 L. J. (Q. B.) 212); see *Lawrence v. Jenkins* (1873), L. R. 8 Q. B. 274; *Stockport and Hyde Division of the Hundred of Macclesfield Highway Board v. Grant*, *supra*. See generally title BOUNDARIES AND FENCES, Vol. III., pp. 129 *et seq.*

(*t*) *Leech v. Schweder* (1874), 9 Ch. App. 463, 474, 475; and see p. 274, *post*.

(*u*) 29 Car. 2, c. 3 (1677).

SECT. 1. doctrine of part performance applies to contracts relating to ease-
Definitions. ments (v).

Distress. The owner of an easement has no right of distress (a).

SECT. 2.—*Distinctions between Easements and other Rights.*

*Profits à
prendre.*

477. The chief distinction between an easement and a *profit à prendre* is that whereas the former only confers a right to utilise the servient tenement in a particular manner, or to prevent the commission of some act on that tenement (b), a *profit à prendre* confers a right to take from the servient tenement some part of the soil of that tenement, or some part of its natural produce, or the animals *feræ naturæ* existing upon it (c).

Incorporeal
rights.

478. An easement, though an incorporeal right (d), does not stand upon the same footing as other incorporeal rights, because it cannot be enjoyed apart from the ownership of the dominant tenement (e). An easement does not involve such an interest in the land that the dominant owner can maintain an action for trespass against a trespasser upon the servient tenement, nor can estates be created in an easement apart from the dominant tenement (f).

Servitude.

479. An easement is a servitude, but the latter is a wider term and includes both easements and *profits à prendre* (g).

(v) *Hoare & Co., Ltd. v. Lewisham Corporation* (1901), 85 L. T. 281; compare *McManus v. Cooke* (1887), 35 Ch. D. 681, where the question was raised, but although the court appears to have been of this opinion the point was not expressly decided. Compare also *Metropolitan Rail. Co. v. Fowler*, [1893] A. C. 416; *Rowe v. London School Board* (1887), 36 Ch. D. 619; *Jones v. Watts* (1890), 43 Ch. D. 574, O. A.; *Webber v. Lee* (1882), 9 Q. B. D. 315, C. A., where an agreement to grant a *profit à prendre* was held void under the Statute of Frauds.

(a) *Capel v. Buszard* (1829), 6 Bing. 150, 161, 162, Ex. Ch. See title DISTRESS, p. 121, ante.

(b) For definition and characteristics of *profits à prendre*, see p. 336, post. In *Pye v. Mumford* (1848), 11 Q. B. 666, a right of using a close for mixing manure brought upon the land was treated as a *profit à prendre*, although clearly an easement.

(c) *Race v. Ward* (1855), 4 E. & B. 702, wherein Lord CAMPBELL, C.J., at p. 709, referring to water rising from a spring, said: "This is no part of the soil, like sand, or clay, or stones; nor the produce of the soil, like grass or turves, or trees, they all come under the category of *profit à prendre*, being part of the soil or the produce of the soil"; *Blewett v. Tregonning* (1835), 3 Ad. & El. 554 (a case of drifted sand); *De la Warr (Earl) v. Miles* (1881), 17 Ch. D. 535, 577, O. A.; *Sutherland (Duke) v. Heathcote*, [1892] 1 Ch. 475, 484, O. A.; *Peers v. Lucy* (1694), 4 Mod. Rep. 362; *Robins v. Barnes* (1616), Hob. 131.

(d) *Heulins v. Shippam* (1826), 5 B. & C. 221, per BAYLEY, J., at p. 229.

(e) Easements have been called incorporeal hereditaments (see, for instance, *Bryan v. Whistler* (1828), 8 B. & C. 288, 293; *Liggins v. Inge* (1831), 7 Bing. 682; *Wood v. Leadbitter* (1845), 13 M. & W. 838; *Hill v. Midland Rail. Co.* (1882), 21 Ch. D. 143; *Great Western Rail. Co. v. Swindon and Cheltenham Extension Rail. Co.* (1882), 22 Ch. D. 677, O. A.; affirmed (1884) 9 App. Cas. 787; *Jones v. Watts* (1890), 43 Ch. D. 574, O. A.; *McManus v. Cooke*, supra), but are not proper incorporeal hereditaments, for they do not descend to the heir apart from the dominant tenement. As to whether an easement is a hereditament, see the Law Quarterly Review, Vol. XXIV., pp. 28, 199, 259, 264; *Re Brotherton's Estate* (1908), 77 L. J. (CH.) 58, 373, O. A.; *Hastings (Lord) v. North Eastern Railway*, [1898] 2 Ch. 674, and cases there cited.

(f) *Clifford v. Hoare* (1874), 43 L. J. (C.P.) 225, 230.

(g) *Dalton v. Angus* (1881), 6 App. Cas. 740, per Lord SELBORNE, L.C., at p. 796.

SECT. 2.
Distinctions
between
Easements
and other
Rights.

Licence.

Running
powers over
railways.

Local
customary
rights.

480. The chief distinction between an easement and a licence to use land in a particular manner is that whereas an easement cannot be destroyed (except in the modes hereinafter mentioned (*h*)) merely at the will of the grantor, a licence is generally revocable at the will of the person who has given it (*i*). Moreover, a licence is merely personal (*k*), and does not run with the land (*l*). Again, a deed is generally necessary to grant an easement (*m*), but unnecessary to give a licence (*n*).

481. Running powers granted to railway companies by Parliament, or by another railway company, whether expressly sanctioned by Parliament or not, over land not owned by the company using the powers, are not easements within the strict meaning of the term (*o*), although they are frequently spoken of as such (*p*).

482. Easements are also distinguishable from that class of rights which exist in particular localities under special local customs, whereby undefined and fluctuating bodies of people are entitled to utilise the land of another person in a particular manner and for a particular purpose (*q*).

(*h*) For the modes in which easements may be lost or destroyed, and generally as to the extinguishment of easements, see p. 276, *post*.

(*i*) *Fentiman v. Smith* (1803), 4 East, 107, 109; *Cocker v. Cowper* (1834), 1 Cr. M. & R. 418; *Hyde v. Graham* (1862), 1 H. & C. 593; *Taplin v. Florence* (1851), 10 C. B. 744. See, however, *Winter v. Brockwell* (1807), 8 East, 308; *Adams v. Andrews* (1850), 15 Q. B. 284. But a licence coupled with an interest is irrevocable (*Wood v. Leadbitter* (1845), 13 M. & W. 838, 845). A revocable licence by parol or writing not under seal may, moreover, become irrevocable upon its being acted upon (see *Taylor v. Waters* (1817), 7 Taunt. 374, *per* GIBBS, C.J., at 384; *Wallis v. Harrison* (1838), 4 M. & W. 538); and revocation of a licence may give rise to a claim for damages (*Kerrison v. Smith*, [1897] 2 Q. B. 445). As to licences in relation to land, see title REAL PROPERTY AND CHATELS REAL.

(*k*) *Cocker v. Cowper*, *supra*; *Wood v. Leadbitter*, *supra*. Compare *Smart v. Jones* (1864), 15 C. B. (N. S.) 717; *Russell v. Harford* (1866), L. R. 2 Eq. 507; *Brown v. Metropolitan Counties Life Assurance Society* (1859), 1 E. & E. 832; *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193, C. A.

(*l*) See *Taylor v. Waters*, *supra*.

(*m*) *Cocker v. Cowper*, *supra*; *Hewlins v. Shippam* (1826), 5 B. & C. 221, *per* BAYLEY, J., at p. 229; *Bird v. Higginson* (1835), 4 Nev. & M. (K. B.) 505; *Wood v. Leadbitter*, *supra*, *per* ALDERSON, B., at pp. 842, 843; *Perry v. Fitzhove* (1846), 8 Q. B. 757, 778; *Bryan v. Whistler* (1828), 8 B. & C. 288; *Adams v. Andrews*, *supra*; *Roffey v. Henderson* (1851), 17 Q. B. 574; *McManus v. Cooke* (1887), 35 Ch. D. 681. And see generally p. 246, *post*.

(*n*) *Taylor v. Waters*, *supra*; *Winter v. Brockwell*, *supra*; *R. v. Horndon-on-the-Hill (Inhabitants)* (1816), 4 M. & S. 562; *Hewlins v. Shippam*, *supra*.

(*o*) *Great Western Rail. Co. v. Swindon and Cheltenham Extension Rail. Co.* (1882), 52 L. J. (CH.) 306, C. A., *per* JESSEL, M.R., at p. 317; *Rangleley v. Midland Rail. Co.* (1868), 3 Ch. App. 306, 310. As to running powers generally, see title RAILWAYS AND CANALS.

(*p*) See, for instance, *Great Western Rail. Co. v. Swindon and Cheltenham Extension Rail. Co.*, *supra*, at p. 320. Compare *Great Western Railway v. Midland Railway*, [1909] A. C. 445, where the former company had acquired a valid easement.

(*q*) See title CUSTOM AND USAGES, Vol. X., p. 238.

SECT. 3.

Classi-
fication.Classification
of easements.Positive and
negative
easements.SECT. 3.—*Classification.*

483. Easements may be classified (r) according to their nature into positive or affirmative and negative easements (s); into continuous and non-continuous easements (t); into apparent and non-apparent easements (a); and into easements of necessity and easements which are not of necessity (b).

484. A positive or affirmative easement bestows a right to commit some act upon the servient tenement (c). A negative easement involves merely a right to prohibit the commission of certain acts upon the servient tenement which the owner of that tenement would have been otherwise entitled to commit (d). With regard to adverse user which, if continued, may give rise to a prescriptive claim to an easement, a positive or affirmative easement differs from a negative easement; for the adverse user of the

(r) The classification was formerly considered of great importance, chiefly with regard to the creation of easements by implication of law and their extinction, suspension, and revival. But since the decision in *Wheeldon v. Burrows* (1879), 12 Ch. D. 31, C. A., the distinctions between continuous and non-continuous easements and between apparent and non-apparent easements have been treated as of little practical significance. The distinction between easements of necessity and easements which are not of necessity is of considerable importance; see *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, C. A.; *Ray v. Hazeldine*, [1904] 2 Ch. 17; *Wheeldon v. Burrows*, *supra*. As to the origin of these distinctions, see *Dalton v. Angus* (1881), 6 App. Cas. 740, at p. 821, where Lord BLACKBURN attributes their creation to those who framed the Code Napoléon.

(s) *Dalton v. Angus*, *supra*.

(t) *Suffield v. Brown* (1864), 4 De G. J. & Sm. 185; *Worthington v. Gimson* (1860), 2 E. & E. 618; *Pheysey v. Vicary* (1847), 16 M. & W. 484; *Pyer v. Carter* (1857), 1 H. & N. 916; *Watts v. Kelson* (1871), 6 Ch. App. 166; *Polden v. Bastard* (1865), L. R. 1 Q. B. 156, Ex. Ch.; *Pearson v. Spencer* (1861), 1 B. & S. 571; (1863) 3 B. & S. 761, Ex. Ch.

(a) *Suffield v. Brown*, *supra*; *Brown v. Alabaster* (1887), 37 Ch. D. 490; *Wheeldon v. Burrows*, *supra*; *Union Lighterage Co. v. London Graving Dock Co.*, *supra*.

(b) *Brown v. Alabaster*, *supra*; *Holmes v. Goring* (1824), 2 Bing. 76; *Union Lighterage Co. v. London Graving Dock Co.*, *supra*; *Wheeldon v. Burrows*, *supra*; *Ray v. Hazeldine*, *supra*; *Pearson v. Spencer* (1863), 3 B. & S. 761, Ex. Ch.

(c) The commonest forms of positive or affirmative easements are: rights of way (see p. 284, *post*); rights to pews and graves (see titles BURIAL AND CREMATION, Vol. III., p. 473; ECCLESIASTICAL LAW, *post*); rights of placing and maintaining sign-posts on another's land (*Hoare v. Metropolitan Board of Works* (1874), L. R. 9 Q. B. 296), sign-boards (*Moody v. Steggles* (1879), 12 Ch. D. 261), advertisement hoardings (*R. v. St. Pancras Assessment Committee* (1877), 2 Q. B. D. 581), and other erections (*Francis v. Hayward* (1882), 22 Ch. D. 177, C. A.).

(d) The commonest forms of negative easements are: the right to light (see p. 297, *post*); the right to the passage of air through a defined channel (see p. 326, *post*); the right to receive water flowing over the servient tenement and the right to discharge water upon that tenement (see pp. 314, 317, *post*). But there are easements which it is difficult to classify either as positive or negative—for instance, the right to cause what except for that right would be a nuisance, by noise (*Sturges v. Bridgman* (1879), 11 Ch. D. 852, C. A.), or by noxious odours (*Bliss v. Hall* (1838), 4 Bing. (N. C.) 183, *per* TINDAL, C.J., at p. 186), or the right to send smoke up another's chimney (*Jones v. Pritchard*, [1908] 1 Ch. 630). Compare *Great Northern Railway v. Inland Revenue Commissioners*, [1901] 1 K. B. 416, 428, 429, C. A.; and see p. 326, *post*.

accommodation in the case of an inchoate negative easement can under no circumstances be interrupted except by acts done upon the servient tenement, whereas the adverse user of the accommodation in the case of an inchoate affirmative easement, constituting as it does a direct interference with the enjoyment by the servient owner of his tenement, may be the subject of legal proceedings as well as of physical interruption (e).

485. A continuous easement is a right to do some act of a continuous and constant nature (f). The enjoyment of a non-continuous easement is intermittent, and consists of the commission of some act or of a series of acts (g). Continuous easements.

486. An easement is apparent if its existence is evidenced by some apparent sign, whether such sign be patent to everyone or whether it can only be perceived on a careful inspection by a person ordinarily conversant with the subject (h). An easement is non-apparent if no external sign points to its existence (i). Apparent easements.

487. An easement of necessity is an easement which under particular circumstances the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case (k). It is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all (l). Such an easement lasts only so long as the necessity exists (m); for a grant arising out of the Easement of necessity.

(e) *Sturges v. Bridgman* (1879), 11 Ch. D. 852, O. A., *per* THESIGER, L.J., at p. 864. The authorities are somewhat conflicting as to whether the right of support to a building, whether lateral or vertical, is a positive or negative easement; see *Dalton v. Angus* (1881), 6 App. Cas. 740, where Lord SELBORNE, L.C., described support as an "easement not purely negative." Compare the dicta of LINDLEY, J., at p. 763, and BOWEN, J., at p. 784.

(f) *Pyer v. Carter* (1857), 1 H. & N. 916 (drain); *Watts v. Kelson* (1871), 6 Ch. App. 166, 173 (watercourse); *Polden v. Bastard* (1865), L. R. 1 Q. B. 156, 161, Ex. Ch.; *Worthington v. Gimson* (1860), 2 E. & E. 618, 625, 626. The dicta of CHANNELL, B., in *Hall v. Lund* (1863), 1 H. & C. 676, at p. 685, apparently refer not to a continuous easement, but to a continuous user of a right which is not an easement. See also *Pearson v. Spencer* (1861), 1 B. & S. 571, 583. A right of way is not a continuous easement (*Worthington v. Gimson, supra*; *Pheysey v. Vicary* (1847), 16 M. & W. 484), unless over a formed road (*Brown v. Alabaster* (1887), 37 Ch. D. 490).

(g) Thus in *Suffield v. Brown* (1864), 4 De G. J. & Sm. 185, an alleged right to project the bowsprits of ships in dock over the land of another owner was held not to be a "continuous" easement because there was no sign of the existence of the right except when a ship was actually in the dock with her bowsprit projecting beyond its limit.

(h) *Pyer v. Carter, supra*, *per* WATSON, B., at p. 922; *Suffield v. Brown, supra*, at p. 199; *Brown v. Alabaster, supra*.

(i) *Suffield v. Brown, supra*; *Wheeldon v. Burrows* (1879), 12 Ch. D. 31, O. A.

(k) *Wheeldon v. Burrows, supra*; *Holmes v. Goring* (1824), 2 Bing. 76, 82. "A way of necessity is not a defined way. A way of necessity is a way which is the most convenient access to a land-locked tenement over other property belonging to the grantor" (*Brown v. Alabaster, supra*, at p. 500); and see p. 289, *post*.

(l) *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, O. A., *per* STIRLING, L.J., at p. 573; *Ray v. Hazeldine*, [1904] 2 Ch. 17.

(m) *Holmes v. Goring, supra*; *Pearson v. Spencer* (1863), 3 B. & S. 761, Ex. Ch., *per* ERLE, C.J., at p. 767.

SECT. 3.
Classifi-
cation.

Quasi-
easements.

Easement
must be
appurtenant.

Owner of
tenement
cannot have
easement
over it.

implication of necessity cannot be carried further than the necessity of the case requires (*n*).

488. *Quasi-easements* are rights analogous to easements, but not in strictness easements, because some necessary element is wanting (*o*).

SECT. 4.—*Characteristics.*

489. An easement is said to be appurtenant to the dominant tenement. So long as it exists it is inseparably attached to that tenement and cannot be severed from it or made a right in gross (*p*). Nor can an easement exist as appendant in the strict meaning of this term (*q*). The right constituting the easement must be in some way connected with the enjoyment of the dominant tenement (*r*).

The dominant tenement to which an easement is appurtenant generally consists of corporeal real property, namely, land and buildings upon the land(*s*); it is a matter of some doubt whether an easement may not also be appurtenant to an incorporeal hereditament, provided it is not incongruous (*t*).

490. It is an essential characteristic of every easement that there be both a servient and a dominant tenement (*a*), and the owner of the

(*n*) *Holmes v. Goring* (1824), 2 Bing. 76, *per* BEST, C.J., at p. 82.

(*o*) The term *quasi-easement* is not a strict legal term. It is used generally as denoting the accommodation afforded by one tenement to another when both tenements are owned by the same person and where the accommodation thus afforded would in fact be an easement had the tenement affording the accommodation been owned by another person; see, e.g., *Wheeldon v. Burrows* (1879), 12 Ch. D. 31, C. A. Compare *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836, 841, C. A. The term was used in *Brocklebank v. Thompson*, [1903] 2 Ch. 344, 348, in respect of a customary church way; see also *Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386, C. A., where a restrictive covenant is described as an equitable easement.

(*p*) *Ackroyd v. Smith* (1850), 10 C. B. 164, *per* CRESSWELL, J., at pp. 187, 188, and see also *n*. (*a*) on p. 188 in this case; *Bailey v. Stephens* (1862), 12 C. B. (N. S.) 91, *per* BYLES, J., at pp. 114, 115; *Keppell v. Bailey* (1834), 2 My. & K. 517, 535, 536; *Rangeley v. Midland Rail. Co.* (1868), 3 Ch. App. 806; *Hill v. Tupper* (1863), 2 H. & C. 121, 127, 128; *Thorpe v. Brumfitt* (1873), 8 Ch. App. 650.

(*q*) For the meaning of the terms "appurtenant," "appendant," and "in gross," see p. 338, *post*; and p. 235, note (*d*), *ante*.

(*r*) *Ackroyd v. Smith*, *supra*; *Bailey v. Stephens*, *supra*, *per* BYLES, J., at p. 115; see also *Simpson v. Godmanchester Corporation*, [1897] A. C. 696, *per* Lord DAVEY, at p. 707.

(*s*) Co. Litt. 121 b (Hargrave and Butler's ed. (1832)): "Concerning things appendant and appurtenant two things are implied. First, that prescription (which regularly is the mother thereof) doth not make any thing appendant or appurtenant unless the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal." See also *A.-G. v. Copeland*, [1901] 2 K. B. 101, *per* Lord ALVERSTONE, O.J.; the decision in this case was, however, reversed on appeal (*A.-G. v. Copeland*, [1902] 1 K. B. 690, C. A.).

(*t*) Co. Litt. 121 b, n. (7); *Hanbury v. Jenkins*, [1901] 2 Ch. 401, where BUCKLEY, J., at p. 422, considered that an incorporeal right of way might be appurtenant to an incorporeal right of fishing. If the *dictum* be correct there must be an easement appurtenant to every *profit à prendre*. It is, however, submitted that a *profit à prendre* includes the whole right, and no question of an incorporeal right being appurtenant to an incorporeal right can arise in such cases.

(*a*) *Rangeley v. Midland Rail. Co.*, *supra*, at p. 310; *Hawkins v. Rutter*, [1892] 1 Q. B. 668, 671; and see p. 236, *ante*.

dominant tenement and the owner of the servient tenement must be different persons. A man cannot have an easement over his own land (*b*), because all acts which he does upon his own land are acts done in respect of his rights as the owner of the land (*c*), and the law does not allow the co-existence of an easement over land with the possession of the land itself (*d*). But this principle does not necessarily hold good where the dominant owner has an estate or interest in reversion or remainder only in the *quasi*-servient tenement (*e*).

SECT. 4.
Character-
istics.

491. No easement can give the dominant owner the exclusive use of any part of the servient tenement (*f*), and no right in the nature of an easement which would prevent the servient owner from making ordinary use of his land can be claimed by prescription (*g*). A grant which gives the dominant owner the exclusive and unrestricted use of part of the servient tenement passes the property and not merely an easement therein (*h*). But the grant of the exclusive use of pipes or wires is an easement (*i*), and so apparently may be the exclusive use of a vault (*k*).

Easement does not confer exclusive use of servient tenement.

Part II.—Creation of Easements.

SECT. 1.—In General.

492. Easements, being rights which are superadded to the ordinary common law incidents of the ownership of real property, can only be created by grant (*l*) or statute (*m*). An apparent exception

Easement must be created by grant or statute.

(*b*) *Metropolitan Rail. Co. v. Fowler*, [1892] 1 Q. B. 165, 171, C. A., affirmed [1893] A. C. 416; *Roe v. Siddons* (1888), 22 Q. B. D. 224, 236, C. A.; *Bolton v. Bolton* (1879), 11 Ch. D. 968, 970, 971; *Ladyman v. Grave* (1871), 6 Ch. App. 763, 768; *Bright v. Walker* (1834), 1 Cr. M. & R. 211, 219; *James v. Plant* (1836), 4 Ad. & El. 749, 761, Ex. Ch.; *Murgatroyd v. Robinson* (1857), 7 E. & B. 391, 397. Compare *Jones v. Richard* (1836), 5 Ad. & El. 413, 418; *Bunting v. Hicks* (1894), 70 L. T. 455, C. A.

(*c*) *Bolton v. Bolton*, *supra*; *Roe v. Siddons*, *supra*.

(*d*) *Ladyman v. Grave*, *supra*, per Lord HATHERLEY, L.C., at p. 768.

(*e*) *Farguhar v. Newbury Rural Council*, [1909] 1 Ch. 12, C. A.

(*f*) *Reilly v. Booth* (1890), 44 Ch. D. 12, 26, C. A.; *Capel v. Buszard* (1829), 6 Bing. 150, 159, Ex. Ch.; *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.*, [1895] A. C. 117; *Southport Corporation v. Ormskirk Union Assessment Committee*, [1894] 1 Q. B. 196, 201, C. A.

(*g*) *Dyce v. Hay (Lady)* (1852), 1 Macq. 305, H. L.

(*h*) *Reilly v. Booth*, *supra*; *Capel v. Buszard*, *supra*. Compare *London Taverns Co. v. Worley* (1888), not reported, C. A., cited in *Reilly v. Booth*, *supra*, at p. 24.

(*i*) *Southport Corporation v. Ormskirk Union Assessment Committee*, *supra*. Compare *Taylor v. St. Helen's Corporation* (1877), 6 Ch. D. 264, C. A. (a case of a watercourse); *Finlinson v. Porter* (1875), L. R. 10 Q. B. 188 (sewer); *Hill v. Midland Rail. Co.* (1882), 21 Ch. D. 143; *Bevan v. London Portland Cement Co.*, [1892] W. N. 151.

(*k*) *Bryan v. Whistler* (1828), 8 B. & C. 288.

(*l*) *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, per Lord LINDLEY, at p. 239.

(*m*) For cases of the creation of easements by statutory enactment, see *Adeane*

NOTE 1. to this rule is an easement existing by custom; since custom, however, amounts to the common law within the particular locality where it obtains, a right existing by custom is not strictly an easement (n).

In General. Grant may be express, presumed, or implied. An easement may either rest upon an express grant actually subsisting or upon a presumed grant, or upon a grant arising merely by implication. An easement arising in the last-mentioned manner is virtually created by express grant, since the creation of the easement is effected by the legal construction of the instrument, although it contains no express mention whatever of the easement.

Presumed grant. An easement existing by presumed grant is an easement claimed under the doctrine of prescription, based either upon the doctrine of prescription at common law, or on the doctrine of a lost modern grant, or on the provisions of the Prescription Act, 1832 (o), all of which rest upon the fact of long undisturbed possession of the right constituting the easement (p).

Quality of right. **493.** Whatever be the origin of an easement, the quality of the right when found to be validly subsisting is in every case the same. Whether the right has been created by long enjoyment or by grant, express or implied, makes not the least difference (q). The remedy is also the same (r).

Quantum of right. **494.** There is, however, a most important difference in respect of quantum of right between an easement created by express grant or arising by implication of law and an easement claimed under a presumed grant. In the former case the easement may be created for interests analogous in their duration to all manner of interests and estates (s); in the latter case the easement must exist, if at all, in perpetuity (t).

v. *Mortlock* (1889), 5 Bing. (N. C.) 236; *White v. Leeson* (1859), 5 H. & N. 53; *Dand v. Kingscote* (1840), 6 M. & W. 174. For cases relating to rights of way created by statute, see note (r), p. 288, *post*.

(n) See title CUSTOM AND USAGES, Vol. X., p. 217.

(o) 2 & 3 Will. 4, c. 71.

(p) *Philipps v. Halliday*, [1891] A. C. 228, *per* Lord HERSCHELL, at p. 231; *Clippens Oil Co. v. Edinburgh and District Water Trustees*, [1904] A. C. 64, *per* Lord HALSBURY, L.C., at p. 69.

(q) *Leech v. Schweder* (1874), 9 Ch. App. 463; and see also *Dalton v. Angus* (1881), 6 App. Cas. 740, at p. 809; *Bonomi v. Backhouse* (1859), E. B. & E. 622, 654, Ex. Ch.; *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165, 171 (cases relating to the easement of support).

(r) *Leech v. Schweder*, *supra*, *per* MELLISH, L.J., at p. 475.

(s) Easements are frequently spoken of as existing for certain estates (see *Wood v. Leadbitter* (1845), 13 M. & W. 838; *Hewlins v. Shippam* (1826), 5 B. & C. 221).

(t) *Large v. Pitt* (1797), Peake, Add. Cas. 152. As to prescription, see *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, 63, O. A.; *Kilgour v. Gaddes*, [1904] 1 K. B. 457, 466, O. A., and as to lost grant, *Bright v. Walker* (1834), 1 Cr. M. & R. 211; *Wheaton v. Maple & Co.*, *supra*; *East Stonehouse Urban District Council v. Willoughby*, [1902] 2 K. B. 318, 332; but see *Timmons v. Hewitt* (1888), 22 L. R. Ir. 627, O. A.; *Hanna v. Pollock*, [1900] 2 I. R. 664, O. A.

SECT. 2.—By Express Grant.

SECT. 2.

By Express Grant.

Duration.

495. An easement may be created by express grant for interests analogous in their duration to an estate in fee simple (a), an estate for life (b), an estate for years (c), or even a smaller interest (d).

Extent of grantor's estate.

496. In order to create an easement in fee simple by express grant otherwise than in exercise of some statutory power (e), the grant must be made by the owner of the fee simple of the servient tenement. Similarly, upon the creation of an easement by express grant for any period or interest less than a perpetual interest, it is essential that the grantor be entitled to an interest in the servient tenement greater than or at least co-extensive with the interest for which the easement is created (f).

Effect of general words.

A grant of an easement by general words in a conveyance will be construed as being referable only to the interest which the grantor had in the servient tenement at the time of the grant, and will not bind any larger interest which he may afterwards acquire (g). If, however, there is any contract or representation that the easement shall be enjoyed for the full term, then if the grantor subsequently acquires a larger interest in the servient tenement, the interest so acquired will be bound. For where a person represents himself as having a larger interest in the servient tenement than he has in fact, and purports to create an easement for an interest in excess of what he actually has, then, if he subsequently acquires the larger interest, that interest so acquired is bound by way of estoppel (h).

Grant by tenant for life.

Again, the rule that a grantor of an easement must have an estate or interest in the servient tenement as extensive as the period for which the easement is created is subject to exceptions arising from statutory modification of the common law such as the power of a tenant for life to grant a perpetual easement in

(a) See, for example, the cases cited in note (a), on p. 246, *post*.

(b) *Pym v. Harrison* (1876), 33 L. T. 796, C. A.

(c) *Davis v. Morgan* (1825), 4 B. & C. 8 (a right of diverting water from a river for ninety-nine years); *Booth v. Alcock* (1873), 8 Ch. App. 663; *Davies v. Marshall* (No. 1) (1861), 1 Drew. & Sm. 557; *Harding v. Wilson* (1823), 2 B. & C. 96; *Collins v. Slade* (1874), 23 W. R. 199.

(d) *Ardley v. St. Pancras Guardians* (1870), 39 L. J. (CH.) 871.

(e) See p. 246, *post*, as to tenants for life acting under the powers of the Settled Land Acts, 1882 and 1890.

(f) *Booth v. Alcock*, *supra*, where it was held that a grant of right to light by a tenant for years did not bind the reversion; and that on the expiration of the lease he (having acquired the reversion himself) might build so as to obstruct the light coming to the quondam dominant tenement. See also *Re Barrow-in-Furness Corporation and Rawlinson's Contract*, [1903] 1 Ch. 339, where it was held that an executrix having a power of sale over the quasi-servient tenement, but no estate or interest in it, could not create an easement over it.

(g) *Booth v. Alcock*, *supra*, per MELLISH, L.J., at p. 667. And see *Beddington v. Attles* (1887), 35 Ch. D. 317, 327. As to the effect of general words in a conveyance, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 470.

(h) *Rowbotham v. Wilson* (1857), 8 E. & B. 123, Ex. Ch., per WATSON, B., at p. 145: "Where a person without title professes to grant an easement his conveyance operates by way of estoppel, if, at a subsequent period he acquires the fee"; *Booth v. Alcock*, *supra*. See also title ESTOPPEL.

SMOT. 2.
By Express
Grant.

Extent of
 grantee's
 estate.

Manner of
 creating
 easement.

exercise of his power under the Settled Land Acts, 1882 and 1890 (i), for all the estate or interest which is the subject of the settlement (k).

497. The grantee of an easement must have an estate or interest in the dominant tenement at the time of the grant, and this estate or interest must in general be either greater than or at least co-extensive with the estate or interest for which the easement is created (l). If, however, the grantee receives a grant of an easement in terms which, had he a greater estate in the dominant tenement would have entitled him to a greater estate in the easement, and afterwards acquires an estate in the dominant tenement as great or greater than the estate or interest for which the easement was expressly created, the easement may enure to his extended interest in the dominant tenement, if it appears that the instrument purporting to create the easement was intended to operate as a covenant as well as a grant (m).

498. An easement or any estate or interest in an easement can at common law only be granted by deed (n), its incorporeal nature making delivery physically impossible (o). An easement may, however, be effectually created under circumstances which render it inequitable to deny the existence of an easement, although the proper formalities for its creation have not in fact been observed (a). If an owner verbally agrees to grant an easement to an adjoining owner, who on the faith of such agreement alters his position, the validity of the easement cannot be impeached (b).

(i) 45 & 46 Vict. c. 38, ss. 3, 17 (1); 53 & 54 Vict. c. 69, s. 5. See also Universities and College Estates Act, 1898 (61 & 62 Vict. c. 55), s. 1, and *Sutherland (Dowager Duchess) v. Sutherland (Duke)*, [1893] 3 Ch. 169; *Re Bracken's Settlement*, [1903] 1 Ch. 265.

(k) Settled Land Act, 1882 (45 & 46 Vict. c. 33), s. 20 (1).

(l) *Smeteborn v. Holt* (1347), Y. B. 21 Edw. 3, 2, pl. 5; *Rymer v. McIlroy*, [1897] 1 Ch. 528; and compare *North British Railway v. Park Yard Co.*, [1898] A. C. 643 (a case of Scotch law).

(m) *Rymer v. McIlroy*, *supra*.

(n) Co. Litt. 9 a; *Hewlins v. Shippam* (1826), 5 B. & C. 221, 229; *Bryan v. Whistler* (1828), 8 B. & C. 288, 293; *Cocker v. Cowper* (1834), 1 Cr. M. & R. 418, 421; *Wallis v. Harrison* (1838), 4 M. & W. 538; *Adams v. Andrews* (1850), 15 Q. B. 284; *Wood v. Leadbitter* (1845), 13 M. & W. 838, 842; *Liggins v. Inge* (1831), 7 Bing. 682, 691; *Aldin v. Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437, 448; *Fentiman v. Smith* (1803), 4 East, 107, 109. As to estate and interest in easements see *Wood v. Leadbitter*, *supra*, and *Hewlins v. Shippam*, *supra*. See also title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 361.

(o) Co. Litt. 9 a. The significance of this distinction has been considerably lessened by the Real Property Act, 1845 (8 & 9 Vict. c. 106), which in effect made all property which formerly lay in livery lie also in grant.

(a) *Devonshire (Duke) v. Eglin* (1851), 14 Beav. 530; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Dalton v. Angus* (1881), 6 App. Cas. 740, 765, 782; *Moreland v. Richardson* (1856), 22 Beav. 596; *Laird v. Birkenhead Rail. Co.* (1859), John, 500; *Mold v. Wheatcroft* (1859), 27 Beav. 510; *Carr v. Benson* (1868), 3 Ch. App. 524; *Newby v. Harrison* (1861), 1 John. & H. 393; *Bankart v. Tennant* (1870), L. R. 10 Eq. 141. Compare *Cocker v. Cowper*, *supra*; *Fentiman v. Smith*, *supra*; *Powell v. Thomas* (1848), 6 Hare, 300; *Clavering's Case* (undated), cited in *Jackson v. Cator* (1800), 5 Ves. 688, at p. 690; *Cotching v. Bassett* (1862), 32 Beav. 101; *Plimmer v. Wellington Corporation* (1884), 9 App. Cas. 699, 710, P. C.; *Rochdale Canal Co. v. King* (1853), 16 Beav. 630; *East India Co. v. Vincent* (1740), 2 Atk. 83.

(b) *Devonshire (Duke) v. Eglin*, *supra* (watercourse); *McManus v. Cooke*

499. The use of the word “grant” (c), or any other particular word (d), is not necessary for the express creation of an easement. Any words are sufficient which clearly show the intention to create an easement grantable at law (e).

SECT. 2.
By Express
Grant.

Form of
grant.

Grants of negative easements are frequently framed in the form of a covenant, and there appears to be no reason why a so-called affirmative easement should not be similarly framed (f). Indeed some high legal authorities have in fact gone so far as to say that negative easements rest solely upon covenant (g) while others hold, what appears to be the view most in accordance with the modern authority, that a negative easement may be considered as a right *ne facias* and as such a proper subject-matter for a grant (h).

Where the instrument of creation though framed in the form of a covenant (i) amounts according to its true construction to a grant of an easement, a legal easement is created, which passes at law with the dominant tenement and binds all subsequent owners of the servient tenement whether they have notice of it or not (k). Where, however, the right comes into existence by covenant only, the burden becomes an equitable easement, which passes with the servient tenement in a similar manner, but, like all other equitable interests, is liable to be defeated by a purchase for value of the legal estate without notice (l). Except for this important distinction

Effect of
covenant
creating
easement.

(1887), 35 Ch. D. 681 (skylight). See also *Wood v. Lake* (1751), cited in *Wood v. Leadbitter* (1845), 13 M. & W. 838, at p. 848, n.

(c) *Shove v. Pincke* (1793), 5 Term Rep. 124, per Lord KENYON, C.J., at p. 129; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 49.

(d) *Rowbotham v. Wilson* (1860), 8 H. L. Cas. 348, 362.

(e) *Ibid.*; *Northam v. Hurley* (1853), 1 E. & B. 665, 673; *Holms v. Seller* (1891), 3 Lev. 305. The question whether words of limitation are necessary to the creation of a perpetual easement by express grant does not appear to be settled. The point is discussed in three articles in the Law Quarterly Review, Vol. XXIV. (1908), pp. 199, 259, 264, where opposing views are taken. It is submitted that the use of such words is not necessary, though clearly desirable.

(f) *Holms v. Seller*, *supra*; *Rowbotham v. Wilson*, *supra*. See also *Gogarty v. Hoskins*, [1906] 1 I. R. 173.

(g) *Moore v. Rawson* (1824), 3 B. & C. 332, at p. 340, where LITLEDAL, J., said: “Although a right of way being a privilege of something positive to be done or used in the soil may be the subject of legal grant, yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant.” And see the dissenting judgments in *Rowbotham v. Wilson* (1857), 8 E. & B. 123, Ex. Ch., of WATSON, B., at p. 143, and of CRESSWELL, J., at pp. 159 and 160; and *Hall v. Lichfield Brewery Co.* (1880), 49 L. J. (CH.) 655, per FRY, J., at p. 656.

(h) *Rowbotham v. Wilson* (1857), *supra*, per BRAMWELL, B., at p. 147; *Leech v. Schweder* (1874), 9 Ch. App. 463, per MELLISH, L.J., at p. 474; *Dalton v. Angus* (1881), 6 App. Cas. 740, per Lord SELBORNE, at pp. 794, 795, and per Lord BLACKBURN, at p. 823; *Ecclesiastical Commissioners for England v. Kino* (1880), 14 Ch. D. 213, 221, O. A. See also *Phillips v. Low*, [1892] 1 Ch. 47, at p. 50, where CHITTY, J., speaks of a conveyance operating as an implied grant of light.

(i) *Harbidge v. Warwick* (1849), 3 Exch. 552, 556.

(k) *Leech v. Schweder*, *supra*, at pp. 474, 475.

(l) *Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386, O. A., in which case a person becoming entitled under the Real Property Limitation Act, 1833 (3 & 4

SECT. 2.
By Express
Grant.

Positive
covenant.

a negative easement and a restrictive covenant binding the land are analogous. The incidents which flow from both are apparently identical.

A positive covenant may also in some sense be considered as binding the land in equity; but no covenant involving expenditure can be enforced against the land, or any tenant of the land, unless he be one of the contracting parties (*m*). A covenant cannot be construed as a grant creating a legal easement unless the right so created conforms to the essential nature of an easement and unless the subject-matter of the right is sufficiently capable of definition to be the possible subject-matter of a grant (*n*). A covenant may, however, create such an indefinite right as could not be raised by implied grant and can attach the burden of the equitable right so created to the land, subject to defeasance by a purchase for value without notice (*o*).

Nature of
rights which
can be
created.

500. The rights which can be created as legal easements are limited in character. An owner of land cannot attach to that land, or any part of it, legal incidents of a novel kind so as to create a new species of incorporeal right (*p*). Only kinds of property well known to the law and familiarly dealt with by its principles can be recognised, for to allow a multiplication of the species of legal rights would render the law uncertain, to the great harm of the public welfare (*q*). An owner of land may, however, create a right, having the nature of an easement, and may attach it as appurtenant to his land so as to bind all subsequent owners whether they take the land with notice or not; and it does not matter that the right be an easement of a description never before known provided the right conforms to all the requisite and essential characteristics of an easement which have been already noticed (*r*).

Will. 4, c. 27), was held bound by restrictive covenants, and expressions in previous cases to the effect that the burden does not run unless there is notice were dissented from. See, for instance, *Leech v. Schweder* (1874), 9 Ch. App. 463, *per* MELLISH, L.J., at p. 475; see also *Cable v. Bryant*, [1908] 1 Ch. 259, *per* NEVILLE, J., at p. 264. For the distinction between a restrictive covenant and a legal negative easement, see *Prinsep v. Belgravian Estate, Ltd.*, [1896] W. N. 39.

(*m*) *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, *per* FARWELL, J., at p. 397; affirmed [1906] 1 Ch. 386, C. A.

(*n*) *Chastey v. Ackland* (1895), 11 T. L. R. 460, C. A. (a claim to a prescriptive right to air); *Harris v. De Pinna* (1886), 33 Ch. D. 238, 262, C. A. (claim to a right to light to shifting apertures and a claim to air). As to what rights can be attached to land, see p. 326, *post*.

(*o*) See *Leech v. Schweder*, *supra*, at pp. 474, 475, where MELLISH, L.J., took the instance of a covenant not to interfere with the prospect from a drawing-room window.

(*p*) *Keppell v. Bailey* (1834), 2 My. & K. 517, *per* Lord BROUGHAM, L.C., at p. 535; *Bailey v. Stephens* (1862), 12 O. B. (N. S.) 91, 115; *Hill v. Tupper* (1863), 2 H. & C. 121, 128; *Ackroyd v. Smith* (1850), 10 O. B. 164; *Nuttall v. Bracewell* (1866), L. R. 2 Exch. 1; *Spencer's Case* (1583), 5 Co. Rep. 16 a; *Great Northern Railway v. Inland Revenue Commissioners*, [1901] 1 K. B. 416, 428, 429, C. A.

(*q*) *Keppell v. Bailey*, *supra*, at pp. 535, 536, where Lord BROUGHAM, L.C., pointed out the reasons necessitating the rule in the text. See also *Hill v. Tupper*, *supra*, at p. 128, where MARTIN, B., said, "To admit the right would lead to the creation of an infinite variety of interests in land, and an indefinite increase of possible estates."

(*r*) See pp. 236, 240, *ante*. As to the great diversity of the forms of rights which easements may take, see pp. 326 *et seq.*;

SECT. 2.

By Express Grant.

Reservation and exception of easement.

501. Easements are often spoken of as being reserved or excepted upon the conveyance of land (a). An easement, however, cannot be made the subject-matter either of an exception or a reservation; for an easement is neither parcel of the thing granted, nor is it something issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation (b). Where the instrument conveying or otherwise disposing of the servient tenement purports to reserve an easement in favour of the owner of the dominant tenement, the true effect is to create an easement in favour of the latter by a new grant of the right by the grantee of the land to the grantor (c).

502. Until 1882 no easement could be granted by means of a use (d). The Statute of Uses does not execute such a use (e). Now, however, as regards conveyances made after the 31st of December, 1881, a conveyance of freehold land, to the use that any person may have any easement over or in respect of that land for an estate or interest not exceeding in duration the estate conveyed in the land, operates to vest such easement in that person for the estate or interest expressed to be limited to him (f); and tenants for life when exercising their statutory powers are now empowered to create easements to the uses requisite for giving effect to the exercise of their powers (g).

Easement created by way of use.

503. The grant of an easement is *primâ facie* also the grant of all such ancillary rights as are reasonably necessary for its exercise and enjoyment (h). It gives to the grantee the right of entering the servient tenement when reasonably necessary for the purposes of making repairs necessary for the due enjoyment of the

Grant of easement includes ancillary rights.

(a) The difference between a reservation and an exception is that in the first case the thing reserved is not something which was *in esse* immediately before the conveyance, but is newly created or reserved out of the land upon the execution of the deed. An exception, on the other hand, is part of the thing conveyed being *in esse* before the conveyance, but which is excepted from the operation of the deed. See Co. Litt. 47 a; 1 Shep. Touch. 78, 80; *Cardigan (Earl) v. Armitage* (1823), 2 B. & C. 197, 206, 207; *South-Eastern Rail. Co. v. Associated Portland Cement Co.*, [1910] 1 Ch. 12. See also title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 472, and cases there cited.

(b) *Durham and Sunderland Rail. Co. v. Walker* (1842), 2 Q. B. 940, 967; *Proud v. Bates* (1865), 34 L. J. (CH.) 406, 411.

(c) *Durham and Sunderland Rail. Co. v. Walker*, *supra*; *London Corporation v. Riggs* (1880), 13 Ch. D. 798, *per* JESSEL, M.R., at p. 806, (a case of a regnant of a right of way of necessity); *Dynevor (Lord) v. Tennant* (1886), 33 Ch. D. 420, C. A.; *Midland Rail. Co. v. Miles* (1886), 33 Ch. D. 632, 644; *Doe d. Douglas v. Lock* (1835), 2 Ad. & El. 705; *Wickham v. Hawker* (1840), 7 M. & W. 63; compare *Batten Pool v. Kennedy*, [1907] 1 Ch. 256; *Pinnington v. Galland* (1853), 9 Exch. 1.

(d) Gilbert on Uses, 281; Bac. Abr. tit. Uses and Trusts (F), "A man cannot walk over another's ground to the use of a third person."

(e) *Ibid.*

(f) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 62 (1).

(g) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20 (1); see p. 245, *ante*.

(h) *Jones v. Pritchard*, [1908] 1 Ch. 630, *per* PARKER, J., at p. 638; *Pomfret v. Ricroft* (1669), 1 Wms. Saund., 6th ed. 321 (ed. 1871, 557); *Goodhart v. Hyett* (1883), 25 Ch. D. 182, 186, 187; *Clark v. Cogge* (1607), Cro. Jac. 170; *Hoare v. Metropolitan Board of Works* (1874), L. R. 9 Q. B. 296; *Roberts v. Fellowes* (1906), 94 L. T. 279.

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By Express
Grant.
 —

easement (i) ; and if the owner of the servient tenement builds, or does any other act which practically interferes with the right, he may be restrained by injunction (k). It is no answer to proceedings by the dominant owner to prevent the servient owner from rendering the repairs, inspection, or cleansing more difficult, that the former may still exercise his right if he only expends more money or exercises greater skill ; for if the acts of the servient owner render the exercise of the right more expensive and more difficult an injunction will be granted (l).

How extent
and nature
of easement
ascertained.

504. The nature and extent of an easement created by express grant depend upon the wording of the instrument. In construing a grant of an easement regard must be had to the circumstances existing at the time of its execution (m) ; for the extent of the easement is ascertainable by the conditions existing at the time of the grant, and is limited to those conditions. Consequently, if those conditions be subsequently altered and the nature of the user and enjoyment be changed, the altered or extended user cannot be justified (n).

Effect of
Conveyancing
Act, 1881.

505. Since the 31st of December, 1881, every conveyance of land is deemed to include and operates to convey all ways, waters, water-courses, liberties, privileges, easements, rights and advantages appertaining or reputed to appertain to the land, or, at the time of the conveyance, demised occupied or enjoyed with or reputed or

(i) *Jones v. Pritchard*, [1908] 1 Ch. 630. "The law gives power to him who ought to repair a bridge to enter into the land, and to him who has a conduit in the land of another, to enter into the land to mend it when occasion requires" (*Liford's Case* (1614), 11 Co. Rep. 46 b, 52 a). As to the right and obligation of repairing ways, see p. 294, *post* ; as to the same with regard to watercourses, see p. 318, *post*. There are no rights and obligations to repair in the case of the easement of light or other negative easements. For cases bearing on the subject of repair of easements generally, see *Pomfret v. Ricraft* (1669), 1 Wms. Saund. (ed. 1871) 557 ; *Senhouse v. Christian* (1787), 1 Term Rep. 560 ; *Gerrard v. Cooke* (1806), 2 Bos. & P. (N. R.) 109 ; *Newcomen v. Coulson* (1877), 5 Ch. D. 133, C. A. (cases relating to rights of way) ; *Hodgson v. Field* (1806), 7 East, 613 ; *Goodhart v. Hyett* (1883), 25 Ch. D. 182, 189 ; *Humphries v. Cousins* (1877), 2 O. P. D. 239, 244 ; and compare *Sandgate Local Board v. Leney* (1883), cited 25 Ch. D. 183, n. ; *Finlinson v. Porter* (1875), L. R. 10 Q. B. 188 ; *Beeston v. Weate* (1856), 5 E. & B. 986 ; *Rhodes v. Airedale Drainage Commissioners* (1876), 1 O. P. D. 380, 392, 393 ; *R. v. Wharton* (1701), 12 Mod. Rep. 510 ; *Brown v. Best* (1747), 1 Wils. 174.

(k) *Goodhart v. Hyett supra* (a house built over a line of pipes on the servient tenement in such a way as to prevent the owner of an easement of the flow of water through the pipes from repairing the pipes).

(l) *Goodhart v. Hyett, supra* ; but see *Sandgate Local Board v. Leney, supra*, where DENMAN, J., refused to grant a mandatory injunction to pull down a building which had been erected over a sewer although there was an agreement with a former owner not to build so as to prevent reasonable access to the sewer. The injunction was refused on the ground that the evidence only showed that it would take an hour or so longer to get down to the sewer, because of the building. See title INJUNCTION.

(m) See *Thornton v. Little*, [1907] W. N. 68 (grant of a right of way for visitors to a house used at the time of the grant as a school, held to include pupils).

(n) *Henning v. Burnet* (1852), 8 Exch. 187 (a right of way to a house and stable altered by the owner of the dominant tenement so as to be available as a means of access to the whole of his field) ; *Bayley v. Great Western Rail. Co.* (1884), 26 Ch. D. 434, C. A. ; *Harris v. Flower & Sons* (1904), 74 L. J. (CH.) 127, C. A. ; *Ankersen v. Connelly*, [1907] 1 Ch. 678, C. A.

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By Express
Grant.

known as part of it (*o*); and a conveyance of land with buildings includes in the same manner all rights of light and other rights and easements appertaining to or enjoyed with the buildings (*p*); provided in each case that no contrary intention is expressed in the conveyance (*q*). Rights which arise in this manner are expressly granted and not implied by law, for the conveyance is construed as if the necessary words were expressly contained in it (*r*).

A right unknown to the law cannot, however, pass by the operation of these words (*s*), nor a right which the grantor had at the time no power to grant (*t*). But if the grantor be a tenant for years of the *quasi-servient* tenement, though he cannot create a perpetual easement by his grant, yet he may bind the *quasi-servient* tenement for so long as his interest continues (*a*).

SECT. 3.—By Implication of Law.

506. The doctrine of the creation of easements by implication of law (*b*) is founded upon an implied grant (*c*), which arises in

Implied
grant of
easement.

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6 (1). See *Pollard v. Gare*, [1901] 1 Ch. 834; *Quicke v. Chapman*, [1903] 1 Ch. 659. For cases on the express creation or express conveyance of easements under these statutory provisions, see *Burrows v. Lang*, [1901] 2 Ch. 502; *Titchmarsh v. Royston Water Co.* (1899), 81 L. T. 673; *Re Peck and London School Board's Contract*, [1893] 2 Ch. 315; *Re Hughes and Ashley's Contract*, [1900] 2 Ch. 595, C. A.; *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165; *Godwin v. Schweppes, Ltd.*, [1902] 1 Ch. 926; *Brazier v. Glasspool*, [1902] W. N. 162, C. A.

(*p*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6 (2); *Beddington v. Atlee* (1887), 35 Ch. D. 317; *Quicke v. Chapman*, *supra*. See also title REAL PROPERTY AND CHATTELS REAL.

(*q*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6 (4); *Broomfield v. Williams*, [1897] 1 Ch. 602 (a description of the land reserved as "building land" is not sufficient to show a contrary intention so as to negative an implied grant of an easement of light).

(*r*) *Broomfield v. Williams*, *supra*, per LINDLEY, L.J., at p. 610. As to the effect of these words, see *Key v. Neath Rural District Council* (1905), 93 L. T. 507 (free supply of water for domestic purposes).

(*s*) *Burrows v. Lang*, *supra*, per FARWELL, J., at p. 512 (grant of a house adjoining a mill stream into which the miller had been in the habit of turning water when so required for the purposes of his mill).

(*t*) *Quicke v. Chapman*, *supra* (in which case the grantor, a builder, had a right to enter upon the neighbouring land for the purpose of building a house, but had no estate or interest in the land and could not therefore grant any easement over it).

(*a*) *Key v. Neath Rural District Council*, *supra* (the grantors were tenants from year to year of a reservoir from which a free supply of water had been enjoyed by the land granted).

(*b*) *Pomfret v. Ricroft* (1669), 1 Wms. Saund. 321, 323, n. (6); *Wheeldon v. Burrows* (1879), 12 Ch. D. 31, C. A.; *Polden v. Bastard* (1865), L. R. 1 Q. B. 156, Ex. Ch.; *Leach v. Schweder* (1874), 9 Ch. App. 463; *Watts v. Kelson* (1870), 6 Ch. App. 166; *Thomas v. Owen* (1887), 20 Q. B. D. 225, C. A.; *Master v. Hansard* (1876), 4 Ch. D. 718, 721, C. A.; *Wimbledon and Putney Commons Conservators v. Dixon* (1876), 1 Ch. D. 362, C. A.; *Richards v. Rose* (1853), 9 Exch. 218; *Shubbrook v. Tufnell* (1882), 46 L. T. 886. Compare also *Pyer v. Carter* (1857), 1 H. & N. 916, the decision in which case was approved in *Morland v. Cook* (1868), L. R. 6 Eq. 252, *Watts v. Kelson*, *supra*, and *Pearson v. Spencer* (1863), 3 B. & S. 761, Ex. Ch., but was dissented from in *Suffield v. Brown* (1864), 4 De G. J. & Sm. 185, and overruled in *Wheeldon v. Burrows*, *supra*, in so far as the doctrine of implied reservation was concerned. As to the creation by implication of law of ways of necessity, see pp. 288 *et seq.*, *post*.

(*c*) *Phillips v. Low*, [1892] 1 Ch. 47, 50.

SECT. 3.
By Impli-
cation of
Law.

the majority of cases in connection with some express grant or disposition of the servient or dominant tenement (*d*). Such a grant can only be implied where both the dominant and servient tenements have been in the common ownership of one man; so that the creation of an easement by implication of law may be said to be the outcome of the former relationship between the two tenements. The disposition which causes a cessation of the common ownership and thus gives rise to the implication of an easement may be of either tenement (*e*); or a simultaneous disposition of both tenements (*f*). The disposition may be a grant in fee simple (*g*), a grant for life (*h*), or a demise for years (*i*), and the fact that the servient tenement (*k*) or dominant tenement (*l*) is in lease at the date of the disposition does not seem to defeat the implication.

Implied
devise of
easements.

The doctrine under which easements are held to be created by implication of law holds good with regard to devises and dispositions by will as well as to dispositions *inter vivos* (*m*), but it is doubtful if an easement can be created by law in favour of a person who becomes entitled to a tenement by escheat (*n*).

Distinction
between
implied grant
and implied
reservation.

507. In connection with the doctrine of the creation of easements by implication of law there is a distinction of great importance between easements of necessity and easements which are merely necessary for the reasonable enjoyment of the property granted; for where an owner of land grants part of the land and retains other parts himself, all easements necessary for reasonable enjoyment are usually implied in favour of the part so granted; but such easements are not raised by implication in favour of the part retained unless they are easements of a much more restricted class, namely,

(*d*) *Phillips v. Low*, [1892] 1 Ch. 47, 50; *Timmons v. Hewitt* (1888), 22 L. R. Ir. 627, C. A.

(*e*) For dispositions of the dominant tenement, see *Howton v. Frearson* (1798), 8 Term Rep. 50; *Oldfield's Case* (1607), Noy, 123; *Pulmer v. Fletcher* (1663), 1 Lev. 122. For dispositions of the servient tenement, see *Pinnington v. Galland* (1853), 9 Exch. 1; *Pyer v. Carter* (1857), 1 H. & N. 916, now overruled (see p. 251, note (b), *ante*); compare *Beddington v. Atlee* (1887), 35 Ch. D. 317.

(*f*) See, for instance, *Swansborough v. Coventry* (1832), 9 Bing. 305 (light). See also *Barnes v. Loach* (1879), 4 Q. B. D. 494; *Rigby v. Bennett* (1882), 21 Ch. D. 559, C. A., *per* JESSEL, M.R., at p. 567; *Allen v. Taylor* (1880), 16 Ch. D. 355; *Phillips v. Low*, *supra*, *per* CHITTY, J., at p. 51; *Pinnington v. Galland*, *supra*; *Richards v. Rose* (1853), 9 Exch. 218. Compare also *Russell v. Hurford* (1866), L. R. 2 Eq. 507.

(*g*) *Pomfret v. Ricroft* (1669), 1 Wms. Saund. 321, 323, n. (6).

(*h*) *Pomfret v. Ricroft*, *supra*.

(*i*) *Ibid.*; *Timmons v. Hewitt*, *supra*; *Gayford v. Moffatt* (1868), 4 Ch. App. 133.

(*k*) *Coutts v. Gorham* (1829), Mood. & M. 396; *Davies v. Marshall* (1861), 9 W. R. 866; *Cable v. Bryant*, [1908] 1 Ch. 259.

(*l*) *Barnes v. Loach* (1879), 4 Q. B. D. 494.

(*m*) *Barnes v. Loach*, *supra*; *Pheysey v. Vicary* (1847), 16 M. & W. 484; *Allen v. Taylor*, *supra* (light); *Phillips v. Low*, *supra* (light); *Milner's Safe Co., Ltd. v. Great Northern and City Railway*, [1907] 1 Ch. 208 (right of way); *Pearson v. Spencer* (1861), 1 B. & S. 571, (1863) 3 B. & S. 761, Ex. Ch. See also *Nicholls v. Nicholls* (1899), 81 L. T. 811 (right of way). Compare *Whalley v. Tompson* (1799), 1 Bos. & P. 371; *Taws v. Knowles*, [1891] 2 Q. B. 564, C. A.

(*n*) *Proctor v. Hodgson* (1855), 10 Exch. 824, 828.

“easements of necessity,” without which no enjoyment at all would be possible (o).

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By Impli-
cation of
Law.

The tendency of the law to favour easements against the common owner rather than easements for his benefit arises from the two-fold principle that a man shall not derogate from his grant (p), and that a grant is always construed most strictly against the grantor (q).

508. Where the owner of two tenements (r) sells and conveys one for an absolute estate therein, he puts an end by contract to the relation which he had himself created between the land sold and the land retained, and discharges the land so sold from any burden imposed upon it during his joint occupation. The condition of such land is thenceforth determined by the contract of alienation, and not by the previous user of the former common owner during his common ownership (s). If the grantor intends to reserve any right over the tenement granted, other than rights of absolute necessity, it is his duty to reserve it expressly in the grant (t). Where a man disposes of part of his land and that part affords an accommodation to the part retained, that accommodation will upon severance ripen into an easement, if it be such as to be absolutely necessary for the enjoyment of the part retained (a), and the accommodation be such that it is capable of constituting the subject-matter of an easement.

Effect of
disposition by
common
owner.

An easement arising by implication of law in this manner, upon the severance of two tenements or two parts of a tenement, in favour of the reserved tenement or part, is generally spoken of as being reserved by virtue of an implied reservation (b). This,

Implied
reservation.

(o) *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, C. A., per STIRLING, L.J., at p. 573; *Ray v. Hazeldine*, [1904] 2 Ch. 17, 20, 21; and see *Wheeldon v. Burrows* (1879), 12 Ch. D. 31, 49, C. A.; *Gordon v. Ogilvie* (1899), 15 T. L. R. 239.

(p) *Cable v. Bryant*, [1908] 1 Ch. 259 (right of air through defined apertures); *Wheeldon v. Burrows*, *supra*.

(q) *Willion v. Berkley* (1562), Plowd. 223, per WESTON, J., at p. 243; *Neill v. Devonshire (Duke)* (1882), 8 App. Cas. 135, per Lord SELBORNE, L.C., at p. 149; *Johnson v. Edgware Rail. Co.* (1866), 35 Beav. 480, per Lord ROMILLY, M.R., at p. 484. It has been said that the reason for this rule of construction is that were it otherwise grantors would always affect ambiguous expressions if they were afterwards at liberty to put their own construction on them (Cru. Dig. tit. 32, c. 20, s. 13; Shep. Touch. 87). See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 440.

(r) Or one tenement divided into two parts.

(s) *Suffield v. Brown* (1863), 4 De G. J. & Sm. 185, per Lord WESTBURY, L.C., *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478; *Wheeldon v. Burrows*, *supra*.

(t) *Wheeldon v. Burrows*, *supra* per THESIGER, L.J. at p. 49; *Taws v. Knowles*, [1891] 2 Q. B. 564, 568, C. A. See also *Ray v. Hazeldine*, *supra*, per KEKEWICH, J., at p. 19; *Union Lighterage Co. v. London Graving Dock Co.*, *supra*, per VAUGHAN WILLIAMS, L.J., at pp. 566, 567; *Crossley & Sons, Ltd. v. Lightowler*, *supra*, per Lord CHELMSFORD, L.C., at p. 486.

(a) *Wheeldon v. Burrows*, *supra*; *Union Lighterage Co. v. London Graving Dock Co.*, *supra*; *Richards v. Rose* (1853), 9 Exch. 218, per POLLOCK, C.B., at p. 221.

(b) See, for instance, in *Richards v. Rose*, *supra*, per POLLOCK, C.B., at p. 221; *Wheeldon v. Burrows*, *supra*, per THESIGER, L.J., at p. 59.

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By Impli-
cation of
Law.

by the appearance in the conveyance of such words as "with all rights usually enjoyed therewith," or "with all rights appertaining thereto," but probably the mere grant of the land itself without general words would carry the right of way (*u*). The road must be a defined one made up and running in a definite direction (*a*). It is not sufficient that the retained portion affords an accommodation which has in fact been used for egress and regress to and from the portion granted; for when a man walks over his own land in a particular direction he is not using anything, he is merely going where he pleases on his own property (*b*).

Easement
may be
implied from
intention of
parties.

513. The rule against derogation from grant may also apply where there has been no previous enjoyment of the accommodation in question, if from the contract between the parties it must be assumed that the grantee has intended to use the land granted in a manner for which the accommodation would be reasonably necessary (*c*).

Grant by
company.

514. Easements cannot be implied upon a grant of lands by a statutory company where such easements would interfere with the execution of the purposes for which the company was created (*d*).

SECT. 4.—Under the Doctrine of Prescription.

SUB-SECT. 1.—Prescription Generally.

Nature of
prescription.

515. An easement may be established by a court of law sanctioning and upholding under the doctrine of prescription a claim to the right founded upon its enjoyment (*e*). When a claim to an easement has been put forward under this doctrine, and has received judicial sanction, the title to the easement is thereby perfected (*f*), but, inasmuch as the sanction of the court is given solely upon the presumption that the easement has in fact validly existed before the claim is made, it is not strictly accurate to regard the doctrine of prescription as a mode of creating an easement. It is rather a mode of establishing an easement.

Methods of
claiming
prescriptive
title.

516. A title may be established by prescription in any one of three ways—first, prescription at common law; secondly, prescription under the doctrine of a lost modern grant (*g*); and thirdly,

(*u*) *Bayley v. Great Western Rail. Co.* (1884), 26 Ch. D. 434, C. A., per FRY, L.J., at p. 457; *Broomfield v. Williams*, [1897] 1 Ch. 602, C. A., per LINDLEY, L.J., at p. 610.

(*a*) *Langley v. Hammond* (1868), L. R. 3 Exch. 161, per BRAMWELL, B., at pp. 170, 171; *Barkshire v. Grubb* (1881), 18 Ch. D. 616, 622.

(*b*) *Watts v. Kelson* (1870), 6 Ch. App. 166, per MELLISH, L.J., at p. 172.

(*c*) *Frederick Betts, Ltd. v. Pickfords, Ltd.*, [1906] 2 Ch. 87, per KEKEWICH, J., at p. 93 (covenant by lessees to erect buildings according to plans containing windows, implies a right to necessary light and air to those windows), and compare *Brazier v. Glasspool*, [1902] W. N. 162, C. A.

(*d*) *Myers v. Catterson* (1889), 43 Ch. D. 470, C. A., per COTTON, L.J., at p. 477.

(*e*) First Report of the Real Property Commissioners. As to claims by prescription to profits à prendre, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 483 et seq.

(*f*) *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, 239; compare *Battersea (Lord) v. City of London Sewers Commissioners*, [1895] 2 Ch. 708; *Greenhalgh v. Brindley*, [1901] 2 Ch. 324.

(*g*) Prescription under the doctrine of a lost modern grant is a species of

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prescription as governed by the provisions of the Prescription Act, 1832 (*h*). The last-mentioned statute did not take away the other modes of claiming easements existing at the time of its being passed (*i*); and it is now the common practice for a person seeking to establish a claim to an easement to claim it alternatively as acquired under each of these three methods (*k*). He can, however, only succeed upon one of them, and consequently pleads them at his own risk as to costs (*l*). He must, moreover, show clearly in his pleadings which of these modes he intends to adopt, so that his adversary may be prepared for the case he has to meet, but he may rely on them all in the alternative (*m*). The same principle applies in cases where the action is tried without pleadings, so that if a party adopts an alternative mode of claiming a right at the trial without having previously given his opponent an opportunity of meeting that particular new mode of claim, such an opportunity will be given by the court (*n*).

517. The doctrine of prescription generally is based upon the presumption of a grant, the common law doctrine being that all prescription pre-supposes a grant (*o*) once made and validly subsisting, but since lost or destroyed (*p*). The other forms of prescription are merely modifications of this doctrine (*q*). The

Prescription
based on
grant.

common law prescription, and is sometimes treated as a prescription at common law.

(*h*) 2 & 3 Will. 4, c. 71.

(*i*) *Aynsley v. Glover* (1875), 10 Ch. App. 283; *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, 238, 239; *Bright v. Walker* (1834), 1 Cr. M. & B. 211, 222, 223; *Dalton v. Angus* (1881), 6 App. Cas. 740, 814; *Smith v. Baxter*, [1900] 2 Ch. 138, 146; *Hulbert v. Dale*, [1909] 2 Ch. 570, C. A.; *Hyman v. Van Den Bergh*, [1908] 1 Ch. 167, 177, 178, C. A. In this case FARWELL, L.J., at p. 176, expressed the opinion that a claimant cannot evade the statutory defences of enjoyment under a written agreement or interruption for a year by setting up any mode of claim other than the statutory mode. But see *Norfolk (Duke) v. Arbutnot* (1880), 5 C. P. D. 390, 392, 393, C. A.

(*k*) As for instance in *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, C. A.; *Roberts v. James* (1903), 89 L. T. 282, C. A.; *Bailey v. Stephens* (1862), 12 C. B. (N. S.) 91; *Norfolk (Duke) v. Arbutnot*, *supra*. As to amending pleadings, see *Budding v. Murdoch* (1875), 1 Ch. D. 42; *Laird v. Briggs* (1881), 19 Ch. D. 22; *Brown v. Dunstable Corporation*, [1899] 2 Ch. 378; *Gardner v. Hodgson's Kingston Breweries Co.*, [1900] 1 Ch. 592, 601; *Smith v. Baxter*, *supra*.

(*l*) *Harris v. Jenkins* (1882), 22 Ch. D. 481, *per* FRY, J., at p. 482; *Palmer v. Guadagni*, [1906] 2 Ch. 494, *per* SWINFEN EADY, J., at p. 497.

(*m*) *Harris v. Jenkins*, *supra*; *Palmer v. Guadagni*, *supra*; *Smith v. Baxter*, *supra*; *Hyman v. Van Den Bergh*, *supra*, at p. 169.

(*n*) *Smith v. Baxter*, *supra*. The great particularity in pleading which was formerly necessary has been removed, and liberty to amend pleadings at any stage of the proceedings is now freely allowed on such terms as may be just. This liberty has been made use of in cases of prescriptive claims, but the old rules of pleading are still of importance with reference to the costs of the action. See title PLEADING.

(*o*) *Gardner v. Hodgson's Kingston Breweries Co.*, [1903], A. C. 229; *Lockwood v. Wood* (1844), 6 Q. B. 50, 64, Ex. Ch.

(*p*) *Goodman v. Saltash Corporation* (1882), 7 App. Cas. 633, *per* Lord BLACKBURN, at pp. 654, 655; *Lockwood v. Wood*, *supra*, *per* TINDAL, C.J., at p. 64; First Report of the Real Property Commissioners.

(*q*) See *Bryant v. Lefever* (1879), 4 C. P. D. 172, 177, where BRAMWELL, L.J., said that the doctrine of a lost modern grant was merely ancillary to common

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tion.

presumption in the former instance of such a grant arises under the doctrine of prescription from the fact of enjoyment of the right (r). It therefore follows that a right claimed by prescription under any of these three modes must be such that it could have formed the subject-matter of a grant (s). Nothing which cannot have had a lawful beginning can be claimed by prescription (t). Recourse can only be had to the doctrine of prescription in cases where a grant of the right is not forthcoming; for if a grant is proved and its terms are known, prescription has no place (a).

Presumed
grant is
based on user.

518. In prescriptive claims the presumption of a former grant is raised by proof of long enjoyment, evidenced particularly in the case of positive or affirmative easements by acts of user (b) on the part of the person claiming the easement or of his predecessors in title, and in the case of negative easements by passive enjoyment (c). Such acts or enjoyment are, as regards easements and similar incorporeal rights, equivalent to the physical possession of corporeal property, an easement being incapable from its nature of forming the subject-matter of actual physical possession.

Ground of
doctrine of
prescription.

The reason why the doctrine of prescription is applied in law is, that it is the policy of the law to do all it can to quiet titles so as to avoid litigation and preserve the security of property (d). Where an open and uninterrupted enjoyment of an easement or other incorporeal right has continued for a long time, the court will, where such enjoyment is wholly unexplained, presume, if it be reasonably possible, that the enjoyment is referable to a right which had a lawful origin (e).

Knowledge.

519. Mere enjoyment, however, is not sufficient to create a prescriptive right. The enjoyment must be such as is, or ought to

law prescription, and only applicable where something prevents the application of the latter doctrine; *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, where Lord MACNAGHTEN doubted whether the scope and effect of the Prescription Act had been always understood, and said that the Act really did nothing more than shorten the time of prescription in certain cases. See also *Hulbert v. Dale*, [1909] 2 Ch. 570, C. A.

(r) First Report of the Real Property Commissioners.

(s) *Goodman v. Saltash Corporation* (1882), 7 App. Cas. 633, per Lord BLACKBURN, at p. 654; *Dalton v. Angus* (1881), 6 App. Cas. 740, per Lord SELBORNE, L.O., at p. 795; *Rowles v. Mason* (1612), 2 Brownl. 192, per COKE, C.J., at p. 198.

(t) *Lockwood v. Wood* (1844), 6 Q. B. 50, Ex. Ch.; *Gateward's Case* (1607), 6 Co. Rep. 59 b; *Johnson v. Barnes* (1872), L. B. 7 C. P. 592, 604.

(a) *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, per Lord LINDLEY, at p. 239; *Norfolk (Duke) v. Arbutnot* (1880), 5 C. P. D. 390, 392, C. A.; *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, 69, C. A. See also *Labrador Co. v. R.*, [1893] A. C. 104, P. C.; *Rury v. Pope* (1886), Oro. Eliz. 118, where no prescriptive right to light was allowed as the house had only been built forty years.

(b) First Report of the Real Property Commissioners.

(c) *Ibid.*

(d) *Ibid.* See also *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, C. A., per FLETCHER MOWATON, L.J., at p. 679; *Neaverson v. Peterborough Rural Council*, [1902] 1 Ch. 557, C. A., where COLLINS, M.B., at p. 573, said that the court was endowed with a great power of imagination for the purpose of supporting ancient user.

(e) First Report of the Real Property Commissioners; *A.-G. v. Simpson*, [1901] 2 Ch. 671, 698, C. A.; *Simpson v. Godmanchester Corporation*, [1896] 1 Ch. 214, 218, C. A.; *Mercer v. Denne*, [1904] 2 Ch. 534, 556; *Philippe v. Halliday*,

be, known to the owner of the servient tenement (*f*). Presumption of a grant implies acquiescence by the owner of the servient tenement (*g*), but proof of actual knowledge is not necessary; it is sufficient if the owner of the servient tenement has means of knowledge (*h*).

Every presumption is made in favour of long user (*i*); and not only ought the court to be slow to draw an inference of fact which would defeat a right that has been exercised during a long period, unless such inference is irresistible, but it ought to presume everything that it is reasonably possible to presume in favour of such a right (*k*). Where the user is equally consistent with two reasonable inferences, either of which would provide a lawful origin for the right enjoyed, the inference of a lost grant will not necessarily be drawn (*l*).

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Under the
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Prescription.

Presumption
in favour of
long user.

520. In all prescriptions, except as regards prescriptive claims to light under the Prescription Act, 1832 (*m*), the grant which is presumed is a grant by the owner of the fee simple of the servient tenement to the owner of the fee simple of the dominant tenement (*n*). The whole theory of prescription at common law militates against the presumption of any grant or covenant by anyone except an owner in fee (*a*). For this reason where an easement is claimed by prescription it must be claimed in favour of the fee simple of the dominant tenement as against the fee simple of the servient tenement (*b*), and no easement can be claimed by prescription for an estate or interest less than a perpetual one (*c*). For the same reason a tenant cannot acquire an easement by prescription against his landlord (*d*). An easement for an estate less than an

Grant
presumed to
be by owner
in fee simple.

[1891] A. C. 228, 231; *Clippens Oil Co. v. Edinburgh and District Water Trustees*, [1904] A. C. 64, 69; *Haigh v. West*, [1893] 2 Q. B. 19, C. A.

(*f*) *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, 568, C. A. See p. 262, *post*.

(*g*) *Sturges v. Bridgman* (1879), 11 Ch. D. 852, 863, C. A.; and see *Dalton v. Angus* (1881), 6 App. Cas. 740, 773, 803, 823, and p. 262, *post*.

(*h*) *Union Lighterage Co. v. London Graving Dock Co.*, *supra*, at p. 569, and see p. 262, *post*.

(*i*) *Whitstable Free Fishers v. Gann* (1861), 11 O. B. (N. S.) 387, *per* ERLE, O.J., at p. 412; *Goodman v. Saltash Corporation* (1882), 7 App. Cas. 633; *Mercer v. Denne*, [1904] 2 Ch. 534.

(*k*) *Mercer v. Denne*, *supra*, *per* FARWELL, J., at p. 556; *Goodman v. Saltash Corporation*, *supra*; *Tilbury v. Silva* (1890), 45 Ch. D. 98, C. A., *per* BOWEN, L.J., at p. 118; *Moody v. Steggles* (1879), 12 Ch. D. 261, *per* FRY, J., at pp. 264, 265.

(*l*) *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, *per* Lord LINDLEY, at p. 239.

(*m*) 2 & 3 Will. 4, c. 71. As to claims to light under the Prescription Act, see p. 305, *post*.

(*n*) *Bright v. Walker* (1834), 1 Cr. M. & R. 211, 221; *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, C. A.; *Kilgour v. Gaddes*, [1904] 1 K. B. 457, 466, C. A. As to whether a qualified right to an easement may be assumed under the doctrine of a lost modern grant, see p. 268, *post*.

(*a*) *Wheaton v. Maple & Co.*, *supra*, *per* LINDLEY, L.J., at p. 63.

(*b*) *Kilgour v. Gaddes*, *supra*, *per* ROMER, L.J., at p. 466.

(*c*) *Ibid.*, at pp. 466, 467; *Wheaton v. Maple & Co.*, *supra*.

(*d*) *Kilgour v. Gaddes*, *supra*; *Large v. Pitt* (1797), Peake, Add. Cas. 152. This proposition does not, however, hold good with regard to claims of light under the Prescription Act; as to which see *Frewen v. Philipps* (1861), 11 O. B. (N. S.) 449, Ex. Ch.; *Mitchell v. Cantrell* (1887), 37 Ch. D. 56, C. A.; *Wheaton v. Maple & Co.*, *supra*; *Morgan v. Fear*, [1907] A. C. 425.

SECT. 4.
Under the
Doctrine of
Prescrip-
tion.

Basis of
prescription
at common
law.

Length of
time during
which user
must be
proved.

Enjoyment
for twenty
years.

absolute interest may, however, be created by express grant or may arise otherwise by operation of law (e).

SUB-SECT. 2.—Prescription at Common Law.

521. Prescription at common law is based upon a presumed grant which the law assumes to have been made prior to 1189, the first year of the reign of Richard I. By the ancient rule of the common law, enjoyment of an easement has to be proved from time "whereof the memory of man runneth not to the contrary," that is to say, during legal memory or since the commencement of the reign of Richard I. (f).

As it is usually impossible to prove user or enjoyment further back than the memory of living persons, proof of enjoyment as far back as living witnesses can speak raises a presumption of an enjoyment from the remoter era (g). Where evidence is given of the long enjoyment of a right to the exclusion of all other persons, enjoyed as of right as a distinct and separate property in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, which, in the absence of proof that it was modern, is deemed to have arisen beyond legal memory (h).

Unexplained user of an easement or other incorporeal right for a period of twenty years is also held to be presumptive evidence of the existence of the right from time immemorial (i); but the rule is not inflexible, the period of twenty years being only fixed as a convenient guide (k). It is not, however, necessary in the case of a claim by prescription at common law to prove user

(e) *Kilgour v. Gaddes*, [1904] 1 K. B. 457, 466, C. A.

(f) Co. Litt. 114 b; *Chapman v. Smith* (1754), 2 Ves. Sen. 506, *per* Lord HARDWICKE, L.C., at p. 514; *Hulbert v. Dale*, [1909] 2 Ch. 570, 577, C. A. For the different epochs fixed from time to time as the commencement of legal memory, and for the reasons generally assigned for the alterations in the date, see the First Report of the Real Property Commissioners, and *Angus v. Dalton* (1878), 4 Q. B. D. 162, C. A., *per* THESIGER, L.J., at pp. 170, 171, affirmed *Dalton v. Angus* (1881), 6 App. Cas. 740. As to claims by prescription at common law to profits à prendre, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 484 *et seq.*

(g) First Report of the Real Property Commissioners; *Jenkins v. Harvey* (1835), 1 Cr. M. & R. 877, *per* PARKE, B., at p. 894; *Bryant v. Foot* (1868), L. R. 3 Q. B. 497, Ex. Ch., *per* KELLY, C.B., at pp. 505, 506; *Johnson v. Barnes* (1872), L. R. 7 C. P. 592, 604; *Bailey v. Appleyard* (1838), 8 Ad. & El. 161, where LITLEDALE, J., at p. 166, said that if the claim in that case had been made by virtue of immemorial user, twenty-eight years' enjoyment would have been some evidence; *Angus v. Dalton*, *supra*.

(h) *Johnson v. Barnes*, *supra*.

(i) First Report of the Real Property Commissioners; *Bealey v. Shaw* (1805), 6 East, 208, *per* Lord ELLENBOROUGH, C.J., at p. 215; *Cox v. Matthews* (1673), 1 Vent. 237; *Partridge v. Scott* (1838), 3 M. & W. 220, *per* ALDERSON, B., at p. 229.

(k) The period of twenty years appears to have been adopted in analogy to the Statute of Limitations (*Bright v. Walker* (1834), 1 Cr. M. & R. 211, *per* PARKE, B., at p. 217). See *Bealey v. Shaw*, *supra*, where Lord ELLENBOROUGH, C.J., said that less than twenty years' enjoyment might or might not afford a presumption of a grant according as it was attended with circumstances to support or rebut the right. See also *Whitstable Free Fishers v. Gann*

for twenty years next before the action in which the claim is made (l).

522. If it is shown that an act of enjoyment has been often repeated, and must necessarily have been often repeated, with the knowledge of the persons interested in denying the right, a strong presumption is raised in favour of the right so exercised (m).

523. A right claimed by prescription at common law, notwithstanding that there is evidence of user or enjoyment for a great number of years, can be defeated by showing that it did not or could not exist at any one point of time since the commencement of legal memory (n). Thus, even though it be shown to have originated before the commencement of legal memory, it may be defeated by proof that at some subsequent period the servient tenement and the dominant tenement once belonged to the same individual, and that consequently the right was then extinguished, although still treated as continuing (o). Again, a prescriptive claim may be defeated by proof of the existence of some deed of grant or other document, dated since the commencement of legal memory, which originated or was likely to have originated the user (p); but

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THE DOCTRINE OF

Doctrine of Prescription.

Knowledge of servient owner.

Claim defeated by proof of title or existence of actual grant.

(1861), 11 C. B. (N. S.) 387, *per* ERLE, C.J., at pp. 412, 413. The following are instances of the periods of enjoyment which have been held sufficient to establish the right:—*Hill v. Smith* (1809), 10 East, 476 (forty years' enjoyment), reversed on appeal upon other grounds, *Hill v. Smith* (1812) 4 Taunt. 520, Ex. Ch.; *Biddulph v. Ather* (1755), 2 Wils. 23, 25 (ninety-two years' enjoyment); *Whitmores (Edenbridge), Ltd. v. Stanford*, [1909] 1 Ch. 427 (two hundred and fifty years' enjoyment); *Hall v. Lichfield Brewery Co.* (1880), 49 L. J. (CH.) 655 (enjoyment of air for upwards of thirty years).

(l) *Darling v. Clue* (1864), 4 F. & F. 329. Claims by prescription under the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), must be made in respect of user for period next before action, see p. 272, *post*.

(m) *Bartlett v. Downes* (1825), 3 B. & C. 616, *per* ABBOTT, C.J., at p. 621. See, generally, *Sturges v. Bridgman* (1879), 11 Ch. D. 852, 863, C. A.; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Roberts v. James* (1903), 89 L. T. 282, C. A.

(n) First Report of the Real Property Commissioners. Thus, in *Bury v. Pope* (1587), Cro. Eliz. 118, upon its being shown that a house had not existed prior to some forty years previously, a prescriptive claim to a right of light failed. Similarly in *Norfolk (Duke) v. Arbutnot* (1880), 5 Q. P. D. 390, C. A., it was held that no prescriptive right to light at common law could exist in respect of a church which was shown to have been built since 1189. In *Hollins v. Verney* (1884), 13 Q. B. D. 304, 305, C. A., it was conceded that the right claimed could not be established by immemorial prescription at common law, inasmuch as the right could be shown to have originated in modern time. See also *Church v. Tame* (1865), cited in *Mills v. Colchester Corporation* (1867), L. R. 2 C. P. 476, at p. 480, n.; *Bowry and Pope's Case* (1587), 1 Leon. 168, S. C. *Bury v. Pope*, *supra*, cited in *Dalton v. Angus*, *supra*, at p. 822; *Hulbert v. Dale*, [1909] 2 Ch. 570, 577, C. A.

(o) First Report of the Real Property Commissioners. Notwithstanding the dictum of MARTIN, B., in *Winship v. Hudspeth* (1854), 10 Exch. 5, 8, it seems that unity of possession without unity of seisin will not destroy a claim by prescription at common law. Compare *Richardson v. Graham*, [1908] 1 K. B. 39, C. A. As to extinguishment see p. 276, *post*.

(p) *Welcome v. Upton* (1839), 5 M. & W. 398; S. C. (1840) 6 M. & W. 536; and see *R. v. Westmark (Tithing)* (1840), 2 Mood. & B. 305; *Labrador Co. v. R.*, [1893] A. C. 104, P. C.

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Doctrine of
Prescription.

User must be
as of right.

not if the grant can be shown to have been merely in confirmation of a prior prescriptive right (*q*).

524. The user or enjoyment of an alleged right in order to support a prescriptive claim, under the doctrine of prescription at common law, must be shown to have been user "as of right" (*r*), having been enjoyed *nec vi, nec clam, nec precario*, neither as the result of force, secrecy, or evasion, nor as dependent upon the consent of the owner of the servient tenement (*s*). Consent or acquiescence on the part of the servient owner lies at the root of prescription (*t*). He cannot be said to acquiesce in an act enforced by mere violence, or in an act which fear on his part hinders him from preventing (*u*), or in an act of which he has no knowledge actual or constructive (*a*), or which he contests and endeavours to interrupt (*b*), or which he sanctions only for temporary purposes (*c*), or in return for recurrent consideration.

Ignorance of
servient
owner.

Actual ignorance of the exercise or enjoyment of the alleged right will not in every case prevent the enjoyment from being as of right. There are some things which every man ought to be presumed to know (*d*). Very slight circumstances may put the servient owner upon inquiry, and if he neglects to make inquiry it may be that knowledge must be imputed to him (*e*). Where an ordinary owner of land, diligent in the protection of his interests, would have a reasonable opportunity of becoming aware of the enjoyment by another person of a right over his land, he cannot allege that it was secret (*f*). If, however, the enjoyment be fraudulent or surreptitious it cannot support a prescriptive claim (*g*).

Addington v. Clode (1775), 2 Wm. Bl. 988; and compare *Carnarvon v. Villebois* (1844), 13 M. & W. 313, 342.

(*r*) Co. Litt. 113 b. As to the meaning of the expression "as of right," see generally the following cases:—*Bright v. Walker* (1834), 1 Cr. M. & R. 211; *Tickle v. Brown* (1836), 4 Ad. & El. 369, 382, 383; *Sturges v. Bridgman* (1879), 11 Ch. D. 852, C. A.; *Hanna v. Pollock*, [1900] 2 I. R. 664, 671, C. A.; *Burrows v. Lang*, [1901] 2 Ch. 502, 511; *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165, 171; *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, 231.

(*a*) Co. Litt. 113 b; *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585; *Sturges v. Bridgman*, *supra*; *Union Lighterage Co. v. London Graving Dock Co.*, [1901] 2 Ch. 300, 305; affirmed [1902] 2 Ch. 557, C. A.

(*t*) *Sturges v. Bridgman*, *supra*. See p. 258, *ante*.

(*u*) This fear must, however, be of something other than mere legal proceedings.

(*a*) *Dalton v. Angus* (1881), 6 App. Cas. 740, *per* Lord SELBORNE, L.O., at p. 801.

(*b*) *Eaton v. Swansea Waterworks Co.* (1851), 17 Q. B. 267; *Dalton v. Angus*, *supra*, *per* BOWEN, L.J., at p. 786.

(*c*) *Sturges v. Bridgman*, *supra*.

(*d*) *Dalton v. Angus*, *supra*.

(*e*) *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 569.

(*f*) *Union Lighterage Co. v. London Graving Dock Co.*, *supra*, *per* BOWEN, L.J., at p. 571. See also *Partridge v. Scott* (1838), 3 M. & W. 220, where ALDERSON, B., said that apart from the Prescription Act the court would have said that a grant of an easement ought not to be inferred from any lapse of time short of twenty years after the servient owners "might have been or were fully aware of the facts."

(*g*) *Union Lighterage Co. v. London Graving Dock Co.*, *supra*.

525. Enjoyment of an alleged right which has taken place with the licence of the owner of the servient tenement is not enjoyment as of right (*h*). For if a person who claims an easement or other incorporeal right has exercised the right, not in the manner in which a person rightfully entitled to it would have used it, but has even occasionally asked the permission of the servient owner, no title can be acquired under the doctrine of prescription (*i*). There is no such thing as a precarious easement (*k*). If the servient owner can, whether the dominant owner likes it or not, put a stop to the alleged easement, there is no easement at all, because the very idea of right which necessarily underlies an easement is negatived (*l*).

A payment made from time to time may be evidence that the user of the alleged easement was not user "as of right" (*m*), for one of the most common modes of preventing a user growing into a right is to insist upon a small periodical payment by the person enjoying the accommodation (*n*).

526. Where an alleged easement is shown to have been enjoyed by reason of a mistaken view of the rights of the parties entertained by both the dominant and the servient owner, there is no enjoyment as of right upon which a prescriptive claim to the easement can be based (*o*). Where a lessee has exercised a right under the assumption that the lease authorised his doing so, and the lessor has acquiesced under the same assumption, the lessee cannot ground a prescriptive claim to the right upon such enjoyment (*p*).

There is no enjoyment as of right so long as the dominant and servient tenements are in the possession of the same person (*q*).

527. Continuity of user is also essential (*r*), for long intervals between the acts of user, unless satisfactorily explained, go far

SECT. 4.
Under the Doctrine of Prescription.

Permission of servient owner.

Payment for use.

Enjoyment under mistake of rights.

Unity of possession.

Enjoyment must be continuous.

(*h*) *Co. Litt.* 113 b; *Bright v. Walker* (1834), 1 Cr. M. & R. 211, 219; *Tickle v. Brown* (1836), 4 Ad. & El. 369, 382, 383; *Hanna v. Pollock*, [1900] 2 I. R. 644, 671, O. A.; *Burrows v. Lang*, [1901] 2 Ch. 502, 511; *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165, 171; *Plasterers' Co. v. Parish Clerks' Co.* (1857), 6 Exch. 630; *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229.

(*i*) *Bright v. Walker*, *supra*.

(*k*) *Burrows v. Lang*, *supra*, per FARWELL, J., at pp. 510, 511. "What is precarious? That which depends not on right, but on the will of another person."

(*l*) *Burrows v. Lang*, *supra*.

(*m*) *Gardner v. Hodgson's Kingston Brewery Co.*, *supra*, at p. 238; compare *Tickle v. Brown*, *supra*; *Plasterers' Co. v. Parish Clerks' Co.*, *supra*.

(*n*) *Gardner v. Hodgson's Kingston Brewery Co.*, *supra*, per Lord HALSBURY, L.C., at p. 231.

(*o*) *Chamber Colliery Co. v. Hopwood* (1886), 32 Ch. D. 549, O. A. (watercourse made on land held under a lease); *Campbell v. Wilson* (1803), 3 East, 294, per LAWRENCE, J., at pp. 301, 302; *Rivers (Lord) v. Adams* (1878), 3 Ex. D. 361. But see *De La Warr (Earl) v. Miles* (1881), 17 Ch. D. 535, O. A.; *Dawson MacGrogan*, [1903] 1 I. R. 92.

(*p*) *Chamber Colliery Co. v. Hopwood*, *supra*, at p. 557.

(*q*) *Battishill v. Reed* (1856), 18 O. B. 696; *Onley v. Gardiner* (1838), 4 M. & W. 496; *Damper v. Bassett*, [1901] 2 Ch. 350; *Outram v. Maude* (1881), 17 Ch. D. 391, 405; *Harbidge v. Warwick* (1849), 3 Exch. 552.

(*r*) *Ward v. Ward* (1852), 7 Exch. 838; *R. v. Chorley* (1848), 12 Q. B. 515; *Stokoe v. Singers* (1857), 8 E. & B. 31; *Moore v. Rawson* (1824), 3 B. & C. 332.

SECT. 4.
Under the
Doctrine of
Prescrip-
tion.

Continuity
as affecting
easements.

towards defeating the right(s). The period of non-user of an alleged right which will defeat a prescriptive claim has no fixed length. The user need not be constant (t), but where it has not been constant the evidence should show that the cessation of the user was not due to the interference by the owner of the servient tenement.

The degree of continuity required differs according as the easement to be acquired be affirmative or negative. The enjoyment of an accommodation capable of constituting an affirmative easement consists in acts done upon the servient tenement, each of which, since it constitutes a direct interference with the enjoyment of the servient owner, is capable of being resisted by legal proceedings as well as by physical interruption, and gives the servient owner a cause of action which he neglects at his peril. The enjoyment, however, of an accommodation capable of constituting a negative easement does not in general give any cause of action and cannot be interrupted except by acts of obstruction done on the servient tenement (u). Similarly, acts done by the owner of the so-called dominant tenement on his own land cannot amount to enjoyment as of right capable of supporting a prescriptive claim unless and until they amount to actionable wrongs to the owner of the supposed servient tenement (x).

SUB-SECT. 3.—*Prescription under the Doctrine of a lost Modern Grant.*

Origin of
doctrine of
lost grant.

528. The method of claiming easements under the doctrine of a lost modern grant (a) was the outcome of the facility with which

Compare *Dare v. Heathcote* (1856), 25 L. J. (EX.) 245; *Hall v. Swift* (1838), 4 Bing. (N. C.) 381; *Bennison v. Cartwright* (1864), 5 B. & S. 1; *Hollins v. Verney* (1884), 13 Q. B. D. 304, C. A.

(s) *Hollins v. Verney*, *supra*; *Moore v. Rawson* (1824), 3 B. & C. 332; *R. v. Chorley* (1848), 12 Q. B. 515. Compare *Carr v. Foster* (1842), 3 Q. B. 581; *Ward v. Ward* (1852), 7 Exch. 838; *Ducis v. Morgan* (1825), 4 B. & C. 8; *M'Inroy v. Athole (Duke)*, [1891] A. C. 629, a Scotch case.

(t) 1 Bl. Com. 77. Compare *Hamerton v. Honey* (1876), 24 W. R. 603, *per* JESSEL, M.R.

(u) *Sturges v. Bridgman* (1879), 11 Ch. D. 852, 864.

(x) *Ibid.*, *per* THESIGER, L.J., at p. 864, in which case it was held that an alleged easement to make a noise upon the dominant tenement gave no right to an easement because the noise had not been an actionable nuisance for a sufficient period of time.

(a) This mode of prescription has been successfully adopted in the following cases:—*Cowlam v. Slack* (1812), 15 East, 108, where the presumption was made upon fifty years' user; *Rolle v. Whyte* (1868), L. R. 3 Q. B. 286; *Leconfield v. Lonsdale* (1870), L. R. 5 C. P. 657, 726, where a lost modern grant was presumed of a right to maintain a coop in a dam for catching fish, the coop having existed for upwards of a hundred and twenty years; *Bass v. Gregory* (1890), 25 Q. B. D. 481 (a grant of a right to air to a cellar through a defined channel); *Philipps v. Halliday*, [1891] A. C. 228, and *Stilman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749, where a lost grant of a faculty assuring the right to a pew was presumed; *Haigh v. West*, [1893] 2 Q. B. 19, C. A., where a lost grant not requiring enrolment was presumed; *Simpson v. Godmanchester Corporation*, [1897] A. C. 696, where a lost grant was presumed of a right to open sluices in time of flood to avoid damage to the dominant tenement; *Hulbert v. Dale*, [1909] 2 Ch. 570, C. A., where a grant of a right of way was presumed over an awarded but unmade road. As to claims by lost grant to profits à prendre, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 496 *et seq.*

claims under the common law doctrine of prescription were capable of being defeated (b) merely by showing that the right did not or could not exist at any one point of time since the commencement of legal memory (c). By founding a claim on the presumption of a grant at some comparatively modern date this ready method of defence is evaded, since proof of the non-existence of the right prior to the date of the alleged modern grant is *ex hypothesi* immaterial (d). The courts, following their usual rule in favour of the presumption that an alleged right had a legal origin when proof of long enjoyment can be shown, have readily adopted this convenient fiction (e).

SECT. 4.
Under the
Doctrine of
Prescription.

529. The courts first laid down the rule that from the user of a lifetime the presumption arose that a similar user had existed from remote antiquity. As it could not but happen that in many cases such a presumption was impossible, in order to support possession and enjoyment, which the law ought to have invested with the character of rights, recourse was had to the theory of lost modern grants. At first juries were told that from user during living memory, or even during twenty years, they might presume a lost grant. Subsequently they were told that they not only might, but were bound to, presume the existence of such a lost grant (f), and now where there has been long-continued possession in assertion of a right, the right will be presumed to have had a legal origin, if such an origin was possible, and the courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title (g).

Length of
user from
which lost
grant is
presumed.

530. The doctrine of a lost modern grant is in general only used as ancillary to a claim to prescription at common law, and is resorted to in cases where for some reason prescription at common law or under the provisions of the Prescription Act, 1832, cannot be adopted (h).

When
presumption
will be made

There is no need to resort to the presumption of a lost modern grant when the facts of the case, so far as they are known, suggest

(b) First Report of the Real Property Commissioners.

(c) See p. 261, *ante*.

(d) First Report of the Real Property Commissioners.

(e) *Bryant v. Foot* (1867), L. R. 2 Q. B. 161, 181, *Aynsley v. Glover* (1875), 10 Ch. App. 283, 285; *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, 238, 239; *Dalton v. Angus* (1881), 6 App. Cas. 740, 800, 814; *Hulbert v. Dale*, [1909] 2 Ch. 570, C. A. The introduction of the fiction of a lost modern grant would appear to have taken place towards the end of the eighteenth or early in the nineteenth century; see the First Report of the Real Property Commissioners, which speaks of the then recent introduction of the doctrine. The earliest reported decision is *Lewis v. Price* (1761), 2 Wm. Saund. 175 a.

(f) *Bryant v. Foot*, *supra*, per COCKBURN, C.J., at p. 181; *Mounsey v. Ismay* (1865), 3 H. & C. 486, 496; First Report of the Real Property Commissioners.

(g) *Philipps v. Halliday*, [1891] A. C. 228, 231; *Simpson v. Godmanchester Corporation*, [1896] 1 Ch. 214, 218, C. A.; on appeal, [1897] A. C. 695; *A.-G. v. Simpson*, [1901] 2 Ch. 671, per FARWELL, J., at p. 698; on appeal, *Simpson v. A.-G.*, [1904] A. C. 476; *Haigh v. West*, [1893] 2 Q. B. 19, C. A., at pp. 28 *et seq.*; *Hulbert v. Dale*, *supra*.

(h) *Bryant v. Lefever* (1879), 4 O. P. D. 172, 177, C. A.; and see *Mounsey v. Ismay*, *supra*; *Hulbert v. Dale*, *supra*.

SECT. 4.
Under the
Doctrine of
Prescription.

Nature and
evidence of
user.

a much simpler and a more natural explanation (i). The doctrine only applies where the enjoyment cannot be otherwise reasonably accounted for (k).

531. The user must, as in the case of prescription at common law, be "as of right" (l).

The evidence of user necessary to raise the presumption of a lost modern grant depends upon the circumstances of each particular case (m). It is not the duty of a judge to presume that a grant once existed when he is convinced that it never did exist (n). If the grant sought to be presumed be one affecting the rights of a large number of the public, and one of which, if it really ever existed, there might reasonably be supposed to be some public record, and if the period of user be comparatively short, it is more difficult to infer the existence of the grant than where it is sought to presume a grant by some single and clearly competent owner (o).

As a general rule the evidence of user necessary to induce the court to presume a lost modern grant must be stronger than that upon which the court will presume a grant upon immemorial user (p). For where the party opposing the claim shows that the user did not at one time exist, the presumption of a modern grant becomes a more violent inference than the presumption of an ancient grant based upon immemorial user (q). Direct evidence that the grant was never made would appear to be inadmissible to rebut the presumption of a lost modern grant raised by the uninterrupted user (r). The presumption of acquiescence is in the nature of an estoppel by conduct, which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct (s).

(i) *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, per Lord MACNAGHTEN, at p. 235.

(k) *Ibid.*, per Lord LINDLEY, at p. 240; *A.-G. v. Horner* (1884), 14 Q. B. D. 245, 258; and compare *R. v. Hudson* (1732), 2 Stra. 909.

(l) *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585, 602; *Sturges v. Bridgman* (1879), 11 Ch. D. 852, 863; *Union Lighterage Co. v. London Graving Dock Co.*, [1901] 2 Ch. 300, 305, 306, affirmed [1902] 2 Ch. 557, C. A.; *Partridge v. Scott* (1838), 3 M. & W. 220. As to user as of right, see p. 262, *ante*.

(m) See, for instance, *Tilbury v. Silva* (1890), 45 Ch. D. 98, 122, 123, C. A.

(n) *A.-G. v. Simpson*, [1901] 2 Ch. 671, C. A., per FARWELL, J., at p. 698. See S. C. on appeal, *Simpson v. A.-G.*, [1904] A. C. 476.

(o) See *Neaverson v. Peterborough Rural Council*, [1902] 1 Ch. 557, C. A., per COLLINS, M.R., at p. 564.

(p) *Tilbury v. Silva*, *supra*, where BOWEN, L.J., said: "If it was a case of immemorial enjoyment from time out of mind for which we were asked to find a legal origin, I would strain a point to find it; but what we have to deal with is a user of since 1845, and there is nothing to justify us in making such a violent presumption as that there is a lost grant."

(q) *Tilbury v. Silva*, *supra*.

(r) *Angus v. Dalton* (1878), 4 Q. B. D. 162, 172, C. A.; affirmed *Dalton v. Angus* (1881), 6 App. Cas. 740, 765; First Report of the Real Property Commissioners. See, however, *Angus v. Dalton*, *supra*, at p. 201, per BRETT, L.J., and COCKBURN, C.J., in the same case, (1877) 3 Q. B. D. 86, at p. 130, where views are expressed that such evidence is admissible.

(s) *Angus v. Dalton*, *supra*, at pp. 172, 173, per THESIGER, L.J.; see generally, *Norfolk (Duke) v. Arbutnot* (1880), 5 C. P. D., 390, 393, C. A.; *De la Warr*

532. The doctrine of a lost modern grant is not confined to cases of a simple grant by one person to another. It has been applied so as to presume the loss of a charter from the Crown (*t*), the loss of faculties confirming rights (*u*), the loss of a grant ordinarily requiring enrolment, with the further presumption that the grant was exempt from enrolment (*x*), and possibly an award could be presumed (*y*). Even enrolment of a deed, where absolutely necessary, may possibly be presumed (*z*). A surrender of a charter from the Crown may also be presumed under the same doctrine (*a*). Even the waiver of statutory provisions, which unless waived would have prevented the existence of the right claimed, may be presumed, provided the statute be not of a general and public nature (*b*).

SECT. 1.
Under the
Doctrine of
Prescription.

Charter or
enrolment.

533. Although the court readily infers a legal origin for the purpose of supporting ancient user, it will not infer an origin which would involve illegality (*c*). The court will not presume a lost modern grant which, had it ever existed, would have been in contravention of the provisions of a public statute (*d*), or of a custom (*e*).

Illegality or
impossibility

Again, the court will not presume a lost modern grant in cases where there was no person who could ever have made such a grant (*f*), nor in cases where there was no person or persons competent to be recipients of such a grant (*g*).

(*Earl*) *v. Miles* (1881), 17 Ch. D. 535, 591, C. A.; and cases of prescriptive claims to the easement of support, p. 319, *post*.

(*t*) *Goodtitle d. Parker v. Baldwin* (1809), 11 East, 488. See also *A.-G. v. Horner* (1884), 14 Q. B. D. 245, 263.

(*u*) *Philippis v. Halliday*, [1891] A. C. 228; *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

(*x*) *Haigh v. West*, [1893] 2 Q. B. 19, C. A.

(*y*) *East Stonehouse Urban Council v. Willoughby Bros., Ltd.*, [1902] 2 K. B. 318, *per* CHANNELL, J., at p. 332.

(*z*) *Haigh v. West*, *supra*, *per* LINDLEY, L.J., at p. 31; *Wright v. Smythies* (1809), 10 East, 409; *Doe d. Howson v. Waterton* (1819), 3 B. & Ald. 149. But compare *A.-G. v. Moor* (1855), 20 Beav. 119; *Macdougall v. Purrier* (1830), 2 Dow & Cl. 135, H. L.

(*a*) *A.-G. v. Simpson*, [1901] 2 Ch. 671, C. A., *per* STIRLING, L.J., at p. 716. Reversed on other points, *Simpson v. A.-G.*, [1904] A. C. 476.

(*b*) *Goldamid v. Great Eastern Rail. Co.* (1883), 25 Ch. D. 511, C. A.; affirmed (1884), 9 App. Cas. 927.

(*c*) *Neaverson v. Peterborough Rural Council*, [1902] 1 Ch. 557, C. A., *per* COLLINS, M.R., at p. 573; *Rochdale Canal Co. v. Radcliffe* (1852), 18 Q. B. 287. See also *Clayton v. Corby* (1843), 5 Q. B. 415; *Goodman v. Saltash Corporation* (1882), 7 App. Cas. 633, 648.

(*d*) *Neaverson v. Peterborough Rural Council*, *supra*, where the suggested grant would have involved the infringement of an Inclosure Act; *Goodtitle d. Parker v. Baldwin*, *supra*.

(*e*) *Wynstanley v. Lee* (1818), 2 Swan. 332; *Perry v. Eames*, [1891] 1 Ch. 658, 667.

(*f*) *Barker v. Richardson* (1821), 4 B. & Ald. 579, where the court refused to presume a lost modern grant by a rector who had no power to bind his successors by making a grant of a perpetual easement over the glebe land; *Rochdale Canal Co. v. Radcliffe*, *supra*, at p. 315; *Neaverson v. Peterborough Rural Council*, *supra*; *Roberts v. James* (1903), 89 L. T. 282, C. A.; *Daniel v. North* (1809), 11 East, 372; *Staffordshire and Worcestershire Canal Navigation v. Birmingham Canal Navigation* (1866), L. R. 1 H. L. 254; *Wood v. Veal* (1852), 5 B. & Ald. 454.

(*g*) *Tilbury v. Silva* (1890), 45 Ch. D. 98, 118, 122, 123, C. A.; *Neaverson v. Peterborough Rural Council*, *supra*. Compare, however, *Goodman v. Saltash Corporation*, *supra*; and see pp. 344, 345, *post*.

SECT. 4.
Under the
Doctrine of
Prescrip-
tion

The court will not readily presume the loss of a succession of modern grants (*h*); nor will it ever presume a lost modern grant of a right which could not form the subject-matter of an express grant or of a prescriptive claim under the doctrine of prescription at common law (*i*).

Prescribed
grant must
be a fee
simple grant.

534. The grant presumed under the doctrine of a lost modern grant is an absolute one, by some owner of the servient tenement to some owner of the dominant tenement, and it is presumed to have been made in respect of the fee simple in both tenements (*j*). Consequently, no easement can be prescribed for under the doctrine unless it be a perpetual one (*k*), and no title is gained by user which does not give a valid title against all persons interested in the servient tenement (*l*).

Pleading a
lost grant.

535. A person seeking to establish a claim to an easement under this doctrine should plead a lost grant (*m*), but need not state in his pleadings the date of and the names of the parties to the alleged modern grant (*n*).

SUB-SECT. 4.—Prescription under the Prescription Act, 1832.

Object of
Prescription
Act, 1832.

536. The Prescription Act, 1832, was passed, as its preamble declares, for the purpose of getting rid of the inconvenience and injustice arising from the meaning which the law attaches to the expressions "time immemorial," and "time whereof the memory

(*h*) *Tilbury v. Silva* (1890), 45 Ch. D. 98, 122, 123, C. A.

(*i*) *Bryant v. Lefever* (1879), L. R. 4 C. P. 172, 177.

(*j*) *Kilgour v. Gaddes*, [1904] 1 K. B. 457, C. A.; *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, 63, C. A.

(*k*) *Wheaton v. Maple & Co.*, *supra*. The rule in the text that the presumed grant under the doctrine of a lost modern grant must be taken to have been an absolute one has not always been recognised. In *Bright v. Walker* (1834), 1 Cr. M. & R. 211, PARKE, B., at p. 221, said that user by a lessee for lives, though not effectual towards establishing a prescriptive right under the Prescription Act, 1832, would prior to that Act have been evidence to support a plea or claim by reason of a lost grant from a lessee for lives of the servient tenement to a lessee for lives of the dominant tenement, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. LINDLEY, L.J., in *Wheaton v. Maple & Co.*, *supra*, said that he was not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements, or a lost covenant in the case of light; and he said that he was certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right. He also stated that this view was entirely in accordance with *Bright v. Walker*, *supra*.

(*l*) *Bright v. Walker*, *supra*, per PARKE, B., at p. 221.

(*m*) *Smith v. Baister*, [1900] 2 Ch. 138. The court, however, sometimes permits a lost grant to be pleaded by amendment at the trial (*Brown v. Dunstable Corporation*, [1899] 2 Ch. 378, 387; *Gardner v. Hodgson's Kingston Breweries Co.*, [1900] 1 Ch. 592, 601).

(*n*) *Palmer v. Guadagni*, [1906] 2 Ch. 494; *Norfolk (Duke) v. Arbuthnot* (1879), 4 C. P. D. 290, 293; affirmed (1880) 5 C. P. D. 390, C. A. Formerly, great particularity in pleadings being required, the person claiming the grant was obliged to give dates and the names of the supposed grantors (see *Hendy v. Stephenson* (1808), 10 East, 55). But since the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), this particularity has no longer been required, a circumstance which has removed the most obnoxious feature of the fiction.

SECT. 4.
Under the
Doctrine of
Prescription.

of man runneth not to the contrary" (o), and removing the strain supposed to be inflicted upon the consciences of judges and juries by the presumption of lost grants (p). But the statute only applies to prescriptive claims in a *que* estate, that is to say, prescription by a man and his predecessors in title to some tenement (q). As all prescription is founded on a presumed grant (r), and no grant can be made to an undefined and fluctuating body of persons (s), no easement or *quasi*-easement in favour of such bodies can be claimed under the provisions of the Act (t).

537. The Act provides (a) that no claim lawfully made at common law by custom, prescription, or grant to any way (b) or other easement, or to any watercourse or the use of any water to be enjoyed or derived upon, over, or from any land or water of the Crown, or being the property of any ecclesiastical or lay person, when such way or other matter shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which it was liable to be defeated at the time when the Act was passed and where such way or other matter has been so enjoyed as aforesaid for the full period of forty years, the right thereto is deemed absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing (c).

Enjoyment
for twenty
years or
forty years.

This section of the Act applies to easements of every kind (d) except light (e). Thus, a right of support by buildings (f) or land (g),

(o) 2 & 3 Will. 4, c. 71. For the provisions of the Act relating to prescriptive claims to *profits à prendre*, see p. 343, *post*, and title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 488 *et seq.*

(p) *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, *per* Lord MACNAGHTEN, at p. 239.

(q) *Shuttleworth v. Le Fleming* (1865), 19 C. B. (N. S.) 687; *Mounsey v. Ismay* (1865), 3 H. & C. 486; *Mercer v. Denne*, [1904] 2 Ch. 534, 540; affirmed [1905] 2 Ch. 538, C. A.; *Ramsgate Corporation v. Debling* (1906), 22 T. L. R. 369. There are two kinds of prescription, prescription in a man or his ancestors, which is generally referred to as prescription in gross, and prescription in a man and those whose estate he hath, which is generally referred to as prescription in a *que* estate (*Austin v. Amhurst* (1877), 7 Ch. D. 689, 692, *per* FRY, J.). As easements cannot exist as rights in gross (see p. 242, *ante*), prescription in gross is dealt with later only as regards *profits à prendre* (see p. 343, *post*).

(r) *Gardner v. Hodgson's Kingston Brewery Co.*, *supra*, at p. 239; see p. 257, *ante*.

(s) *Rivers (Lord) v. Adams* (1878), 3 Ex. D. 361, 364; and see p. 239, *ante*.

(t) *Mounsey v. Ismay* (1863), 1 H. & C. 729; (1865), 3 H. & C. 486.

(a) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 2.

(b) *A.-G. v. Esher Linoleum Co., Ltd.*, [1901] 2 Ch. 647, 650, where BUCKLEY, J., pointed out that a public way cannot be acquired under the Act.

(c) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 2.

(d) *Simpson v. Godmanchester Corporation*, [1897] A. C. 696, *per* Lord DAVEY, at p. 709; *Dalton v. Angus* (1881), 6 App. Cas. 740, *per* Lord SELBORNE, L.C., at p. 798. See *contra*, *Webb v. Bird* (1861), 10 C. B. (N. S.) 268, *per* ERLE, C.J., at p. 283.

(e) *Perry v. Eames*, [1891] 1 Ch. 658, *per* CHITTY, J., at p. 665; *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, C. A.

(f) *Lemaître v. Davis* (1881), 19 Ch. D. 281.

(g) *Dalton v. Angus*, *supra*.

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Prescription.

a right to pollute water (a), and a right to divert water (b) can all be claimed under the Act.

No presumption is to be made under the Act in favour of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time than the period mentioned in the Act and applicable to the case and to the nature of the claim (c). This means that no presumption or inference in support of the claim shall be derived from the bare fact of user or enjoyment for less than the prescribed number of years; but where there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight as evidence, so as to preclude a jury from taking it, along with other circumstances, into consideration as evidence of a grant (d).

Persons under
disability.

538. The time during which any person otherwise capable of resisting any claim to an easement shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action shall have been pending and which shall have been diligently prosecuted, is excluded from the periods of twenty and forty years except where the claim is declared by the Act to be absolute (e). In other words, the period of disability is excluded from the twenty years period required for acquisition of a *prima facie* right to an easement (other than light under s. 3), but not from any of the other periods.

Reversioners.

But it is provided (f) that where the servient tenement has been held for any term of life or years exceeding three years, the time of enjoyment of the easement during the continuance of such term shall be excluded in the computation of the forty years period, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof (g).

Remainder-
man.

Where, however, the servient tenement has been vested in a tenant for life with remainder in fee simple the time during which the tenancy for life was subsisting cannot be deducted from the forty years period, as the remainderman is not a person entitled to any "reversion expectant on the term" within the meaning of the Act (h).

(a) *Wright v. Williams* (1836), 1 M. & W. 77; *Carlyon v. Lovering* (1857), 1 H. & N. 784, 797.

(b) *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 578.

(c) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 6. See *Curr v. Foster* (1842), 3 Q. B. 581; *Lawson v. Langley* (1836), 4 Ad. & El. 890.

(d) *Hanmer v. Chance* (1865), 4 De G. J. & Sm. 626, per Lord WESTBURY, L.C., at p. 631. For instances of such circumstances, see *Rochdale Canal Co. v. King* (1851), 2 Sim. (N. S.) 88; *Bankart v. Tennant* (1870), L. R. 10 Eq. 141.

(e) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 7. See *Wright v. Williams*, *supra*; *Hale v. Oldroyd* (1845), 14 M. & W. 789; *Onley v. Gardiner* (1838), 4 M. & W. 496; *Roberts v. James* (1903), 89 L. T. 282.

(f) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 8. The word "convenient" occurring in the text of this section appears to be the result of a clerical error (*Laird v. Briggs* (1881), 19 Ch. D. 22, C. A.; *Symons v. Leaker* (1885), 15 Q. B. D. 629).

(g) See *Wright v. Williams*, *supra*; *Onley v. Gardiner*, *supra*; *Laird v. Briggs* (1880), 16 Ch. D. 440; *Bright v. Walker* (1834), 1 Cr. M. & R. 211; *Palk v. Skinner* (1852), 18 Q. B. D. 568.

(h) *Symons v. Leaker*, *supra*.

SECT. 4.
Under the
Doctrine of
Prescrip-
tion.

Enjoyment
must be as of
right.

539. Except in the case of light (*i*), user or enjoyment of the right to an easement when claimed under the provisions of the Act must be user or enjoyment "as of right" (*k*). The words in the Act "claiming right thereto" have the same meaning as the words "as of right" used elsewhere in the Act, and as used in cases of prescription at common law (*l*). Therefore, if an easement or alleged easement is shown to have been enjoyed not openly and in the manner that a person rightfully entitled would have used it, but by stealth, or if the person claiming the right has occasionally asked the permission of the owner of the servient or *quasi*-servient tenement, no title is acquired under the statute, because the enjoyment has not been "as of right" (*n*). User at the will and pleasure of the owner of the servient tenement is not such user as the Act requires (*n*).

540. There is no enjoyment as of right under the statute where during the whole of the period the dominant and servient tenements have been in the possession of one owner, because the acts done by him upon the servient tenement are referable to his possession of that tenement (*o*). Nor is there enjoyment as of right when during part of the period there has been unity of possession (*p*). No easement which can be claimed under s. 2 of the Act can be acquired by a tenant of the *quasi*-dominant tenement against his own landlord or another tenant of the latter (*q*). For the tenant's occupation is in the sight of the law that of his landlord, and when the tenant goes on to the adjoining land of that landlord he cannot be said to do so as claiming a right in respect of the supposed dominant tenement on behalf of the freeholder, the supposed servient tenement being the freeholder's own land (*r*).

User during
unity of
possession.

541. With regard to all easements except the easement of light (*s*), as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow

Nature of
user.

(*i*) For prescriptive claims to the easement of light under the statute, see p. 305, *post*.

(*k*) *Bright v. Walker* (1834), 1 Cr. M. & R. 211; *Tickle v. Brown* (1836), 4 Ad. & El. 369, 382; *Onley v. Gardiner* (1838), 4 M. & W. 496; *Sturges v. Bridgman* (1879), 11 Ch. D. 852, 863, C. A.; *Kilgour v. Gaddes*, [1904] 1 K. B. 457, C. A.; *Timmons v. Hewitt* (1888), 22 L. R. Ir. 627, C. A. See p. 262, *ante*.

(*l*) *Tickle v. Brown*, *supra*, per Lord DENMAN, C.J., at p. 382. The expression "as of right" does not mean rightful apart from the Act (*Gardner v. Hodgson's Kingston Brewery Co.*, [1900] 1 Ch. 592, at p. 596; affirmed [1903] A. C. 229).

(*m*) *Bright v. Walker*, *supra*; *Tickle v. Brown*, *supra*; see also *Onley v. Gardiner*, *supra*, at p. 500.

(*n*) *Gardner v. Hodgson's Kingston Brewery Co.*, *supra*, per Lord HALSBURY L.C., at p. 231; *Onley v. Gardiner*, *supra*; and see *Bunkart v. Tennant* (1870), L. R. 10 Eq. 141.

(*o*) *Bright v. Walker*, *supra*, at p. 219; *Onley v. Gardiner*, *supra*.

(*p*) *Bright v. Walker*, *supra*; *Damper v. Bassett*, [1901] 2 Ch. 350; *Onley v. Gardiner*, *supra*.

(*q*) *Kilgour v. Gaddes*, *supra*.

(*r*) *Gayford v. Moffatt* (1868), 4 Ch. App. 133; *Kilgour v. Gaddes*, *supra*, at p. 467.

(*s*) For prescriptive claims to the easement of light under the statute, see p. 305, *post*.

SECT. 4.
Under the
Doctrine of
Prescrip-
tion.

that no actual user can be sufficient to satisfy the statute, unless during the whole statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted, if such right is not to be recognised, and if resistance to it is intended (t); and no user can be sufficient which does not raise a reasonable inference of continuous enjoyment (u).

The Act has not altered the enjoyment or user by which easements are acquired, and since acquiescence on the part of the servient owner lies at the root of prescription, no man can be presumed to acquiesce in an enjoyment which he cannot prevent. Enjoyment which cannot be physically interrupted and is not actionable is not user as of right under the Act (a).

Relation of
 user to
 action.

542. The periods mentioned in the Act are periods next before some action wherein the claim or matter to which such period relates is brought into question (b). Consequently, although the Act (c) apparently renders the right indefeasible after twenty years' user, the combined operation of these two provisions renders it necessary for a person seeking to establish a prescriptive claim under the statute to prove uninterrupted enjoyment for a period of twenty years immediately previous to and terminating in some action or suit in which the right is called into question (d).

Effect of
 cessation of
 user.

In cases where enjoyment as of right is necessary, a cessation of user which excludes an inference of actual enjoyment as of right for the full statutory period will be fatal at whatsoever portion of the period the cessation occurs; and, on the other hand, a cessation of user which does not exclude such inference is not fatal, even although it occurs at the beginning or the end of the period. The only difference, as regards the stage in the statutory period at which a cessation of the enjoyment occurs is that if the non-user occurs at the end of the period there can be no subsequent user to explain it, and the inference of actual enjoyment for the full period next before action is more difficult to draw than in other cases (e).

(t) *Hollins v. Verney* (1884), 13 Q. B. D. 304, C. A., per LINDLEY, L.J., at p. 315.

(u) *Ibid.*

(a) *Sturges v. Bridgman* (1879), 11 Ch. D. 852; *Bryant v. Lefever* (1879), 4 C. P. D. 172, C. A.; *Winship v. Hudspeth* (1854), 10 Exch. 5; *Sander v. Manley*, [1878] W. N. 181. For the distinction between affirmative and negative easements as regards interruption of adverse enjoyment, see p. 240, *ante*.

(b) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 4.

(c) *Ibid.*, s. 2.

(d) *Hyman v. Van den Bergh*, [1908] 1 Ch. 167, C. A.; *Parker v. Mitchell* (1840), 11 Ad. & El. 788; *Wright v. Williams* (1836), 1 M. & W. 77; *Richards v. Fry* (1838), 7 Ad. & El. 698; *Ward v. Robins* (1846), 15 M. & W. 237, 242. The period is not necessarily the period before the pending action; it may be the period before any action in which the right was brought into question (*Cooper v. Hubbard* (1862), 12 C. B. (N. S.) 456).

(e) *Hollins v. Verney*, *supra*, per LINDLEY, L.J., at p. 314. Thus in *Parker v. Mitchell*, *supra*, and *Lowe v. Carpenter* (1851), 6 Exch. 825, unexplained non-user at the end of the period was fatal to the prescriptive claim.

SECT. 4.
Under the
Doctrine of
Prescrip-
tion.

Interruption.

543. No act or other matter is deemed to be an interruption within the meaning of the Act, unless submitted to or acquiesced in for one year after the party interrupted has notice of the interruption, and of the person making it or authorising it to be made (*f*).

An interruption for one year after the party interrupted has notice of the interruption is fatal to a prescriptive claim under the Act; but an interruption for less than a year is not, whether it occurs at the commencement or end, or at any part of the statutory period (*g*), and, consequently, where an easement has been enjoyed without interruption for more than nineteen years a title will be acquired to the easement under the Act, provided that an action claiming the right is commenced within a year after notice of the interruption (*h*). The effect, however, of an interruption which does not amount to a statutory interruption may be to qualify the nature of the easement claimed (*i*).

It seems that the mere physical existence of an obstruction is not sufficient notice of interruption within the Prescription Act, 1832 (*j*), because it is not notice of the person making the same (*k*). A promise given within the year to remove an obstruction may prevent the interruption of the easement (*l*). Acquiescence in an interruption is a question of fact (*m*), but in order to disprove acquiescence it is not necessary to take proceedings or remove the obstruction (*n*).

Physical
obstruction.

Until the full expiration of twenty years the inchoate right is not an interest in land nor an easement known to the law (*o*); nor until that period has expired will the court interfere to protect it (*p*).

Enjoyment
for less than
statutory
period.

544. A mere discontinuance of the exercise of the alleged right at the will of the owner of the dominant tenement is not necessarily an interruption which will defeat a prescriptive claim under the Act (*q*). There must be an adverse act indicating that the right is disputed (*r*), and an actual discontinuance of the enjoyment by reason of an obstruction which is submitted to or acquiesced in for a year (*s*). A discontinuance of the enjoyment due to natural causes and not to any act of the parties does not amount to an interruption (*t*).

Discontin-
ance.

(*f*) 2 & 3 Will. 4, c. 71, s. 4.

(*g*) *Flight v. Thomas* (1840), 8 Cl. & Fin. 231, H. L.; *Hollins v. Verney* (1884), 13 Q. B. D. 304, C. A.

(*h*) *Flight v. Thomas*, *supra*.

(*i*) *Rolle v. Whyte* (1868), L. R. 3 Q. B. 286, 302.

(*j*) 2 & 3 Will. 4, c. 71, s. 4.

(*k*) *Seddon v. Bank of Bolton* (1882), 19 Ch. D. 462.

(*l*) *Gale v. Abbot* (1882), 10 W. R. 748.

(*m*) *Bennison v. Cartwright* (1864), 5 B. & S. 1.

(*n*) *Glover v. Coleman* (1874), L. R. 10 C. P. 108.

(*o*) *Greenhalgh v. Brindley*, [1901] 2 Ch. 324, 328.

(*p*) *Battersea (Lord) v. City of London Sewers Commissioners*, [1895] 2 Ch. 708.

(*q*) *Carr v. Foster* (1842), 3 Q. B. 581; and see *Dare v. Heathcote* (1856), 25 L. J. (EX.) 245.

(*r*) *Smith v. Baxter*, [1900] 2 Ch. 138.

(*s*) *Plasterers' Co. v. Parish Clerks' Co.* (1851), 6 Exch. 630, *per* Lord CAMPBELL, U.J., at p. 635 (a case of a claim to light under s. 3 of the Act, where enjoyment as of right is immaterial).

(*t*) *Hall v. Swift* (1838), 4 Bing. (N. C.) 381.

Part III.—Transfer of Easements.

SECT. 1.

In General.

How easements transferred.

545. An easement may be transferred by disposition *inter vivos* or by will. There is a wide distinction between the transfer of an easement actually subsisting prior to the transfer of land, and the creation of an easement by the transfer or other disposition of land (a). This distinction is not always apparent, because, for one reason, an easement cannot be transferred apart from the dominant tenement (b), and for a further reason many easements which arise upon the transfer or other disposition of the dominant tenement have prior to the transfer of that tenement existed in the form of accommodations.

SECT. 1.—In General.

Under Conveyancing Act, 1881.

546. An easement existing appurtenant to the dominant tenement passes with that tenement without the necessity of express mention of the easement or the use of general words (c). Notwithstanding this fact, however, it has always been the practice of conveyancers to insert in conveyances of land such words as "with the appurtenances," and, until recently, a long list of words intended to define amongst other things all easements appurtenant to the land (d). In order to shorten the length of conveyances of land (e) it is now provided by statute (f) that as regards conveyances made since the 31st day of December, 1881, a conveyance of land (g), or of land with buildings upon it (h), or of a manor (i), shall be deemed to include and shall operate to convey amongst other things all easements appurtenant to the subject-matter of the conveyance. But the foregoing statutory provisions only apply if and in so far as a contrary intention is not expressed in the conveyance, and they are subject to the terms and provisions of that instrument (k). Their object is to show what general words

(a) For easements created upon the disposition of land where no accommodation of which the easements consist existed prior to the disposition, see p. 256, *ante*. For easements created upon the disposition of land where such accommodation did previously exist, see pp. 251, 253, *ante*.

(b) See *Rangeley v. Midland Rail. Co.* (1868), 3 Ch. App. 306, 311; *Hawkins v. Rutter*, [1892] 1 Q. B. 668, 671; *Ackroyd v. Smith* (1850), 10 C. B. 164, 188.

(c) Co. Litt. 121, b; Shep. Touch. 89.

(d) See Davidson's *Precedents and Forms of Conveyancing*, 1877, Vol. II., Pt. 1, p. 231.

(e) *Re Peck and London School Board's Contract*, [1893] 2 Ch. 315, 318.

(f) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6.

(g) *Ibid.*, s. 6 (1). For the definition of land, see s. 2 (ii.) of the Act.

(h) *Ibid.*, s. 6 (2). See title REAL PROPERTY AND CHATTELS REAL.

(i) *Ibid.*, s. 6 (3).

(k) *Ibid.*, s. 6 (4). As to what amounts to a contrary intention, see *Birmingham, Dudley and District Banking Co. v. Ross* (1888), 38 Ch. D. 295, O. A.; *Beddington v. Atles* (1887), 35 Ch. D. 317; *Broomfield v. Williams*, [1897] 1 Ch. 602, O. A.; *Pollard v. Gare*, [1901] 1 Ch. 834; *Re Peck and London School Board's Contract*, *supra*. See also *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165. Compare *Bolton v. Bolton* (1879), 11 Ch. D. 968; *Bayley v. Great Western Rail. Co.* (1884), 26 Ch. D. 434, 457, O. A.; *Barkshire v. Grubb* (1881), 18 Ch. D. 616.

SECT. 1.
In General

are to be taken as included in a conveyance of land where the conveyance is otherwise silent (a). They do not affect the contract, so that neither party to the contract is entitled to have these general words included in the conveyance, unless they are justified by the contract and appropriate to the circumstances of the case (b).

Easements appurtenant to the dominant tenement pass upon the conveyance of that tenement by a mortgagee exercising his statutory powers of sale (c). Sale by mortgagee.

SECT. 2.—Stamps.

547. Every instrument whereby any property or any estate or interest in any property upon sale thereof is transferred or vested in a purchaser is liable as a conveyance on sale for the duties specified in the First Schedule to the Stamp Act, 1891 (d). This would appear to apply to a deed creating and passing an easement to a purchaser (e); for, among other reasons, the Act is not confined to rights only in existence prior to the conveyance or transfer (f). Any contract or agreement made in England under seal or under hand only for the sale of any equitable estate or interest in any property whatsoever is chargeable as if there were an actual conveyance on sale of the estate, interest, or property contracted to be sold (g). The word "property" is not defined by the Act, but it has been held in relation to the foregoing that it is of wide import in so much as the express exceptions are so numerous (h). Sales.

Although there is no express mention of leases of easements in the Act, it would seem clear that the provisions contained in the Act with regard to leases and agreements for leases are applicable to instruments letting or purporting to let easements (i). Leases.

(a) *Re Peck and London School Board's Contract*, [1893] 2 Ch. 315.

(b) *Ibid.*, per CHITTY, J., at p. 318; *Re Hughes and Ashley's Contract*, [1900] 2 Ch. 595, 603, C. A.

(c) See *Born v. Turner*, [1900] 2 Ch. 211, per BYRNE, J., at p. 215, a case of the creation of an easement by the conveyance of a mortgagee.

(d) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54. See also s. 62, under which a deed creating an easement, not being an instrument executed on the occasion of a sale or mortgage, would appear to be chargeable with duty as a conveyance of property.

(e) Compare *River Thames Conservators v. Inland Revenue Commissioners* (1886), 18 Q. B. D. 279, which decided that a written licence to construct a jetty was not within the Act, and *Great Northern Railway v. Inland Revenue Commissioners*, [1901] 1 K. B. 416, C. A., where an instrument under seal acknowledging the receipt of money paid by mineral owners to a railway company, the effect of which was to debar the mineral owners from working their mines as they would have otherwise been entitled to do as an incident of their ownership of the property, was held not to be a "conveyance on sale," and therefore not chargeable duty under the Act.

(f) See e.g., Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 60.

(g) *Ibid.*, s. 59 (1).

(h) *Danubian Sugar Factories v. Inland Revenue Commissioners*, [1901] 1 K. B. 245, 257, C. A.

(i) See Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 75, 76, 77, 78. See also the schedule to the Act, "Lease or Tack"; and see generally *British Electric Traction Co. v. Inland Revenue Commissioners*, [1902] 1 K. B. 441, C. A., where a lease of the right of using tramways to a company by a municipal corporation was held chargeable with duty under the Act.

Part IV.—Extinguishment of Easements.

SECT. 1.

In General.

Extinguish-
ment of
easements.

SECT. 1.—*In General.*

548. An easement may be extinguished by release, express or implied, by unity of seisin, by destruction of either tenement, or by statute. There is a distinction in this respect between easements the title to which has been perfected by the existence of an actual grant or by the decision of a court of competent jurisdiction establishing the validity of a prescriptive claim and easements the title to which remains imperfect but a right to which is capable of establishment under the doctrine of prescription (*k*). The term "extinguishment" is often applied indiscriminately to both classes of easements, but in strictness it is applicable only to easements the title to which has been perfected, and the term, when applied to the class of inchoate easements, means rather the destruction of an expectant or contingent right than the abolition of any tangible interest.

SECT. 2.—*By Release.*

Extinguish-
ment by
release.

549. Extinguishment by release may be effected either by express release (*l*) or by circumstances occurring from which a release must be presumed (*m*). In all cases of release the competency of the releasing party is of the utmost importance, and in some cases the competency of the released party requires consideration.

Release by
absolute
owner.

As a general rule a release, whether express or implied, must be made by a party whose estate or interest in the dominant tenement is, as regards duration, either greater than or at least co-extensive with the period for which the easement exists (*n*). Where the estate or interest of the releasor in the dominant tenement is not so extensive in point of duration as the period for which the easement exists, the release will not bind persons entitled to the dominant tenement in remainder or reversion (*o*), and on the

(*k*) See *Smith v. Baxter*, [1900] 2 Ch. 138, where STIRLING, J., points out the importance of this distinction. The title to easements is popularly regarded as complete upon the effluxion of the periods mentioned in the Prescription Act, 1832 (2 & 3 Will. 4, c. 71). This, however, is not an accurate view; the title under the Act is not complete until called in question in some suit or action.

(*l*) *Lovell v. Smith* (1857), 3 C. B. (N. S.) 120; *Davis v. Morgan* (1825), 4 B. & C. 8.

(*m*) *Davies v. Marshall* (1861), 10 C. B. (N. S.) 697; *Salaman v. Glover* (1875), L. R. 20 Eq. 444; *Doe v. Hilder* (1819), 2 B. & Ald. 782, 791; *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478; *Moore v. Rawson* (1824), 3 B. & C. 332; *Liggins v. Inge* (1831), 7 Bing. 682, 693; *Stokoe v. Singers* (1857), 8 E. & B. 31; *Hule v. Oldroyd* (1845), 14 M. & W. 789; *Lawrence v. Obee* (1814), 3 Camp. 514; compare *Winter v. Brockwell* (1807), 8 East, 308.

(*n*) The relevance of the quantum of the releasor's estate in the dominant tenement in questions concerning release is only due to the fact that his estate or interest in that tenement, in order to allow him to effect a valid release of the easement, must exceed the period for which the easement is created.

(*o*) *Davis v. Morgan*, *supra* (a purported release by a person entitled only to a particular estate in the dominant tenement of an immemorial right to water which *ex hypothesi* was a perpetual right).

termination of the particular estate of the releasor, the easement will revive (*a*). It follows, therefore, that in all cases where a release is relied on as a defence to a claim by prescription to an easement all parties whose estates or interests together make up the fee simple in the dominant tenement must be shown to have concurred in the release, inasmuch as the grant presumed under the doctrine of prescription can only be an absolute one (*b*).

An exception occurs in the case of a person having the statutory powers of a tenant for life; for although the Settled Land Acts, 1882 to 1890 (*c*), do not apparently create any express power to release easements, a person having the statutory powers may indirectly effect a release of an easement by selling it to the owner of the servient tenement (*d*).

550. Where the title to an easement has been perfected, an extinguishment by release can rarely be effected in any other manner than by an express release or by circumstances so cogent as to preclude the *quasi*-releasor from denying the release (*e*). Where, however, an easement is claimed by prescription or is based upon the fact of immemorial user, extinguishment or non-completion of the prescriptive claim may readily be presumed from facts pointing to an implied release (*f*).

551. An express release of an easement in order to be effective at common law must be made by deed (*g*). But where the strict legal formalities for the release of an easement have not been observed, no person will be allowed to rely upon this non-observance, if the circumstances would render such a defence inequitable (*h*). Thus, if on the faith of an agreement to release an easement the owner of the servient tenement has been allowed to lay out money, and generally to alter his position in the belief that the destruction or extinction of the easement has been effectually agreed to, the owner of the dominant tenement cannot afterwards enforce his rights under the easement on the ground that the agreement was not under seal (*i*). Similarly, a verbal

SECT. 2.
By Release.

Release by
tenant for
life.

Express and
implied
releases.

How express
release
effected.

(*a*) *Davis v. Morgan* (1825), 4 B. & C. 8.

(*b*) See p. 259, *ante*.

(*c*) 45 & 46 Vict. c. 38; 47 & 48 Vict. c. 18; 50 & 51 Vict. c. 30; 52 & 53 Vict. c. 36; 53 & 54 Vict. c. 69.

(*d*) *Re Brotherton's Estate* (1908), 77 L. J. (CH.) 58, 373, C. A.

(*e*) *Harvie v. Rogers* (1828), 3 Bli. (N. s.) 441, H. L.

(*f*) See Co. Litt. 264 b; *Hillary v. Waller* (1806), 12 Ves. 239, 265; *Lovell v. Smith* (1857), 3 C. B. (N. s.) 120.

(*g*) *Lovell v. Smith*, *supra*, per WILLES, J., at p. 127. See also Co. Litt. 264 b; compare, however, *Norbury v. Meade* (1821), 3 Bli. 211, H. L., per Lord REDESDALE, at pp. 241, 242.

(*h*) *Waterlow v. Bacon* (1866), L. R. 2 Eq. 514, where a person who had verbally agreed to allow alterations involving the obstruction of light to his skylights was restrained from claiming damages for the obstruction; *Fisher v. Moon* (1865), 11 L. T. 623, where a purchaser of a cottage was restrained from prosecuting an action against the owner of the servient tenement, who had upon a verbal agreement with the former owner of the dominant tenement interfered with the windows of that tenement; *Davies v. Marshall* (1861), 10 C. B. (N. s.) 697.

(*i*) *Davies v. Marshall*, *supra*, at p. 710; *Salaman v. Glover* (1875) L. R. 20 Eq. 444; *Johnson v. Wyatt* (1863), 9 Jur. (N. s.) 1333, C. A., where a delay

SECT. 2. licence to do some act whereby the easement is destroyed or substantially altered cannot be countermanded by the person who gave it after it has been acted upon (j).

By Release.

An express release by deed is, of course, far more satisfactory for the owner of the servient tenement, and is construed with greater strictness against the releasor than any implied release or release by law (k).

When release implied.

The extinguishment of an easement by implied release must be based upon the presumed intention of the dominant owner (l). It is a question of fact whether an act amounts to an abandonment or was intended as such (m). The intention to release an easement will be less readily presumed where the title to the easement has been perfected than where the title still remains inchoate (n), and it will be less readily presumed from non-user in the case of negative easements which are acquired by mere occupancy than in the case of positive easements acquired by actual physical user (o).

Mere non-user does not destroy easement.

552. In no case, whether the title to an easement has been perfected or not, or whether the easement is negative or positive, will mere non-user of a right alone cause extinguishment; for the suspension of the exercise of a right is not sufficient to prove an intention to abandon it (p). There must be other circumstances in the case to raise a presumption of the intention to abandon (q).

The duration of the period of non-user is only material as one element from which the dominant owner's intention to retain or abandon his easement may be inferred; and what period may be sufficient in any particular case must depend on the strength of the other indications of intention and all other accompanying circumstances (r). If, however, the period of

of five weeks after knowledge of an intention to build so as to obstruct light was held under the particular circumstances not such acquiescence as to disentitle the plaintiff to relief; *Liggins v. Inge* (1831), 7 Bing. 682.

(j) *Liggins v. Inge*, *supra*, per TINDAL, C.J., at p. 694; *Winter v. Brockwell* (1807), 8 East, 308.

(k) Co. Lit. 264 b.: "A release in law shall be expounded more favourable, according to the intent and meaning of the parties, than a release in deed, which is the act of party, and shall be taken most strongly against himself."

(l) *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478, 482; *Moore v. Rawson* (1824), 3 B. & C. 332, 338. In the case of light the intention must be clearly established (*Greenwood v. Hornsey* (1886), 33 Ch. D. 471).

(m) *Cook v. Bath Corporation* (1868), L. R. 6 Eq. 177, 179; and see *Midland Rail. Co. v. Gribble*, [1895] 2 Ch. 827, C. A.; *Drewett v. Sheard* (1836), 7 C. & P. 465.

(n) *Smith v. Baxter*, [1900] 2 Ch. 138, 146. Compare *Cooper v. Straker* (1888), 40 Ch. D. 21.

(o) *Moore v. Rawson*, *supra*, per LITTLEDALE, J., at pp. 339, 340.

(p) *Crossley & Sons, Ltd. v. Lightowler*, *supra*, per Lord CHELMSFORD, L.C., at p. 482; *Ward v. Ward* (1852), 7 Exch. 838, 839; *Cooke v. Ingram* (1893), 68 L. T. 671.

(q) *Ward v. Ward*, *supra*.

(r) *R. v. Chorley* (1848), 12 Q. B. 515, 519; *Millington v. Griffiths* (1874), 30 L. T. 65; *Mulville v. Fallon* (1872), 6 I. R. Eq. 458; *Cook v. Bath Corporation*, *supra*; *Lovell v. Smith* (1857), 3 C. B. (N. S.) 120; *Norbury v. Mansel* (1864), 3 Bli. 211, H. L.; *Crossley & Sons, Ltd. v. Lightowler*, *supra*; *Cooke v. Ingram*, *supra*; *James v. Stevenson*, [1893] A. C. 162, P. C.; *Young v.*

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suspension of user is of very long duration, it appears that the suspension alone may raise a *prima facie* presumption of abandonment to the extent of throwing upon the person seeking to uphold the right the burden of showing that some indication of his intention to preserve the right was manifested during the period of suspension (s). The doctrine rests to some extent upon the analogy of the doctrine which presumes a grant from long user. For if it is reasonable that twenty years adverse enjoyment should raise a presumption in law of a grant made before the user commenced, it cannot be unreasonable, where a party who has acquired the right ceases for a similar time to make use of the privilege so granted him, to presume that his inaction was caused by an express release which cannot now be proved (t). As a consequence of this analogy the period of twenty years has been adopted by a sort of rough working rule as the period which will raise a *prima facie* case against the claimant of the easement, for as he can only acquire the right by twenty years enjoyment, the right ought not to be lost without disuse for the same period, and as enjoyment for such a length of time is necessary to found a presumption of a grant, a similar period of non-user should be generally necessary to raise a presumption of a release (a). Since long enjoyment of an easement over the land of another, which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such a right by the owner of the land, so, also, if such right appears to have existed in ancient times, a long forbearance to exercise it may most reasonably be accounted for by supposing a release of that right (b). In the first class of cases a grant of the right, and in the second class a release of it, is presumed (c). There is, however, no hard and fast rule that twenty years non-user raises even a *prima facie* presumption of a release (d).

The cesser in the exercise of the right may moreover be explained in such a manner that the non-user will not affect the question of abandonment in the least (e), if, that is, it can be shown

Non-user may be explained by circumstances.

Star Omnibus Co., Ltd. (1902), 86 L. T. 41; compare also *Hall v. Swift* (1838), 4 Bing. (N. C.) 381.

(s) *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478, per Lord CHELMSFORD, L.C., at p. 482.

(t) *Moore v. Rawson* (1824), 3 B. & C. 332, per LITLEDALE, J., at p. 339; *Lovell v. Smith* (1857), 3 C. B. (N. S.) 120; *Doe v. Hilder* (1819), 2 B. & Ald. 782, 791.

(a) *Moore v. Rawson*, *supra*; see also *R. v. Chorley* (1848), 12 Q. B. 515.

(b) *Lovell v. Smith*, *supra*, per WILLES, J., at p. 127; *Moore v. Rawson*, *supra*.

(c) *Lovell v. Smith*, *supra*.

(d) *R. v. Chorley*, *supra*, where the court said that it would be wrong to lay down as a rule of law, or even as a conclusive presumption of fact, that no interruption for a shorter period than twenty years would destroy the right, but suggested that if a mere ceasing to use the easement or a mere acquiescence in the interruption was relied on, it would not be prudent for the jury to rely on such mere ceasing or acquiescence unless shown for twenty years.

(e) *Ward v. Ward* (1852), 7 Exch. 838, where a right of way had not been used because there was another more convenient way during the period of cesser.

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Alterations
of dominant
tenement.

553. An intention to abandon an easement may be inferred from alterations made to the dominant tenement which render the continued user of the easement impossible or unnecessary. Thus, if the easement be attached to the particular user of a building and the owner pulls down or destroys the building with the intention of relinquishing the easement, he cannot afterwards change his mind and claim the easement (*g*). If it can be inferred from his acts that he has abandoned his right to the benefit of the easement, the easement may be extinguished, even though the non-user be for a much less period than twenty years (*h*).

Where
burden of
easement
increased.

So an intention to abandon an easement may be inferred from alterations made in the dominant tenement or in the mode of using the easement whereby the burden of the easement is materially increased (*i*). Where the alteration is substantial, an intention to abandon the easement will be more readily presumed than where the alteration is slight (*k*), but there is no precise test of what amount of alteration will cause an extinguishment (*l*). It is a question of great difficulty upon alterations being made to the dominant tenement whereby the burden of the servitude is increased whether the dominant owner has lost the whole easement or can merely be restrained from making the excessive user (*m*).

Where
burden of
easement not
increased.

If, however, the alteration in the dominant tenement or in the mode of using an easement is not of such a nature that the burden

(*f*) *Ward v. Ward* (1852), 7 Exch. 838; *James v. Stevenson*, [1893] A. C. 162, 168, P. C. (non-user of a way coupled with the use of the land by the servient owner for agricultural purposes for many years when the way was not required held not sufficient evidence of abandonment); *Payne v. Shelden* (1834), 1 Mood. & R. 382; *Lovell v. Smith* (1857), 3 C. B. (N. S.) 120.

(*g*) *Liggins v. Inge* (1831), 7 Bing. 682, per TINDAL, C.J., at p. 693: "Suppose a person who formerly had a mill on a stream should pull it down and remove the works with the intention never to return. Could it be held that the owner of the other land adjoining the stream might not erect a mill and employ the water so relinquished?" *Ankerson v. Connelly*, [1906] 2 Ch. 544; affirmed on the facts, [1907] 1 Ch. 678, O. A. (a case of light); *Lawrence v. Obee* (1814), 3 Camp. 514; *Moore v. Rawson* (1824), 3 B. & C. 332; compare *Ecclesiastical Commissioners for England v. Kino* (1880), 14 Ch. D. 213, O. A.

(*h*) *Moore v. Rawson*, *supra*, per LITTLEDALE, J., at p. 341. See also *Young v. Star Omnibus Co., Ltd.* (1902), 86 L. T. 41.

(*i*) *Ankerson v. Connelly*, *supra*, where a window of a shed open in front to the plaintiff's yard overlooked defendant's land and the plaintiff roofed in the whole of his yard and thus made the window the only means of access of light to the shed. See also *Scott v. Pape* (1886), 31 Ch. D. 554, O. A., at p. 566. Compare *Harris v. Flower & Sons* (1904) 74 L. J. (CH.) 127, O. A., where the excessive user of a right of way was held not to have extinguished the easement by abandonment; *Hall v. Swift* (1838), 4 Bing. (N. C.) 381 (a case of the natural right to water); *Saunders v. Newman* (1818), 1 B. & Ald. 258; *Smith v. Baxter*, [1900] 2 Ch. 138 (light).

(*k*) *Garritt v. Sharp* (1835), 3 Ad. & El. 325, per Lord DENMAN, C.J., at p. 330: "A party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether"; and compare *Cotterell v. Griffiths* (1801), 4 Esp. 69; *Allan v. Gomme* (1840), 11 Ad. & El. 759, 772.

(*l*) *East India Co. v. Vincent* (1740), 2 Atk. 83, per Lord HARDWICKE.

(*m*) See *Scott v. Pape*, *supra*; *Tapling v. Jones* (1865), 11 H. L. Cas. 290.

of the easement is substantially changed, or the burden on the servient tenement materially increased, the easement is not destroyed in consequence of the alteration (*n*), and there appears to be no difference between the amount of alteration which will involve the loss of the right when acquired and the amount of alteration which will prevent the acquisition of the right (*o*).

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SECT. 3.—By Unity of Seisin.

554. Easements are often said to be extinguished by merger (*p*). It would be more correct, however, to say that they are extinguished by unity of seisin (*q*), for the term “merger” is not properly applicable to easements, as it applies in strictness only to the annihilation by act of law of vested estates (*r*). Easements are not estates, although the law has attributed certain characteristics to easements on the analogy of estates in realty (*s*). The term “extinguishment” is more appropriate, since it more especially denotes the annihilation of a collateral right or interest in the estate out of which it is derived (*t*). Extinguishment by unity of seisin of easements, whether created originally in perpetuity or for a limited period (*u*), takes place upon the dominant and servient tenements becoming united in the common ownership of the same person. When one person becomes seised of both tenements all easements over the servient tenement are thereupon extinguished (*x*). This occurs for the most part only in cases where the common owner is seised in fee simple of both tenements (*a*).

Unity of
seisin
extinguishes
easement.

(*n*) *Barnes v. Loach* (1879), 4 Q. B. D. 494, 498 (easement of light not destroyed by setting back the walls and opening new windows of the same size in the new walls); *Andrews v. Waite*, [1907] 2 Ch. 500; following *Scott v. Pape* (1886), 31 Ch. D. 554, C. A.; *Hale v. Oldroyd* (1845), 14 M. & W. 789; *Harrois v. Flower & Sons* (1904), 74 L. J. (CH.) 127.

(*o*) *Andrews v. Waite*, *supra*, per NEVILLE, J., at p. 509.

(*p*) See *Thomson v. Waterlow* (1868), L. R. 6 Eq. 36, per Lord ROMILLY, M.R., at p. 41.

(*q*) *Whalley v. Thompson* (1799), 1 Bos. & P. 371; *Buckby v. Coles* (1814), 5 Taunt. 311, the marginal note to which case does not agree with the case as reported; see 15 R. R. 508, n.

(*r*) 6 Cru. Dig. tit. 39, s. 1 (1).

(*s*) See p. 238, *ante*.

(*t*) 6 Cru. Dig. tit. 39, s. 1 (4).

(*u*) *Dynevor (Lord) v. Tennant* (1886), 32 Ch. D. 375.

(*x*) Co. Litt. 313 a; *Buckby v. Coles* (1814), 5 Taunt. 311; *Heigate v. Williams* (1607), Noy, 119; *James v. Plant* (1836), 4 Ad. & El. 749, 761, Ex. Ch. Compare *R. v. Hermitage (Inhabitants)* (1692), Carth. 239; *Ecclesiastical Commissioners for England v. Kino* (1880), 14 Ch. D. 213, C. A.; *Beddington v. Atlee* (1887), 35 Ch. D. 317; *Richardson v. Graham*, [1908] 1 K. B. 39, C. A.

(*a*) See Co. Litt. 313 a, 313 b. The true view is probably that extinguishment by unity of seisin is only effected where the seisin is for an estate in fee simple, although there is no express authority upon the point. Compare *James v. Plant*, *supra*, where it is said, at p. 761, “We all agree that where there is a unity of seisin of the land and of the way over the land in one and the same person, the right of way is either extinguished or suspended according to the duration of the respective estates in the land and in the way.” See also *Simper v. Foley* (1862), 2 John. & H. 555, per PAGE WOOD, V.-C., at p. 563, and *Richardson v. Graham*, [1908] 1 K. B. 39, C. A., where BUCKLEY, L.J., at p. 46, said that he could not see how the case of *Simper v. Foley*

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The doctrine of extinguishment of easements by unity of seisin, like the doctrine of implied release and abandonment, is based upon the intention of the dominant owner; but it has acquired its individuality by reason of the comparative certainty of an extinguishment being effected by implied release when both tenements come into the absolute ownership of one man. In such a case no difficulties arise as to the rights of remaindermen or reversioners of either tenement, nor is any easement of such a perpetual and binding nature that it cannot be disposed of by the owner of the fee simple (*b*).

Enjoyment
after unity
of seisin
referable to
ownership.

555. When the servient tenement has come into the ownership of the dominant owner all acts which he may do upon the former tenement are referable to his ownership of that tenement and not to the former right which he had as an easement (*c*). If it is alleged that a man and his ancestors have been in possession of two adjoining closes, and a prescriptive claim be set up for an easement over one of them, the prescription is self-destructive; and if the closes were let to different tenants, and from time immemorial a causeway has been built over one to the other, by which the tenants have passed and repassed, although the causeway be a road in fact, there can be no right of way in point of law, for no right can exist in the owner independent of the fee simple (*d*).

Ownership
of both
tenements for
different
estates.

556. The effect of a union of the ownership of the dominant and servient tenement for different estates is not to extinguish the easement, but merely to suspend it so long as the union of ownership continues; and upon severance of the ownership the easement revives (*e*).

Unity of
seisin without
unity of
possession.

557. Unity of seisin of the dominant and servient tenements unaccompanied by unity of possession and enjoyment does not effect an extinguishment of an easement of light as against the tenant in possession of the dominant tenement (*f*). Thus, if the dominant tenement be in possession of a lessee the acquisition by the servient owner of the freehold reversion to the dominant tenement will not extinguish an easement of light during the continuance of the lease (*g*). This rule is founded partly on the peculiar nature of prescription in the case of light which need not be founded on user as of right, but it is not clear whether unity of seisin may destroy other easements without unity of possession and

(1862), 2 John. & H. 555, was an authority for saying that where the unity of ownership is for the same estate there is an extinction of the easement.

(*b*) See note (*a*) on p. 281, *ante*.

(*c*) *Whalley v. Thompson* (1799), 1 Bos. & P. 371, *per* EYRE, C.J., at p. 376; *Thomson v. Waterlow* (1868), L. R. 6 Eq. 36, *per* Lord ROMILLY, M.B., at p. 43; *Bright v. Walker* (1834), 1 Cr. M. & R. 211, *per* PARKE, B., at p. 219.

(*d*) *Whalley v. Thompson*, *supra*.

(*e*) *Simper v. Foley* (1862), 2 John. & H. 555, *per* PAGE WOOD, V.-O., at pp. 563, 564.

(*f*) *Richardson v. Graham*, [1908] 1 K. B. 39, 46, C. A., explaining *Simper v. Foley*, *supra*.

(*g*) *Richardson v. Graham*, *supra*, *per* Lord ALVERSTONE, C.J., at p. 43; *Robson v. Edwards*, [1893] 2 Ch. 146; *Fear v. Morgan*, [1906] 2 Ch. 406, C. A., affirmed *sub nom. Moran v. Fear*. [1907] A. C. 425.

enjoyment (h). On the other hand, unity of possession without unity of seisin will never extinguish an easement (i).

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SECT. 4.—By Statute.

558. An easement may be extinguished by Act of Parliament (k). This may be effected directly under the express provisions of the statute (l), or indirectly as an implied provision (m); or it may arise as the indirect consequence of the Act by the exercise of statutory powers bestowed thereby (n). Thus, easements may be extinguished, either directly or indirectly, by the Elementary Education Act, 1870 (o), by the General Inclosure Acts (p), by private Inclosure Acts (q), by the Lands Clauses Consolidation Act, 1845 (a), by the Railways Clauses Consolidation Act, 1845 (b), by the Thames Embankment Act, 1862 (c), by the Waterworks Clauses Act, 1847 (d), and by the Housing of the Working Classes Act, 1890 (e).

Extinguish-
ment of
easement by
statute.

(h) *Buckby v. Coles* (1814), 5 Taunt. 311, where MACDONALD, C.B., at p. 315, said that a right of way was not extinguished by unity of seisin because the dominant tenement was subject to a lease. The Court of Common Pleas, however, expressed a decided opinion against this view, and it was abandoned by counsel; see also *Simper v. Foley* (1862), 2 John. & H. 555.

(i) Co. Litt. 1136; *Canham v. Fisk* (1831), 2 Cr. & J. 126; *Thomas v. Thomas* (1835), 2 Cr. M. & R. 34. There are numerous *dicta* to the effect that unity of possession is sufficient to cause extinguishment. The word "possession" must be taken in a broad sense to mean "possessed of an estate in fee simple." For various instances of this use of the word "possession," see *Whalley v. Tompson* (1799), 1 Bos. & P. 371, *per* EYRE, C.J., at p. 376; Bro. Abr. tit. Extinguishment, pl. 15. Compare generally, *Hulbert v. Dale*, [1909] 2 Ch. 570, O. A.; *Stott v. Stott* (1812), 16 East, 343.

(k) *Turner v. Crush* (1879), 4 App. Cas. 221; see also *White v. Reeves* (1818), 2 Moore (O. P.), 23; *Holden v. Tilley* (1859), 1 F. & F. 650.

(l) *E.g.*, as in Inclosure Acts.

(m) *Yarmouth Corporation v. Simmons* (1878), 10 Ch. D. 518 (a pier erected under statutory powers, the erection of which necessarily involved the obstruction of a right of way from a public road to the seashore); *New Windsor Corporation v. Taylor*, [1899] A. C. 41, 49.

(n) See, for instance, *Emsley v. North Eastern Rail. Co.*, [1896] 1 Ch. 418, 429, where an injunction to restrain a railway company from building so as to interfere with light was refused upon the ground of the company's statutory powers. Compare *Wells v. London, Tilbury and Southend Rail. Co.* (1877), 5 Ch. D. 126, O. A.

(o) 33 & 34 Vict. c. 75; see *Clark v. London School Board* (1874), 9 Ch. App. 120. See also title EDUCATION.

(p) As to the Inclosure Act, 1801 (41 Geo. 3, c. 109), see *Harber v. Rand* (1821), 9 Price, 58; *Logan v. Burton* (1826), 5 B. & O. 513; *Thackrah v. Seymour* (1832), 3 Tyr. 87; *R. v. Downshire (Marquis)* (1836), 4 Ad. & El. 698; *Turner v. Crush*, *supra*.

(q) See, *e.g.*, *Logan v. Burton*, *supra*; *Harber v. Rand*, *supra*; *R. v. Hatfield (Inhabitants)* (1835), 4 Ad. & El. 156.

(a) 8 & 9 Vict. c. 18; *Clark v. London School Board*, *supra*; *Bedford (Duke) v. Dawson* (1875), L. R., 20 Eq. 353; *Wigram v. Fryer* (1887), 36 Ch. D. 87; *Kirby v. Harrogate School Board*, [1896] 1 Ch. 437, O. A.; *Pinchin v. London and Blackwall Rail. Co.* (1854), 5 De G. M. & G. 851, O. A.; *Hill v. Midland Rail. Co.* (1882), 21 Ch. D. 143. See also title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 47, 165.

(b) 8 & 9 Vict. c. 20.

(c) 25 & 26 Vict. c. 93; *Macey v. Metropolitan Board of Works* (1864), 33 L. J. (CH.) 377.

(d) 10 & 11 Vict. c. 17.

(e) 53 & 54 Vict. c. 70; see *Re Harvey and London County Council*, [1909] 1 Ch. 528.

Where the continuance of an easement is inconsistent with the carrying out of any works under statutory powers the result is that an extinguishment of the easement by implication occurs (*f*).

By Statute.

Part V.—Particular Easements.

SECT. 1.—*Rights of Way.*

SUB-SECT. 1.—*Definition and Nature.*

Definition of right of way.

559. A right of way is a right to traverse the land belonging to another person (*g*). It may be public or private (*h*). Whether a way is public or private is a question of fact, and depends greatly on reputation (*i*). A public right of way is a right of way common to all the King's subjects and is called a highway (*k*). A highway is not an easement; it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, whereas in the case of an easement the occupation of the land remains in the servient owner subject only to the easement (*l*). A private right of way may be defined as a right to utilise the servient tenement as a means of access to or egress from the dominant tenement for some purpose connected with the enjoyment of the dominant tenement, according to the nature of that tenement (*m*).

Classification of ways.

560. The classification of private rights of way which was formerly regarded as of importance is now of no practical utility (*n*). There are no exact categories under one or other of which every private right of way must fall, as was formerly supposed (*a*).

(*f*) *Yarmouth Corporation v. Simmons* (1878), 10 Ch. D. 518, 526, 527.

(*g*) For forms of grants, acknowledgments, and agreements in connection with rights of way, see *Encyclopædia of Forms*, Vol. V., pp. 505—528.

(*h*) A public right of way was formerly spoken of as "chimin common"; a private right of way as "chimin private"; see, for instance, 4 Vin. Abr. 513.

(*i*) *Austin's Case* (1672), 1 Vent. 189; 1 Hawk. P. C., c. 76, s. 1; and see *Barraclough v. Johnson* (1838), 8 Ad. & El. 99; *Nicholls v. Parker* (1805), cited 44 East, at 331, n.

(*k*) *Rangeley v. Midland Rail. Co.* (1868), 3 Ch. App. 306, *per* CAIRNS, L.J., at p. 311; *Hawkins v. Rutter*, [1892] 1 Q. B. 668, 671.

(*l*) *Austin's Case*, *supra*; *Senhouse v. Christian* (1787), 1 Term Rep. 560, 570. See title HIGHWAYS, STREETS AND BRIDGES.

(*m*) For judicial dicta from which the nature of a private right of way may best be gathered, see *Ballard v. Dyson* (1808), 1 Taunt. 279; *Cannon v. Villars* (1878), 8 Ch. D. 415.

(*n*) Coke says there are three kinds of ways "in our ancient books. First, a footway, which is called *iter*. . . . The second is a footway and horseway, which is called *actus ab agendo*; and this vulgarly is called *packe* and *prime way*, because it is both a footway, which was the first or *prime way*, and a *packe* or *driftway* also. The third is *via* or *aditus*, which contains the other two, and also a cart etc" (Co. Litt. 56). A carriage way includes a footway (*Davies v. Stephens* (1836), 7 C. & P. 570).

(*a*) *Ballard v. Dyson*, *supra*, where MANSFIELD, C.J., at p. 284, pointing out the bareness of Coke's definitions, said: "A parson has the *via*

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The nature and extent of the right depends upon all the circumstances of each particular case, and the former rigid classifications no longer suit the various kinds of ways as they are now regarded by our law.

561. The distinction, however, between general and limited rights of way is still of some importance (b). The term "general right of way" is applied to private rights of way upon which there are no restrictions other than the necessary qualifications which nature or the law requires with regard to all private rights of way. The term is misleading in that it is more applicable to a public highway for all kinds of traffic (c) than to a private right of way, which is necessarily qualified by law in several respects; for all private rights of way, no matter how general they may be, can only be used by the owners and occupiers of the dominant tenement and their licensees (d), and for some purpose connected with the dominant tenement (e), and, in the great majority of cases, only for the purposes of the dominant tenement as that tenement existed at the time of the creation of the easement (f).

General rights of way.

The true significance of the term "general right of way" lies in its use in contradistinction from the special limitations expressed or inferred upon the user of any particular right of way over and above the limitations thus imposed by the general law. Thus, special limitation may be placed upon the user in respect of time; for instance, the user may be limited to certain times in

or *aditus*" (which presumably was intended to represent the fullest right, and which was the most analogous to the modern right of way for all purposes) "over a farm with carts to bring home his tithe, but he can use it for no other purpose."

(b) *Cowling v. Higginson* (1838), 4 M. & W. 245, 256; *United Land Co. v. Great Eastern Rail. Co.* (1875), 10 Ch. App. 586, 590; *Wimbledon and Putney Commons Conservators v. Dixon* (1875), 1 Ch. D. 362, 371, C. A. As to rights of way in favour of parishioners to and from the parish church, see *Grimstead v. Marlowe* (1792), 4 Term Rep. 717, 718; *Thrower's Case* (1672), 1 Vent. 208; *Batten v. Gedye* (1889), 41 Ch. D. 507; *Brocklebank v. Thompson*, [1903] 2 Ch. 344; *Farguhar v. Newbury Rural Council*, [1909] 1 Ch. 12, C. A.; 4 Bac. Abr. 7th ed., p. 215; 3 Cru. Dig., 4th ed., p. 85. As to rights of way for perambulations, see *Goodday v. Mitchell* (1595), Cro. Eliz. 441; *Taylor v. Devey* (1837), 7 Ad. & El. 409; *Grant (Sir W.) v. Kearney* (1823), 12 Price, 773. As to rights of way in favour of parishioners or inhabitants of specific districts for obtaining water, see *Manning v. Wasdale* (1836), 5 Ad. & El. 758; *Race v. Ward* (1855), 4 E. & B. 702; *Smith v. Archibald* (1880), 5 App. Cas. 489; and compare *Boteler v. Bristow* (1476), Y. B. 15 Edw. 4, fol. 29, A, pl. 7; *Weekley v. Wildman* (1698), 1 Id. Raym. 405, 407; *Harrop v. Hirst* (1868), L. R. 4 Exch. 43. For customary rights of the foregoing nature generally, see title CUSTOM AND USAGES, Vol. X., p. 243. Compare generally, *Abercromby v. Fermoy Town Commissioners*, [1900] 1 I. R. 302.

(c) Highways may be limited to particular kinds of traffic; see title HIGHWAYS, STREETS AND BRIDGES.

(d) See p. 293, *post*.

(e) *Harris v. Flower & Sons* (1904), 74 L. J. (CH.) 127, C. A.; *Skull v. Glenister* (1864), 16 C. B. (N. S.) 81; *Williams v. James* (1867), L. R. 2 C. P. 577; *Lawton v. Ward* (1696), 1 Id. Raym. 75; *Howell v. King* (1674), 1 Mod. Rep. 190; *Finch v. Great Western Rail. Co.* (1879), 5 Ex. D. 254.

(f) See, for instance, *Bayley v. Great Western Rail. Co.* (1864), 26 Ch. D. 484, C. A.; *Cousens v. Rose* (1871), L. R. 12 Eq. 366. Compare *Finch v. Great Western Rail. Co.*, *supra*; *United Land Co. v. Great Eastern Rail. Co.*, *supra*.

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the day (*g*), to certain seasons (*h*) or periods (*i*), or to the duration of the purposes for which it was created (*k*). It may be limited also in respect of the part of the area of the servient tenement over which it may be exercised (*l*). Another and the most common form of limitation is in respect of the mode in which the way may be used, that is to say, in respect of the nature of the traffic (*m*). In this respect it may be limited to foot passengers (*n*), to men driving cattle and other animals (*o*), to carriages and wheeled traffic, excluding cattle and other animals (*p*), to agricultural traffic (*q*), or to traffic of some other particular nature (*r*). The user of the way may also be limited in respect of its special purposes (*s*), or of the persons who are entitled to use it (*t*).

The owner of a right of way cannot in general use the way for the service of tenements other than the dominant tenement, that is to say, he cannot use the way to go to the servient tenement, and from there to a point beyond (*u*); nor to go to points between the servient and the dominant tenement (*v*). Moreover, it has been said that he must enter the private way at the usual and accustomed part (*x*).

A private right of way and a highway may co-exist over the

Co-existent
private way
and highway

(*g*) See *Collins v. Slade* (1874), 23 W. R. 199, where a right of way was created, which was only to be used in the day time.

(*h*) Instances of rights of way limited to particular seasons of the year are to be found in cases dealing with the tithe owner's right of carrying away the tithe. See, e.g., *Payne v. Brigham* (1685), 2 Lut. 1313; *Shapcott v. Mugford* (1697), 1 Ld. Raym. 187; *James v. Dods* (1834), 2 Cr. & M. 266.

(*i*) *Hollins v. Verney* (1884), 13 Q. B. D. 304, C. A., where a right of way was claimed for carting away felled timber at intervals recurring about every twelve years; see also *Bennison v. Cartwright* (1864), 5 B. & S. 1.

(*k*) *Ardley v. St. Pancras Guardians* (1870), 39 L. J. (CH.) 871.

(*l*) See *Clifford v. Hoare* (1874), L. R. 9 O. P. 362; *Wood v. Stourbridge Rail. Co.* (1864), 16 O. B. (N. S.) 222; *Cousens v. Rose* (1871), L. R. 12 Eq. 366. Compare *Knox v. Sansom* (1877), 25 W. R. 864; *Strick & Co., Ltd. v. City Offices Co., Ltd.* (1906), 22 T. L. R. 667.

(*m*) See, for instance, *Jackson v. Stacey* (1816), Holt (N. P.), 455; *Iveson v. Moore* (1899), 1 Ld. Raym. 486, 3 Ld. Raym. 291; *Stafford (Marquis) v. Coyney* (1827), 7 B. & C. 257.

(*n*) See, for instance, *Cousens v. Rose*, *supra*; *Brunton v. Hall* (1841), 1 Q. B. 792.

(*o*) *Brunton v. Hall*, *supra*.

(*p*) *Ballard v. Dyson* (1808), 1 Taunt. 279.

(*q*) *Cowling v. Higginson* (1838), 4 M. & W. 245; *Bradburn v. Morris* (1876), 3 Ch. D. 812, C. A.; *Wimbledon and Putney Commons Conservators v. Dixon* (1875), 1 Ch. D. 362, C. A.

(*r*) *Durham and Sunderland Rail. Co. v. Walker* (1842), 2 Q. B. 940, Ex. Ch.

(*s*) *Higham v. Rabett* (1839), 5 Bing. (N. O.) 622; *Wimbledon and Putney Commons Conservators v. Dixon*, *supra*; *Bradburn v. Morris*, *supra*; *Cowling v. Higginson*, *supra*, per Lord ABINGER, C.B., at p. 256.

(*t*) See, for instance, *Brunton v. Hall*, *supra*. Compare, however, *Bazendale v. North Lambeth Liberal and Radical Club, Ltd.*, [1902] 2 Ch. 427.

(*u*) *Howell v. King* (1674), 1 Mod. Rep. 191; *Bradburn v. Morris* (1876), 3 Ch. D. 812, C. A.; *Finch v. Great Western Rail. Co.* (1879), 5 Ex. D. 254; *Skull v. Glenister* (1864), 16 O. B. (N. S.) 81; *Dand v. Kingscote* (1840), 6 M. & W. 174; *Lawton v. Ward* (1896), 1 Ld. Raym. 75; *Williams v. James* (1867), L. R. 2 O. P. 577; *Wimbledon and Putney Commons Conservators v. Dixon*, *supra*; *Harris v. Flower & Sons, Ltd.* (1904), 74 L. J. (CH.) 127, C. A.

(*v*) *Senhouse v. Christian* (1787), 1 Term Rep. 560; *Henning v. Burnet* (1852), 8 Exch. 187.

(*x*) *Woodger v. Hadden* (1816), 5 Taunt. 126, per CHAMBER, J., at p. 132; but see *South Metropolitan Cemetery Co. v. Eden* (1855), 16 O. B. 42. The rule is different in the case of highways (*Marshall v. Ullswater Co.* (1871), L. R. 7 Q. B. 166, 172; *Berridge v. Ward* (1860), 2 F. & F. 208; affirmed (1861), 10 O. B. (N. S.) 400).

same road (*y*); and the acquisition by the public of a highway over a road in respect of which a private individual enjoys a right of way does not necessarily destroy the latter's easement (*z*). Nor does the extinguishment of the public right of way necessarily extinguish the private right (*a*).

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Rights of Way.

SUB-SECT. 2.—*Rights of Way existing by express Grant.*

562. If a right of way be claimed under an express grant which is actually existing, the nature and extent of the right depends upon the proper construction of the language of the instrument creating it (*b*). It is for the court to put the true construction upon the words used in the grant (*c*), guided, in the absence of any clear indication of the intention of the parties, by the maxim that a grant must be construed most strongly against the grantor (*d*).

Nature and extent of express grant.

The construction of the grant depends on the circumstances surrounding the execution of the instrument (*e*). Thus, a grant of a right of way *per se* and nothing else may be a right of foot-way or a general right of way or a right to any other kind of way, according to the circumstances of the case (*f*). Amongst these circumstances the nature and description of the lands or buildings comprising the dominant tenement (*g*), and the nature of the *locus in quo* over which the right is granted as it existed at the date of the grant (*h*), are always very material considerations.

563. The right granted may be a right of way by the means of access existing at the date of the grant (*i*), or may be a right of way to or from any point of the boundary of the dominant tenement (*k*).

What rights of way may be granted.

(*y*) *Brownlow v. Tomlinson* (1840), 1 Man. & G. 484, 486; *R. v. Chorley* (1848), 12 Q. B. 515; *A.-G. v. Esher Linoleum Co., Ltd.*, [1901] 2 Ch. 647.

(*z*) *Duncan v. Louch* (1845), 6 Q. B. 904, 915; *R. v. Chorley*, *supra*.

(*a*) *Wells v. London, Tilbury and Southend Rail. Co.* (1877), 5 Ch. D. 126, C. A.

(*b*) *Williams v. James* (1867), L. R. 2 C. P. 577, 581; *United Land Co. v. Great Eastern Rail. Co.* (1875), 10 Ch. App. 586, 590; *Cannon v. Villars* (1878), 8 Ch. D. 415, 420; *New Windsor Corporation v. Stovell* (1884), 27 Ch. D. 665, 672; *Brunton v. Hall* (1841), 1 Q. B. 792; *Wood v. Stourbridge Rail. Co.* (1864), 16 C. B. (N. S.) 222; *Milner's Safe Co., Ltd. v. Great Northern and City Railway*, [1907] 1 Ch. 208, 220. See title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 361, 470. The general words incorporated by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6 (2), in every conveyance not expressing a contrary intention will pass to the purchaser all ways actually used by him at the date of the conveyance, though used only by permission of the vendor (*International Tea Stores Co. v. Hobbs*, [1903], 2 Ch. 165). See p. 250, *ante*.

(*c*) *Williams v. James*, *supra*, at p. 581; *Osborn v. Wise* (1837), 7 C. & P. 761; *Cousens v. Rose* (1871), L. R. 12 Eq. 366; *Watts v. Kelson* (1871), 6 Ch. App. 166; *Wood v. Stourbridge Rail. Co.*, *supra*.

(*d*) *Williams v. James*, *supra*, per WILLES, J., at p. 581; *New Windsor Corporation v. Stovell*, *supra*, at p. 673; *Morris v. Edgington* (1810), 3 Taunt. 24, per Lord Mansfield, C.J., at p. 30; *Allan v. Gomme* (1840), 11 Ad. & El. 759.

(*e*) *Cannon v. Villars*, *supra*, per JESSEL, M.R., at p. 420; *Newcomen v. Coulson* (1877), 5 Ch. D. 133, C. A.

(*f*) *Cannon v. Villars*, *supra*.

(*g*) *United Land Co. v. Great Eastern Rail. Co.*, *supra*, per MELLISH, L.J., at p. 590; *Allan v. Gomme*, *supra*, per Lord DENMAN, C.J., at p. 772; *Harris v. Flower & Sons* (1904), 74 L. J. (OH.) 127, C. A.

(*h*) *Cannon v. Villars*, *supra*, per JESSEL, M.R., at p. 420.

(*i*) *Henning v. Burnet* (1852), 8 Exch. 187.

(*k*) *South Metropolitan Cemetery Co. v. Eden* (1855), 16 C. B. 42; *Cooks v. Ingram* (1893), 68 L. T. 671; *Sketchley v. Berger* (1893), 69 L. T. 754.

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A grant of a right of way to a building used as a factory, or for the purposes of any other business which would require heavy weights or bags or packages to be brought to it, *primâ facie* includes a right to use the way for reasonable purposes sufficient for the purposes of the business, including usually the right to bring up carts and waggons at reasonable times (*l*). A grant of a right of way to a dwelling-house *primâ facie* amounts to a grant of a right of way for all reasonable purposes required for the dwelling-house, and would include the right to the user of carriages by the occupant of the dwelling-house, or a right to have a waggon drawn up to the door (*m*).

If a grant is made of a right of way over a road which is at the time of the grant a metalled road with a pavement on each side, the presumption is that it was intended to be used for foot passengers, horses, carts, and general traffic, being the purpose for which it was obviously constructed. So also a grant of a right of way along a piece of land capable of being used for the passage of carriages, to a place which is stated on the face of the grant to be intended to be used for a purpose necessarily or reasonably requiring the passing of carriages, must be intended to be effectual for the purpose for which the place was designed to be used, or was actually used at the time of the grant (*n*).

When grant
restricted to
purposes
existing at
date of grant.

564. The natural tendency is to construe a grant of a right of way *per se* as conferring only the right to use the way for the purposes for which it would be ordinarily used at the time of the grant (*o*). But if the grant be so worded as expressly to give the fullest rights of user to the dominant owner the grant is not restricted to access for the purposes for which it would be required at the time of the grant (*p*). Thus, if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tanyard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered (*q*).

By statute.

A right of way may be created by statute (*r*).

SUB-SECT. 3.—*Rights of Way arising by Implication of Law.*

Implied
rights of
way.

565. A right of way may arise by implication of law where both dominant and servient tenements have been in the common ownership of one person and one or other of the tenements has

(*l*) *Cannon v. Villars* (1878), 8 Ch. D. 413, *per* JESSEL, M.R., at p. 421.

(*m*) *Ibid.*, at pp. 420, 421. See also *Newcomen v. Coulson* (1877), 5 Ch. D. 133, C. A.

(*n*) *Cannon v. Villars*, *supra*, *per* JESSEL, M.R., at p. 420.

(*o*) *Great Western Railway v. Talbot*, [1902] 2 Ch. 759, C. A.; *Taff Vale Rail. Co. v. Canning*, [1909] 2 Ch. 48; *Allan v. Gomme* (1840), 11 Ad. & El. 759; *Henning v. Burnet* (1852), 8 Exch. 187; *Brunton v. Hall* (1841), 1 Q. B. 792.

(*p*) *Finch v. Great Western Rail. Co.* (1879), 5 Ex. D. 254, 261; *United Land Co. v. Great Eastern Rail. Co.* (1875), 10 Ch. App. 586.

(*q*) *Henning v. Burnet*, *supra*, *per* PARKE, B., at p. 192.

(*r*) See, for instance, *Adeane v. Mortlake* (1839), 5 Bing. (N. C.) 236; *White v. Leeson* (1859), 5 H. & N. 63; *Lister v. Lister* (1839), 3 Y. & O. (EX.) 540; *Finch v. Great Western Rail. Co.*, *supra*; *Midgley v. Richardson* (1845), 14 M. & W. 595. See also *Hulbert v. Dale*, [1909] 2 Ch. 570, C. A.

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been disposed of by him (s). Rights of way thus arising are either rights of way reasonably necessary for the comfortable occupation of the dominant tenement, which only arise upon a grant of the dominant tenement by virtue of an implied grant or words implied in the grant by statute (t), or rights of way of necessity (u). The latter are easements without which it is impossible to make any use of the dominant tenement (a), and can arise in favour either of the grantee on a disposition of the dominant tenement or of the grantor on a disposition of the servient tenement (b).

566. A way of necessity is a right of way which the law implies in favour of a grantee of land over the land of the grantor, where there is no other way by which the grantee can get to the land so granted him (c), or over the land of the grantee where the land retained by the grantor is land-locked (d). Such a way cannot exist over the land of a stranger (e). The doctrine which gives rise to a way of necessity is based only upon an implied grant either by a private individual or by Parliament; so that where land has been acquired after twelve years' possession under the Statutes of Limitation a way of necessity does not thereby arise (f).

Nature of
way of
necessity.

A right of way of necessity can only exist where the grantee has no other means whatsoever of reaching his land (g). If

(s) *Bayley v. Great Western Rail. Co.* (1884), 26 Ch. D. 434, 452, 453, C. A. For a case of a right of way arising by implication of law, see *Milner's Safe Co., Ltd. v. Great Northern and City Railway*, [1907] 1 Ch. 208.

(t) See p. 251, *ante*.

(u) *Wheeldon v. Burrows* (1879), 12 Ch. D. 31, 49, C. A.; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, 572, 573, C. A.; *Pheysey v. Vicary* (1847), 16 M. & W. 484, *per* PARKE, B., at p. 495.

(a) *Pheysey v. Vicary*, *supra*, at p. 495.

(b) *Wheeldon v. Burrows*, *supra*; *Howton v. Frearson* (1798), 8 Term Rep. 50. See, generally, *Glave v. Harding* (1858), 27 L. J. (EX.) 286, 292; *Hinchcliffe v. Kinnoul (Earl)* (1838), 5 Bing. (N. C.) 1; *Morris v. Edgington* (1810), 3 Taunt. 24; *James v. Plant* (1836), 4 Ad. & El. 749, Ex. Ch.; *Brett v. Clowser* (1880), 5 C. P. D. 376; *Watts v. Kelson* (1871), 6 Ch. App. 166, 172, 174; *Ford v. Metropolitan and Metropolitan District Rail. Cos.* (1886), 17 Q. B. D. 12, C. A.; *Thomas v. Owen* (1887), 20 Q. B. D. 225, C. A.

(c) *Pomfret v. Ricroft* (1669), 1 Wms. Saund. 321, 323, n. (6); *Gayford v. Moffatt* (1868), 4 Ch. App. 133, 135, 136; *Brown v. Alabaster* (1887), 37 Ch. D. 490; *London Corporation v. Riggs* (1880), 13 Ch. D. 798, 807; *Miller v. Hancock*, [1893] 2 Q. B. 177, 180, C. A.; *Proctor v. Hodgson* (1855), 10 Exch. 824; *Pearson v. Spencer* (1863), 3 B. & S. 767, Ex. Ch.; *Pinnington v. Galland* (1853), 9 Exch. 1; *Pyer v. Carter* (1857), 1 H. & N. 916; *Bullard v. Harrison* (1815), 4 M. & S. 387; *Beaudley v. Brook* (1607), Cro. Jac. 189; *Howton v. Frearson*, *supra*.

(d) *Clark v. Cogge* (1607), Cro. Jac. 170; *Staple v. Heyden* (1703), 6 Mod. Rep. 1; *Chichester v. Lethbridge* (1738), Willes, 71, 72, n.; *Pinnington v. Gulland*, *supra*; *Davies v. Sear* (1869), L. R. 7 Eq. 427. If a right of way over the land of a stranger is appurtenant to the land granted this right would pass to the grantee without any express mention of it in the conveyance, and no right of way of necessity would arise.

(e) See *Brown v. Alabaster*, *supra*.

(f) *Wilkes v. Greenway* (1890), 6 T. L. R. 449.

(g) *Proctor v. Hodgson*, *supra*; *Union Lighterage Co. v. London Graving Dock Co.*, *supra*; *Dodd v. Burchell* (1862), 1 H. & O. 113, 122; *London Corporation v. Riggs* (1880) 13 Ch. D. 798; *Holmes v. Goring* (1824), 2 Bing. 76; compare *Dand*

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there be any other means of access to the land so granted, no matter how inconvenient, no way of necessity can arise; for the mere inconvenience of an alternative way will not of itself give rise to a way of necessity (*h*). It is not necessary in order that a way of necessity may arise that the land granted should be completely surrounded by the land of the grantor (*i*) if the land be partly surrounded by the land of strangers and abuts upon land of the grantor (*j*). Rights of way of necessity may arise upon a grant of a lease as well as upon a grant in fee (*k*), and also upon the disposition of the property by will (*l*); but not where the *quasi*-dominant tenement and the *quasi*-servient tenement have respectively escheated into the hands of two several persons upon the death without heirs of the common owner (*m*).

Extent of
way of
necessity.

567. The extent and nature of the right of way depends upon the nature of the necessity (*n*). The purposes for which it may be used depend upon the facts existing at the time of the grant which gave rise to the necessity (*o*), and are in general controlled by the obvious intention of the grant (*p*). If a way of necessity arises upon a demise, and the lease contemplates the carrying on of a particular business upon the demised premises, the way of necessity is confined to a way suitable for that business (*q*).

Who may
select the
way of
necessity.

568. Where a way of necessity arises, the grantor or person who creates the way is entitled to choose the actual part of the servient tenement over which the way is to be used (*r*), but the way so selected by him must be convenient for the grantee (*s*).

v. Kingscote (1840), 6 M. & W. 174; *Clarke Cogge* (1607), Cro. Jac. 170; *Reynolds v. Edwards* (1741), Willes, 282.

(*h*) *Dodd v. Burchell* (1862), 1 H. & C. 113, 122; *London Corporation v. Riggs* (1880), 13 Ch. D. 798, 807; *Titchmarsh v. Royston Water Co.* (1899), 81 L. T. 673, where a way of necessity was not allowed, although the only means of access was from a highway in a cutting twenty feet below the land.

(*i*) *Gayford v. Moffatt* (1868), 4 Ch. App. 133; *Serff v. Acton Local Board* (1886), 31 Ch. D. 679; *Holmes v. Goring* (1824), 2 Bing. 76. Compare *Titchmarsh v. Royston Water Co.*, *supra*, where this principle appears to have been overlooked.

(*j*) *Clark v. Cogge*, *supra*; *Brown v. Alabaster* (1887), 37 Ch. D. 490, 500; *Pinnington v. Galland* (1853), 9 Exch. 1; *Gayford v. Moffatt*, *supra*; *Holmes v. Goring*, *supra*; *Serff v. Acton Local Board*, *supra*.

(*k*) *Gayford v. Moffatt*, *supra*; *Serff v. Acton Local Board*, *supra*, at p. 684; *Miller v. Hancock*, [1893] 2 Q. B. 177, 180, O. A.

(*l*) Compare *Pheysey v. Vicary* (1847), 16 M. & W. 484.

(*m*) *Proctor v. Hodgson* (1855), 10 Exch. 824; see per PARKE, B., at p. 828.

(*n*) *Gayford v. Moffatt*, *supra*; *Holmes v. Goring*, *supra*; *London Corporation v. Riggs*, *supra*; *James v. Dods* (1834), 2 Cr. & M. 266.

(*o*) *Gayford v. Moffatt*, *supra*; *London Corporation v. Riggs*, *supra*, at pp. 806, 807; *Serff v. Acton Local Board*, *supra*, where a way of necessity arising upon the grant of land to a local authority to be used as sewage works was held to be a way for all necessary purposes in connection with the sewage works.

(*p*) See, for instance, *Serff v. Acton Local Board*, *supra*, at pp. 684, 685; *London Corporation v. Riggs*, *supra*.

(*q*) *Gayford v. Moffatt*, *supra*.

(*r*) *Clark v. Cogge*, *supra*; *Packer v. Wellstead* (1658), 2 Sid. 111; *Bolton v. Bolton* (1879), 11 Ch. D. 988.

(*s*) *Bolton v. Bolton*, *supra*.

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The grantor has the right of selection whether the way of necessity arises in the grantee's favour (*t*) or in his own favour over the land granted away (*a*). But a way of necessity once selected, whether by the grantor or the grantee, cannot be afterwards altered (*b*). The grantee of land cannot have two ways of necessity (*c*). Nor can he insist as of right to have the way which is the most convenient for himself; for a way of necessity does not necessarily mean the most convenient way that could possibly exist (*d*).

569. There can be no way of necessity unless the necessity existed at the time of the grant of the dominant tenement (*e*), and inasmuch as the exigency of the case alone calls it into existence, it continues only during the subsistence of the necessity; that is to say, the grant which arises by implication of law is a grant of a right of way until such time as the grantee may acquire the power from some other source of reaching the *quasi*-dominant tenement without using the *quasi*-servient tenement (*f*). If the grantee has once acquired such a power he cannot by his own act in extinguishing the power revive the way of necessity (*g*).

Duration of
way of
necessity.

SUB-SECT. 4.—Rights of Way claimed by Prescription.

570. When a private right of way is claimed by prescription, there being no express words to construe, the only mode of measuring the nature and extent of the right is by having regard to the mode of enjoyment, and the way is therefore defined and limited by the evidence of user (*h*).

Claim by
prescription.

If a way has been used for several purposes there may be a ground for inferring that there is a right of way for all purposes;

(*t*) *Clark v. Cogge* (1607), Cro. Jac. 170.

(*a*) *Pucker v. Wellstead* (1658), 2 Sid. 111.

(*b*) *Pearson v. Spencer* (1861), 1 B. & S. 571, 584; *Horn v. Taylor* (1608), Noy, 128; *Deacon v. South Eastern Rail. Co.* (1889), 61 L. T. 377.

(*c*) *Bolton v. Bolton* (1879), 11 Ch. D. 968.

(*d*) *Pheysey v. Vicary* (1847), 16 M. & W. 484, per ALDERSON, B., at pp. 495, 496. Compare, however, *Brown v. Alabaster* (1887), 37 Ch. D. 490; *Pinnington v. Galland* (1853), 9 Exch. 1.

(*e*) *Midland Rail. Co. v. Miles* (1886), 33 Ch. D. 632.

(*f*) *Holmes v. Goring* (1824), 2 Bing. 76; *Pearson v. Spencer* (1863), 3 B. & S. 761, 767, Ex. Ch.; *Pheysey v. Vicary*, *supra*; *Reignolds v. Edwards* (1741), Willes, 282. Compare, however, *Proctor v. Hodgson* (1855), 10 Exch. 824, at p. 828, where PARKE, B., and ALDERSON, B., expressed the opinion that the decision in *Holmes v. Goring*, *supra*, was probably wrong; and see *Deacon v. South Eastern Rail. Co.* (1889), 61 L. T. 377, 379.

(*g*) Compare *Buckby v. Coles* (1814), 5 Taunt. 311.

(*h*) *Howell v. King* (1674), 1 Mod. Rep. 190; *Lawton v. Ward* (1696), 1 Ld. Raym. 75; *Ballard v. Dyson* (1808), 1 Taunt. 279, 283, 286, 287; *Cowling v. Higginson* (1838), 4 M. & W. 245, 256, 257; *Williams v. James* (1867), L. R. 2 O. P. 577; *New Windsor Corporation v. Stovell* (1884), 27 Ch. D. 665, per NORTH, J., at p. 672; *Wimbledon and Putney Common Conservators v. Dixon* (1875), 1 Ch. D. 362, O. A.; *Bradburn v. Morris* (1876), 3 Ch. D. 812, O. A.; *Higham v. Rabett* (1839), 5 Bing. (N. C.) 622; *United Land Co. v. Great Eastern Rail. Co.* (1875), 10 Ch. App. 586, per MELLISH, L.J., at p. 590: "Where a way is claimed by user the purposes for which the way may be used is limited by user; for we must judge from the way in which it has been used what the purposes were for which the party claiming has gained the right." Compare *Sloan v. Holliday* (1874), 30 L. T. 757; *Stott v. Stott* (1812), 16 East, 343.

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but evidence of user for one purpose, or for particular purposes only, will not give rise to such an inference (i).

A right of way cannot be acquired under the provision of the Prescription Act, 1832, over land which is held by a tenant under a lease for lives (j).

SUB-SECT. 5.—*Right to Deviate.*

Obstruction
by servient
owner.

571. If the owner of the servient tenement places an obstruction across the way, the owner of the dominant tenement may, if the obstruction does not allow of easy removal, go round the obstruction so as to connect the two parts of the way on each side of the obstruction (k), and for this purpose may deviate over any part of the servient tenement, provided he does so in a reasonable manner (l). The question whether or not the exercise of this right of deviation is reasonable is a question of fact, depending upon the circumstances of the particular case and having regard to the nature of the *locus in quo* and the extent of the right of way (m). The right to deviate is confined to the land of the servient owner (n). The right of deviation over the servient tenement continues so long as the obstruction remains (o). It is not incumbent upon the dominant owner to enter into litigation in respect of the obstruction so as to protect his original right of way (p); but long acquiescence in the continuance of the obstruction, and long user of the substituted way, may render it difficult for the dominant owner to insist upon the removal of the obstruction (q). The court will assist the dominant owner in the protection of the substituted way, even although he may still have a right to enforce the removal of the obstruction (r).

(i) *Cowling v. Higginson* (1838), 4 M. & W. 245, 256; *Dare v. Heathcote* (1856), 25 L. J. (EX.) 245. For cases relating to prescriptive claims to rights of way generally, see *Lawton v. Ward* (1696), 1 Ld. Raym. 75; *Ballard v. Dyson* (1808), 1 Taunt. 279; *Bright v. Walker* (1834), 1 Cr. M. & R. 211; *Codling v. Johnson* (1839), 9 B. & C. 933; *Cowling v. Higginson*, *supra*; *Kinloch v. Neville* (1840), 6 M. & W. 795; *Lawson v. Langley* (1836), 4 Ad. & El. 890; *Dare v. Heathcote*, *supra*; *R. v. Chorley* (1846), 12 Q. B. 515; *Wimbledon and Putney Common Conservators v. Dixon* (1875), 1 Ch. D. 362, C. A.; *Bradburn v. Morris* (1876), 3 Ch. D. 312, C. A.; *Gayford v. Moffat* (1868), 4 Ch. App. 133; *Hollins v. Verney* (1884), 13 Q. B. D. 304, C. A.; *Symons v. Leaker* (1885), 15 Q. B. D. 629; *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229; *Kilgour v. Gaddes*, [1904] 1 K. B. 457, C. A.; *Damper v. Bassett*, [1901] 2 Ch. 350. For cases relating to claims to rights of way under the doctrine of a lost modern grant, see *Roberts v. James* (1903), 89 L. T. 282, C. A.; *Hulbert v. Dale*, [1909] 2 Ch. 570, C. A.

(j) *Bright v. Walker*, *supra*. Compare *Symons v. Leaker* (1885), 15 Q. B. D. 629.

(k) *Selby v. Nettlefold* (1873), 9 Ch. App. 111, 114. As to deviation generally, see title HIGHWAYS, STREETS AND BRIDGES.

(l) *Hawkins v. Carbine* (1857), 27 L. J. (EX.) 44.

(m) *Ibid.*

(n) Were it otherwise the deviation would be a trespass as against another landowner.

(o) *Reynolds v. Edwards* (1741), Willes, 282; *Lovell v. Smith* (1857), 3 C. B. (N. S.) 120; *Daves v. Hawkins* (1860), 8 C. B. (N. S.) 848; *Selby v. Nettlefold*, *supra*.

(p) *Selby v. Nettlefold*, *supra*.

(q) *Ibid.*

(r) *Ibid.*

572. If the way has become impassable from some other cause than the act of the servient owner, the dominant owner is not entitled to deviate (*s*) even over land belonging to the grantor of the way (*t*).

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Way
impassable.

SUB-SECT. 6.—Persons entitled to use a Right of Way.

573. The determination of the question who is entitled to use a right of way depends upon the nature and extent of the right (*u*). If the right be created by grant, the persons or classes of persons entitled to use it may be expressly limited by the terms of the instrument (*a*); a grant of this kind being construed, not strictly, but in accordance with the apparent intention of the parties (*b*). As a general rule, the persons or classes of persons entitled to use the right must be ascertained by construing the instrument having regard to the general circumstances surrounding the execution of the grant (*c*). The most important of these circumstances are the nature of the *locus in quo* over which the right is granted (*d*), and the nature of the dominant tenement, and the purposes for which that tenement is, in the contemplation of the parties, intended to be used (*e*). In the ordinary case of a grant of a right of way to a house which may only be used as a private

Who may
use a right
of way.

(*a*) *Bullard v. Harrison* (1815), 4 M. & S. 387; *Taylor v. Whitehead* (1781), 2 Doug. (K.B.) 745; *Pomfret v. Hicroft* (1669), 1 Wms. Saund. 321, 322 a, b, c, n. (3), where it is pointed out that in 2 Bl. Com. 36 (1st ed.) and in Com. 119g. "Chimin" (D, 6) an opinion is expressed that the right to deviate because the way has become impassable from some cause other than the obstruction of the servient owner extends to private ways, but that the authorities cited in support of this opinion do not warrant it, as they seem only to relate to public ways (*Duncomb's Case* (1634), Cro. Car. 366).

(*t*) *Taylor v. Whitehead*, *supra*; *Bullard v. Harrison*, *supra*. As to the right of persons using a public way to deviate where the road is impassable, see title HIGHWAYS, STREETS AND BRIDGES.

(*u*) *Cannon v. Villars* (1878), 8 Ch. D. 415, 420, 421.

(*a*) See, for instance, *Brunton v. Hall* (1841), 1 Q. B. 792.

(*b*) *Mitcalfe v. Westaway* (1864), 34 L. J. (C. P.) 113, *per* BYLES, J., at p. 116. In this case a reservation of a right of way in favour of "assigns" was held to allow of other persons using the right who were not assigns in the strict legal interpretation of the word; but a reservation of a right to hunt, fowl, fish, hawk and set in favour of a grantor, his heirs and assigns, attendants, game-keeper and servant does not include his licensees (*Reynolds v. Moore*, [1898] 2 I. R. 641).

(*c*) See *Baxendale v. North Lambeth Liberal and Radical Club, Ltd.*, [1902] 2 Ch. 427; *Milner's Safe Co., Ltd. v. Great Northern and City Railway*, [1907] 1 Ch. 208, 220.

(*d*) *Cannon v. Villars*, *supra*.

(*e*) Thus, in *Thornton v. Little* (1907), 97 L. T. 24, a grant of a right of way to the owner of the dominant tenement for her and her "tenants, visitors, and servants" was held a right of way for her pupils, the dominant tenement being a school at the time of the grant. See also *Baxendale v. North Lambeth Liberal and Radical Club, Ltd.*, *supra*, where a grant of a right of way to premises used as a club was held to extend to members of the club, but a grant of the use of a garden to lessees, sub-lessees, tenants, families and friends, does not extend to members of a club although resident (*Keith v. Twentieth Century Club, Ltd.* (1904), 73 L. J. (CH.) 545); see also *Milner's Safe Co., Ltd. v. Great Northern and City Railway*, *supra*, at p. 227, where it was held that the conversion of a dwelling-house into a railway station and the consequent user of the way by the passengers could never have been contemplated.

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dwelling-house, the way may be used by, and the right extends to the grantee, and to members of his family, servants, visitors, guests, and tradespeople, even though none of these persons be expressly mentioned in the grant (*f*). The owner of the dominant tenement may use a right of way thereto, even though he is not in possession, for the purpose of viewing waste, demanding rent, removing an obstruction, or other similar purposes (*g*).

SUB-SECT. 7.—*Construction and Repair.*

Construction.

574. In general the grantor of a right of way is under no liability to construct the way (*h*). The grantee of a right of way has a right to enter upon the land of the grantor over which the way extends for the purpose of making the grant effective (*i*). Thus, if a right of way for carriages is granted over a field to the grantee's house, the grantee may enter the field and make over it a formed roadway suitable for supporting the ordinary traffic of a carriage way (*k*). But the grantee may only construct such a way as is suitable to the right granted him (*l*), and the necessary works must be executed in a reasonable manner, and with ordinary skill and prudence (*m*). The methods of construction which the grantee may employ are not confined to the methods existing at the time of the grant (*n*).

Repairs.

575. As a general rule the owner of the servient tenement is under no liability to repair the way over which a right of way has been granted (*o*), for such a liability is not a condition incident by law to the grant of a right of way; nor is it even a legal obligation incumbent on the grantee (*p*). The person entitled to the use of the way must do such repairs as he requires (*q*), and he has a right

Baxendale v. North Lambeth Liberal and Radical Club, Ltd., [1902] 2 Ch. 427, per SWINFEN EADY, J., at p. 429.

(*g*) *Proud v. Hollis* (1822), 1 B. & C. 8.

(*h*) *Newcomen v. Coulson* (1877), 5 Ch. D. 133, 143, C. A.; *Osborn v. Wise* (1837), 7 C. & P. 761; *Ingram v. Morecraft* (1863), 33 Beav. 49; *Duncan v. Louch* (1845), 6 Q. B. 904, 909.

(*i*) *Newcomen v. Coulson*, *supra*; *Gerrard v. Cooke* (1806), 2 Bos. & P. (N. R.) 109; *Senhouse v. Christian* (1787), 1 Term Rep. 560; *Abson v. Fenton* (1823), 1 B. & C. 195; *Ingram v. Morecraft*, *supra*; *Tomlin v. Fuller* (1669), 1 Mod. Rep. 27.

(*k*) *Newcomen v. Coulson*, *supra*; see also *Gerrard v. Cooke*, *supra*, where it was held that a grant of a right of way to a house gave the grantee a right of laying down flagstones in front of the door of the house; *Senhouse v. Christian*, *supra*, where a grant of a convenient way for carrying coals was held to entitle the grantee to make a framed waggon way for the purpose of carrying the coal.

(*l*) *Bidder v. North Staffordshire Rail. Co.* (1878), 4 Q. B. D. 412, C. A.

(*m*) *Abson v. Fenton*, *supra*.

(*n*) *Senhouse v. Christian*, *supra*, at pp. 567, 569; *Dand v. Kingscote* (1840), 6 M. & W. 174.

(*o*) *Taylor v. Whitehead* (1781), 2 Doug. (K. B.) 745, 749; *Pomfret v. Ricraft* (1669), 1 Wms. Saund. 321, 322; *Ingram v. Morecraft*, *supra*; *Miller v. Hancock*, [1893] 2 Q. B. 177, 181, C. A.; *Jones v. Pritchard*, [1908] 1 Ch. 630, 638.

(*p*) *Duncan v. Louch*, *supra*, per COLERIDGE, J., at pp. 909, 910.

(*q*) *Taylor v. Whitehead*, *supra*, per Lord MANSFIELD, at p. 749; *Miller v.*

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of entry upon the servient tenement for that purpose (r). The right of repair is not limited to making good the defects in the original soil by subsidence or other natural causes, but includes the right of making the road reasonably fit for the purpose for which it was granted (s). The servient owner is not prevented from doing acts on his land the result of which may be to render the repair of the way more expensive (t).

576. The grantor may, however, expressly bind himself by agreement to repair the way (a). Again, the person entitled to a right of way may be subject to a liability to repair arising from the terms of the grant, either express or presumed; for the grantor of the right of way may annex to the right the qualification that the grantee and his successors in title must repair the way, and thus create a conditional easement (b). This obligation would appear to be capable of being imposed as an incident to the easement itself, and not merely as a liability resting solely upon a covenant running with the land and the easement (c). For it is clear that in the converse case the owner of the dominant tenement may, under the doctrine of prescription, claim to have the way repaired by the servient owner (d); and there appears to be no reason why a like obligation should not be cast upon the dominant owner. The fact that the doctrine of prescription is applicable to such a case shows that the right or obligation does not rest on a mere covenant running with the land, inasmuch as prescription always presumes an absolute grant, and notice is immaterial (e).

Obligation to
repair by
agreement.

SUB-SECT. 8.—*Disturbance of Rights of Way.*

577. Any wrongful interference with a right of way constitutes a nuisance (f). As, however, a right of way never entitles the grantee, or those lawfully using the way under the grant, to the exclusive use of the land over which the way exists (g), it is not every obstruction of the way which amounts to an unlawful interference (h). No action will lie unless there is a substantial

What
amounts to
disturbance.

Hancock, [1893] 2 Q. B. 177, 181, O. A.; *Ingram v. Morecraft* (1863), 33 Beav. 49; *Rider v. Smith* (1790), 3 Term Rep. 766; *Duncan v. Louch* (1845), 6 Q. B. 904, 909.

(r) *Liford's Case* (1614), 11 Co. Rep. 46 b, 52 a; *Hougeon v. Field* (1806), 7 East, 613; *Newcomen v. Coulson* (1877), 5 Ch. D. 133, 143, O. A.; *Goodhart v. Hyett* (1883), 25 Ch. D. 182; *Duncan v. Louch*, *supra*.

(a) *Newcomen v. Coulson*, *supra*, per JESSEL, M.R., at pp. 143, 144.

(b) *Birkenhead Corporation v. London and North Western Rail. Co.* (1885), 15 Q. B. D. 572, O. A.

(c) *Taylor v. Whitehead* (1781), 2 Doug. (K. B.) 745, 749.

(d) *Duncan v. Louch*, *supra*.

(e) *Duncan v. Louch*, *supra*; but see the dictum of WIGHTMAN, J., at p. 913.

(f) *Rider v. Smith*, *supra*; *Pomfret v. Ricroft* (1669), 1 Wms. Saund. 321, 322 a, b, c. n. (8); 2 Wms. Saund. 113 a, n. (1).

(g) See p. 247, *ante*.

(h) *Lane v. Capsey*, [1891] 3 Ch. 411; *Thorpe v. Brumfit* (1873), 8 Ch. App. 650.

(i) *Sketchley v. Berger* (1893), 69 L. T. 754, 755; *Clifford v. Hoare* (1874), L. R. 9 O. P. 362; *Strick & Co., Ltd., v. City Offices Co., Ltd.* (1906), 22 T. L. R. 667; *Hutton v. Hamboro* (1860), 2 F. & F. 218.

(j) *Thorpe v. Brumfit*, *supra*, where JAMES, L.J., at p. 656, said: "Suppose

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interference with the easement granted (i). The effect of a grant of a right of way differs in this respect from a grant of the soil of the way; for in the latter case the slightest interference is a trespass.

The question whether any particular interruption amounts to an unlawful interference depends upon the nature of the right of way and of the *locus in quo*, and upon the general circumstances of the case (k). Any disturbance of a way is unlawful which renders the way unfit for the purposes for which it was granted, to the injury of the person entitled to the way (l). Thus, there would be an unlawful interference if the way be so damaged by vehicular or other traffic that the grantee is unable to use it (m); or if the way be either wholly (n) or partially obstructed by being built upon (o), or if the servient tenement be ploughed up so that the way cannot be used (p).

The nature of the remedy is the same whether the way was created by express grant or by way of reservation, or is claimed under the doctrine of prescription (q).

Abatement.

578. The grantee of a right of way may abate the nuisance arising from the obstruction of the way, whether in whole or in part, by removing the obstruction, or by removing so much of it as will enable him to enjoy his right (r). Even if the obstruction consist of an inhabited house, the owner of the dominant tenement may remove it, provided proper notice has been given and request has been made for its removal (s).

one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent." As to interferences with easements generally, see p. 330, *post*.

(i) *Sketchley v. Berger* (1893), 69 L. T. 754, *per* STIRLING, J., at p. 755. See also *Clifford v. Hoare* (1874), L. R. 9 C. P. 362; *Hutton v. Hamboro* (1860), 2 F. & F. 218; and *Pullin v. Deffel* (1891), 64 L. T. 134.

(k) *Shoemith v. Byerley* (1873), 28 L. T. 553 (carts standing for short periods upon a way where there was no room to pass them were held to be an obstruction which the dominant owner could have removed immediately); *Cannon v. Villars* (1878), 8 Ch. D. 415; *Sketchley v. Berger*, *supra* (a right of way granted over a strip of land broadening out at certain parts was held to give a right of way over the whole of the broad portions). See also *Harding v. Wilson* (1823), 2 B. & C. 96, and *Clifford v. Hoare*, *supra*, where a protruding portico with columns the bases of which rested on the way was held to give no cause of action, although the right of way had been granted by specific measurement.

(l) *Lawton v. Ward* (1696), 1 Ld. Raym. 75; 2 Roll. Abr. 140; *Thorpe v. Brumfitt* (1873), 8 Ch. App. 650; *Phillips v. Treeby* (1862), 3 Giff. 632; *Shoemith v. Byerley*, *supra*.

(m) *Lawton v. Ward*, *supra*.

(n) *Lane v. Capsey*, [1891] 3 Ch. 411; *Phillips v. Treeby*, *supra*.

(o) *Sketchley v. Berger*, *supra*.

(p) 2 Roll. Abr. 140.

(q) 1 Roll. Abr. 109; Com. Dig. tit. Action on the Case for Disturbance (A, 2).

(r) *Lane v. Capsey*, *supra*; see also *Baten's Case* (1610), 9 Co. Rep. 53 b, 64 b.

(s) *Lane v. Capsey*, *supra*; see also *Davies v. Williams* (1851), 16 Q. B. 546; *Perry v. Fitzhouse* (1846), 8 Q. B. 757; *Jones v Jones* (1862), 1 H. & C. 1, and see title.

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The remedy of abatement may be adopted even although the servient tenement be in the hands of a receiver appointed by the court (t). The fact that the court has refused an application on the part of the dominant owner for a mandatory injunction for the removal of the obstruction does not necessarily prejudice his right of abatement (a).

579. The person entitled to a right of way may also sue for an injunction to restrain obstruction of the way or for damages. If he in fact suffers no damage by the obstruction, nominal damages only will be awarded, and an injunction will be refused (b). Action.

A person who in purported exercise of a right of way makes an excessive user of the servient tenement commits a trespass (c), and may be restrained from so doing at the instance of the servient owner (d). Such trespass, however, gives no cause of action to persons who are not entitled to use the way and are not interested in the servient tenement (e). Excessive user.

A person interested in reversion or remainder in the dominant tenement cannot sue for the protection of a right of way unless the obstruction be of such a nature that it either permanently injures the estate or operates as a denial of right (f). Who may sue.

A person interested in reversion or remainder in the servient tenement cannot sue for trespass done under an alleged right of way, because the harm done to the tenement is not of a permanent nature, and because acts of this nature cannot operate as evidence of right against a person who has no present remedy by which he can obtain redress (g).

SECT. 2.—Light.

SUB-SECT. 1.—Nature of the Right to Light.

580. The owner of land has not at common law any right to light; for the general doctrine of law with respect to land is that No natural right to light.

(t) *Lane v. Capsey*, [1891] 3 Ch. 411. But the dominant owner in such a case ought first to obtain the leave of the court to proceed by the remedy of abatement. The court will grant leave unless it is perfectly clear that there is no foundation for the claim (*Randfield v. Randfield* (1861), 3 De G. F. & J. 766, 771, C. A.; *Angel v. Smith* (1804), 9 Ves. 335, 340).

(a) *Lane v. Capsey*, *supra*.

(b) *Behrens v. Richards*, [1905] 2 Ch. 614; and see title INJUNCTION.

(c) *Milner's Safe Co., Ltd. v. Great Northern and City Railway*, [1907] 1 Ch. 208, 228.

(d) As to excessive user of a right of way, see *Gayford v. Moffatt* (1868), 4 Ch. App. 133; *Harris v. Flower & Sons* (1904), 74 L. J. (CH.) 127, C. A.; *Milner's Safe Co., Ltd. v. Great Northern and City Railway*, *supra*; *Williams v. James* (1867), L. R. 2 C. P. 577; *Bradburn v. Morris* (1876), 3 Ch. D. 812, C. A.; *Finch v. Great Western Rail. Co.* (1879), 5 Ex. D. 254; *London Corporation v. Riggs* (1880), 13 Ch. D. 798.

(e) *Milner's Safe Co., Ltd. v. Great Northern and City Railway*, *supra*, at p. 228.

(f) *Hopwood v. Schofield* (1837), 2 Mood. & R. 34; *Kidgill v. Moor* (1850), 9 C. B. 364; see also *Proud v. Hollis* (1822), 1 B. & C. 8, where it was held that the landlord of the dominant tenement might use the way for the purposes of removing an obstruction; *Baxter v. Taylor* (1832), 4 B. & Ad. 72; *Bell v. Midland Rail. Co.* (1861), 10 C. B. (N. S.) 287; *Bower v. Illiff* (1835), 1 Bing. (N. C.) 549, 555; *Shadwell v. Hutchinson* (1831), 2 B. & Ad. 97.

(g) *Baxter v. Taylor*, *supra*; see also Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 7.

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Light.

Nature of
easement
of light.

everyone may build upon or otherwise utilise his own land, regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and buildings of another person (*h*). Every man may open any number of windows looking over his neighbour's land (*i*); for the interference with a neighbour's privacy (*k*), or with his prospect (*l*), gives the latter no cause of action in the absence of other circumstances (*m*). On the other hand, the neighbour may by building on his own land obstruct the light which would otherwise reach the other's windows (*n*).

581. The easement of light is frequently spoken of as the easement of "light and air," as though the right to light and the right to air were inseparably connected. They are, however, wholly distinct (*o*), and, although orders for the protection of light formerly included the protection of air as well, this practice has now been abandoned (*p*).

The easement of light is a negative easement or a species of negative easement (*q*). It is a right acquired in augmentation of the ordinary rights incident to the ownership and enjoyment of land (*r*), and may be defined as a right which a person may acquire, as the owner or occupier of a building with windows or apertures, to prevent the owner or occupier of an adjoining piece of land from building or placing upon the latter's land anything which has the effect of illegally obstructing or obscuring the light coming to the building of the owner of the easement (*s*).

(*h*) *Tapling v. Jones* (1865), 11 H. L. Cas. 290; see also *Higgins v. Betts*, [1905] 2 Ch. 210, 214.

(*i*) *Chandler v. Thompson* (1811), 3 Camp. 80; *Aldred's Case* (1610), 9 Co. Rep. 57 b, 58 b.

(*k*) *Turner v. Spooner* (1861), 1 Drew. & Sm. 467; and see p. 329, *post*.

(*l*) *A.-G. v. Doughty* (1752), 2 Ves. Sen. 453; *Knowles v. Richardson* (1670), 1 Mod. Rep. 55; *Fishmongers' Co. v. East India Co.* (1752), 1 Dick. 163. The obstruction of the view of business premises is not actionable (*Smith v. Owen* (1866), 35 L. J. (CH.) 317; *Butt v. Imperial Gas Co.* (1866), 2 Ch. App. 158; and see p. 329, *post*).

(*m*) *Manners (Lord) v. Johnson* (1875), 1 Ch. D. 673 (privacy); *Figgott v. Stratton* (1859), 1 De G. F. & J. 33, O. A.; *Western v. Macdermott* (1866), 2 Ch. App. 72 (prospect).

(*n*) *Tapling v. Jones*, *supra*, per Lord CRANWORTH, at p. 311. It is within the powers of a railway company (*Bonner v. Great Western Rail. Co.* (1883), 24 Ch. D. 1, O. A.) or a borough council (*Paddington Corporation v. A.-G.*, [1906] A. C. 1) to erect a hoarding to prevent the acquisition of a right to light.

(*o*) As to the easement of air, see p. 326, *post*.

(*p*) *Baxter v. Bower* (1875), 44 L. J. (CH.) 625, 628, O. A.

(*q*) *Rowbotham v. Wilson* (1857), 8 E. & B. 123, Ex. Ch., per BRAMWELL, B., at p. 147; *Dalton v. Angus* (1881), 6 App. Cas. 740, per Lord SELBORNE, L.O., at pp. 794, 795, and per Lord BLACKBURN, at p. 823. See also *Smith v. Kenrick* (1849), 7 O. B. 516, 565, 566; *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, per Lord MACNAGHTEN, at p. 185. For various forms in connection with easements of light, see *Encyclopædia of Forms*, Vol. V., pp. 528—531.

(*r*) See *Higgins v. Betts*, [1905] 2 Ch. 210, at p. 214.

(*s*) *Colls v. Home and Colonial Stores, Ltd.*, *supra*, per Lord MACNAGHTEN, at pp. 185, 186; *City of London Brewery Co. v. Tennant* (1873), 9 Ch. App. 212, per JAMES, L.J., at pp. 216, 217. The nature of the easement of light, when grounded upon a prescriptive title, has recently been fully

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Light.

Interference
must amount
to a nuisance.

582. When the owner of the dominant tenement has acquired the right he has a house or other building with an easement of light attached to it (t). It is a right to be protected from a particular form of nuisance (u), and unless the interference with the light coming to the dominant tenement amounts in law to an actionable nuisance, the owner of the dominant tenement has no right against the person who interferes with the light (a). Any substantial interference with his comfortable use and enjoyment of his house according to the usages of ordinary persons in the locality is actionable as a nuisance at common law (b). The difference between the right to light and the right to freedom from smell and noise is that the former has to be acquired as an easement, in addition to the right of property, before it can be enforced; the two latter are *ab initio* incident to the right of property (c). The wrong done is, however, in both cases the same, namely, the disturbance of the owner in his enjoyment of his house (d).

The mere interference with the light coming to the dominant tenement, or the mere fact that after the interference complained of the owner of the dominant tenement has not so much light as before, does not of itself constitute a nuisance (e).

discussed by the House of Lords in *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179. Lord MACNAGHTEN, at p. 189 of the report, points out that the reported cases on the question of light in recent times are not altogether consistent, and that there seem to have been two divergent views, neither of which is absolutely accurate—the one that the right acquired by so-called statutory prescription is a right to a continuance of the whole, or substantially the whole, light which has come to the windows during twenty years; the other that the right is limited to a sufficient quantity of light for ordinary purposes. It follows, therefore, that reliance cannot be placed upon many reported cases in “the embarrassing chain of authority.” For cases where the first of these two divergent views was taken, see p. 300, note (k), *post*. The following cases, which have either been expressly approved by the House of Lords in *Colls v. Home and Colonial Stores, Ltd.*, *supra*, or contain passages in agreement with the definitions contained in the last-mentioned case, may be referred to for judicial dicta from which the nature of the easement of light may best be ascertained:—*Aldred's Case* (1610), 9 Co. Rep. 57 b; *Fishmongers' Co. v. East India Co.* (1752), 1 Dick. 163; *Tapling v. Jones* (1865), 11 H. L. Cas. 290; *Back v. Stacey* (1826), 2 O. & P. 465; *Clarke v. Clark* (1865), 1 Ch. App. 16; *Robson v. Whittingham* (1866), 1 Ch. App. 442; *Lanfranchi v. Mackenzie* (1867), L. B. 4 Eq. 421; *Kelke v. Pearson* (1871), 6 Ch. App. 809; *City of London Brewery Co. v. Tennant* (1873), 9 Ch. App. 212, *per* JAMES, L.J., at pp. 216, 217; *Ecclesiastical Commissioners for England v. Kino* (1880), 14 Ch. D. 213, O. A.; *Scott v. Pape* (1886), 31 Ch. D. 554, O. A.; *Harris v. De Pinna* (1886), 33 Ch. D. 238, O. A.; *Kine v. Jolly*, [1905] 1 Ch. 480, O. A.; affirmed *sub nom.* *Jolly v. Kine*, [1907] A. C. 1; *Ambler v. Gordon*, [1905] 1 K. B. 417; *Higgins v. Betts*, [1905] 2 Ch. 210, *per* FARWELL, J., at pp. 214, 215.

(t) *Higgins v. Betts*, *supra*, *per* FARWELL, J., at p. 214.

(u) *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, 212.

(a) *Colls v. Home and Colonial Stores, Ltd.*, *supra*; *Fishmongers' Co. v. East India Co.*, *supra*; *Higgins v. Betts*, *supra*, *per* FARWELL, J., at p. 215.

(b) *Higgins v. Betts*, *supra*, at pp. 214, 215; *Fishmongers' Co. v. East India Co.*, *supra*; *Colls v. Home and Colonial Stores, Ltd.*, *supra*, *per* Lord DAVEY, at p. 204; and *per* Lord LINDLEY, at p. 210.

(c) *Higgins v. Betts*, *supra*.

(d) *Ibid.*, at p. 216.

(e) See *Fishmongers' Co. v. East India Co.*, *supra*, *per* Lord HARDWICKE, L.C., at p. 165; *Back v. Stacey*, *supra*, *per* BEST, C.J., at p. 466; *Colls v. Home and Colonial Stores, Ltd.*, *supra*, at pp. 186, 187.

SECT. 2.
Light.

Extent of
easement of
light.

583. The easement of light does not consist in a right to have a continuance of all the light which has previously come to the windows of the dominant tenement (*f*). The test whether the interference complained of amounts to a nuisance is not whether the diminution is enough materially to lessen the amount of light previously enjoyed, nor is it entirely a question of how much light is left, without regard to what there was before, but whether the diminution (that is, the difference between the light before and the light after the obstruction) is such as really makes the building to a sensible degree less fit than it was before for the purposes of business or occupation according to the ordinary requirements of mankind (*g*).

What the dominant owner is bound to show in order to maintain an action is that the interference is such an obstruction of light as to interfere with the ordinary occupations of life (*h*). In other words, the nature and extent of the right is to have that amount of light through the windows of the dominant house which is sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of the house as a dwelling-house, if it be a dwelling-house, or for the beneficial use and occupation of the building if it be a warehouse, shop, or other place of business (*i*).

The rule that the easement of light does not give to the dominant owner a right to all the light coming to the windows of the dominant tenement applies whether the easement is based upon the doctrine of prescription at common law or is claimed under the provisions of the Prescription Act (*k*). A nuisance, however, is caused by the

(*f*) *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, per Lord MACNAGHTEN, at p. 186; *Fishmongers' Co. v. East India Co.* (1752), 1 Dick. 163; *Back v. Stacey* (1826), 2 O. & P. 465; *Ankersen v. Connolly*, [1906] 2 Ch. 544; affirmed on the facts, [1907] 1 Ch. 678, C. A.

(*g*) *Colls v. Home and Colonial Stores, Ltd.*, *supra*, per Lord LINDLEY, at p. 210: "In applying the rule laid down in *Kelk v. Pearson* (1871), 6 Ch. App. 809, it is impossible to avoid considering how much light is left and where it comes from. But the question to be decided is not how much light is left, but whether the plaintiff has been deprived of so much as to constitute an actionable nuisance"; and see per Lord DAVEY, at p. 198; *Kins v. Jolly*, [1905] 1 Ch. 480, C. A., per VAUGHAN WILLIAMS, L.J., at p. 490; affirmed, *sub nom. Jolly v. Kins*, [1907] A. C. 1. FARWELL, J., in *Higgins v. Betts*, [1905] 2 Ch. 210, at pp. 215, 216, seems to have thought that the amount of light actually left was the only point to be considered; but this view is hardly consistent with the rule laid down in the cases cited above. See also *Parker v. Stanley & Co., Ltd.* (1902), 50 W. R. 282.

(*h*) *Clarke v. Clark* (1865), 1 Ch. App. 18, per Lord CRANWORTH, L.C., at p. 20; see also *Ecclesiastical Commissioners for England v. Kino* (1880), 14 Ch. D. 213, C. A., per COTTON, L.J., at p. 228.

(*i*) *Kelk v. Pearson*, *supra*, at p. 811; see also *City of London Brewery Co. v. Tennant* (1873), 9 Ch. App. 212, per Lord SELBORNE, L.C., at pp. 218, 219; *Back v. Stacey*, *supra*, per BEST, C.J., at p. 466; *Ecclesiastical Commissioners for England v. Kino*, *supra*, per COTTON, L.J., at p. 228; *Colls v. Home and Colonial Stores, Ltd.*, *supra*, per Lord MACNAGHTEN, at p. 187, per Lord DAVEY, at p. 204, per Lord LINDLEY, at p. 208. "The expressions 'the ordinary notions of mankind,' 'comfortable use and enjoyment,' and 'beneficial use and occupation,' introduce elements of uncertainty; but similar uncertainty has always existed and exists still in all cases of nuisance" (*Higgins v. Betts*, *supra*, at pp. 214, 215, 216).

(*k*) *Colls v. Home and Colonial Stores, Ltd.*, *supra*; *Higgins v. Betts*, *supra*, at p. 215. For instances of the extreme but erroneous view that the dominant

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Light.

interference with the light coming to the dominant tenement, if it result in a substantial privation of light sufficient to render the occupation of the house uncomfortable, and to prevent the owner from carrying on his accustomed business as beneficially as he formally did (*l*).

584. It is impossible to lay down any precise general rule as to the exact amount of light to which a dominant owner is entitled (*m*). The test is therefore uncertain, but its uncertainty may also be described as its elasticity (*n*).

No fixed test as to amount of light.

It was formerly considered that if a building on the servient tenement, when completed, allowed light to come to the windows of the house forming the dominant tenement at an angle of forty-five degrees from the perpendicular, no objection could be taken by the dominant owner to the diminution of light caused by such building. This was known as the "forty-five degrees rule" (*o*). The fact, however, that forty-five degrees of light are left is only a small element in the case. It may be used as a sort of test in the absence of any other mode of arriving at a conclusion; but there is no rule of law or of evidence and no presumption, except of the very slightest kind, that where the angular height of an erection is less than forty-five degrees the access of light is not substantially interfered with (*p*).

Forty-five degrees rule.

585. In deciding the question whether or not a nuisance has been caused, a distinction must be made between a partial inconvenience and a real injury to the dominant owner in the enjoyment of his premises (*q*). It depends upon all the surrounding

Partial inconvenience.

owner in prescriptive claims was entitled to the whole or substantially the whole light coming to the windows during the period of twenty years, see *Calcraft v. Thompson* (1867), 15 W. R. 387; *Scott v. Pape* (1886), 31 Ch. D. 554; 571, C. A.; *Mackey v. Scottish Widows Society* (1877), 11 I. R. Eq. 541, C. A.; *Parker v. Smith* (1832), 5 C. & P. 438; *Pringle v. Wernham* (1836), 7 C. & P. 377; *Wells v. Ody* (1836), 7 C. & P. 410; *Warren v. Brown*, [1902] 1 K. B. 15, C. A. So far as the decisions in these cases were based upon this view the cases must now be regarded as overruled. See, generally, *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, at p. 189.

(*l*) *Back v. Stacey* (1826), 2 C. & P. 465, at p. 466; *Wells v. Ody* (1836), 7 C. & P. 410, per PARKE, B., at p. 412; *Ecclesiastical Commissioners for England v. Kino* (1880), 14 Ch. D. 213, C. A., per COTTON, L.J., at p. 223; *Parker v. Smith*, *supra*, per TINDAL, C.J., at p. 439.

(*m*) *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, at p. 200, where Lord DAVEY said it is impossible to assert that any man has a right to a fixed "amount of light ascertainable by metes and bounds"; *Ecclesiastical Commissioners for England v. Kino*, *supra*, per JAMES, L.J., at p. 220.

(*n*) *Colls v. Home and Colonial Stores, Ltd.*, *supra*, per Lord HALSBURY, L.C., at p. 185.

(*o*) See *Parker v. First Avenue Hotel Co.* (1883), 24 Ch. D. 282, 288, 289, C. A.; *City of London Brewery Co. v. Tennant* (1873), 9 Ch. App. 212; *Theed v. Debenham* (1876), 2 Ch. D. 165.

(*p*) *Ecclesiastical Commissioners for England v. Kino*, *supra*, per JAMES, L.J., at p. 220; *City of London Brewery Co. v. Tennant*, *supra*, at p. 220; *Theed v. Debenham*, *supra*; *Hackett v. Haiss* (1875), L. R. 20 Eq. 494; *Colls v. Home and Colonial Stores, Ltd.*, *supra*, per Lord LINDLEY, at p. 210.

(*q*) *Back v. Stacey*, *supra*, per BEST, C.J., at p. 466; *Kine v. Jolly*, [1905] 1 Ch. 480, C. A., per ROMER, L.J., at p. 497; affirmed *sub nom. Jolly v. Kine*, [1907] A. C. 1.

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circumstances, upon the amount of light coming from other sources, as well as upon the proximity of the obstructing buildings(*r*). Regard may be had not only to the present use to which the dominant house is put, but also to any ordinary uses to which it is adapted(*s*).

Light from
other sources.

586. The access of light from other sources cannot be regarded if and in so far as it is light upon the continuance of which the dominant owner cannot insist(*t*); for light to which a right has not been acquired by grant or prescription, and of which the dominant owner may be deprived at any time, ought not to be taken into account(*u*).

Increase and
decrease of
burden of
easement.

587. The use to which the dominant owner puts the light does not affect the question(*v*). He cannot increase the burden of the servitude by his user of the light(*w*), nor does he diminish the burden by the nature of his actual user, nor even by complete non-user, or by not using the full measure of the light which the law permits(*x*). If a man for his own convenience or profit converts two or more rooms of his house into one without making provision for lighting them, or converts a portion of his house to some purpose requiring an increased supply of light, he cannot suddenly call upon his neighbour to leave him a supply of light which is rendered necessary only by such alterations and thereby impose what is in substance an increased burden on his neighbour(*y*). Conversely, if the owner of the dominant tenement builds on his

(*r*) *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, per Lord HALSBURY, L.C., at p. 185; *Ankerson v. Connelly*, [1906] 2 Ch. 544; affirmed on the facts, [1907] 1 Ch. 678, C. A. As to the necessity of taking into consideration the nature of the locality of the *locus in quo* in cases of nuisance, see generally the following cases:—*St. Helen's Smelting Co. v. Tipping* (1865), 11 H. L. Cas. 642; *Sturges v. Bridgman* (1879), 11 Ch. D. 852, 865, C. A.; *Poleue and Alfieri, Ltd. v. Rushmer*, [1907] A. C. 121; but consider *Yates v. Jack* (1866), 1 Ch. App. 295; *Dent v. Auction Mart Co.* (1866), L. R. 2 Eq. 238; *Martin v. Headon* (1866), L. R. 2 Eq. 425; *Clarke v. Clark* (1865), 1 Ch. App. 16; *Robson v. Whittingham* (1866), 1 Ch. App. 442.

(*s*) *Colls v. Home and Colonial Stores, Ltd.*, *supra*, per Lord DAVEY, at p. 202; compare the decisions as to possible future user in *Moore v. Hall* (1878), 3 Q. B. D. 178; *Dicker v. Popham, Radford & Co.* (1890), 63 L. T. 379.

(*t*) *Colls v. Home and Colonial Stores, Ltd.*, *supra*, at p. 211; *Kine v. Jolly*, [1905] 1 Ch. 480, C. A., at p. 498; affirmed *sub nom. Jolly v. Kine*, [1907] A. C. 1. Although the rule in the text must be regarded at present as law it should be noted that it is opposed to general principles. The result of an application of the rule is that the servient owner must not build if through the subsequent erection of a building by a third party the light coming to the dominant tenement is substantially diminished by the joint effect of the building of the servient owner and that of the third party. As there is no privity of contract or title between the servient owner and the third party, the servient owner cannot foresee the amount of obstruction which may be raised by the third party. Since the easement must rest on the grant or covenant of the servient owner, the result is that he makes a grant or enters into a covenant to which he is unable to give effect, short of abandoning all intention of erecting any building whatsoever.

(*u*) *Colls v. Home and Colonial Stores, Ltd.*, *supra*, per Lord LINDLEY, at p. 211. See also *Kine v. Jolly*, *supra*, per ROMER, L.J., at p. 498.

(*v*) *Colls v. Home and Colonial Stores, Ltd.*, *supra*, at p. 204.

(*w*) *Ambler v. Gordon*, [1905] 1 K. B. 417.

(*x*) *Colls v. Home and Colonial Stores, Ltd.*, *supra*, at p. 203.

(*y*) *Ibid.*; see also *Ankerson v. Connelly*, [1907] 1 Ch. 678, C. A.

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own land in such a way as partially to interfere with the access of light to windows in respect of which he enjoys an easement of light, his doing so is no bar to a suit by him to prevent the servient owner from further interfering with the light (z).

588. It is not clear whether the right to an extraordinary amount of light can be acquired by twenty years user for extraordinary purposes; but such authorities as bear upon the point tend to a negative conclusion (a). At any rate, such a right cannot be acquired where the servient owner is unaware of the extraordinary user, for he cannot be presumed to have granted a right to an enjoyment of which he was wholly ignorant (b).

Extra-ordinary user.

589. The easement of light can only be enjoyed in respect of buildings (c), and must be claimed in respect of a window or other aperture in a building on the dominant tenement (d). The use for twenty years of an open space in a particular way requiring light does not give a right to preclude the adjoining owner from building on his land so as to obstruct the light (e).

Right can only be claimed for buildings.

SUB-SECT. 2.—Acquisition of Right to Light.

590. A right to light may be created by express grant (f). The grant may be in the form of a covenant (g), or may be effected by the use of general words whereby accommodations which were formerly merely *quasi*-easements are converted into valid easements (h). A mere parol agreement to grant an easement of light may be enforceable at the instance of the grantee, if he has acted in pursuance of his part of the agreement (i).

By express grant.

(z) *Buxter v. Bower* (1875), 44 L. J. (CH.) 625, C. A.; *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, per Lord DAVEY, at p. 202.

(a) *Lanfranchi v. Mackenzie* (1867), L. R. 4 Eq. 421, 430; *Ambler v. Gordon*, [1905] 1 K. B. 417, 423; *Colls v. Home and Colonial Stores, Ltd.*, *supra*, at p. 203; compare, however, *Herz v. Union Bank of London* (1859), 2 Giff. 686.

(b) *Ambler v. Gordon*, *supra*, at p. 424; compare, however, *Herz v. Union Bank of London*, *supra*. See also *Corbett v. Jonas*, [1892] 3 Ch. 137.

(c) *Potts v. Smith* (1868), L. R. 6 Eq. 311; *Roberts v. Macord* (1832), 1 Mood. & R. 230; see also *Scott v. Pape* (1886), 31 Ch. D. 554, C. A.; *Harris v. De Pinna* (1886), 33 Ch. D. 238, C. A.; *Collis v. Laughner*, [1894] 3 Ch. 659; *Courtauld v. Legh* (1869), L. R. 4 Exch. 126; *Ecclesiastical Commissioners for England v. Kino* (1880), 14 Ch. D. 213, C. A.; *Clifford v. Holt*, [1899] 1 Ch. 698; *Colls v. Home and Colonial Stores, Ltd.*, *supra*, at p. 205.

(d) See p. 307, *post*.

(e) *Roberts v. Macord*, *supra*.

(f) *Dalton v. Angus* (1881), 6 App. Cas. 740, 794; *Higgins v. Belts*, [1905] 2 Ch. 210, 214; *Booth v. Alcock* (1873), 8 Ch. App. 663, 667.

(g) As to the question whether the easement of light and other negative easements are properly the subject of grant or are only capable of being created by covenant, see *Moore v. Rawson* (1824), 3 B. & C. 332, at p. 340; *Rowbotham v. Wilson* (1857), 8 E. & B. 123, 147, Ex. Ch.; *Hall v. Lichfield Brewery Co.* (1880), 49 L. J. (CH.) 655, 656; *Leech v. Schweder* (1874), 9 Ch. App. 463, 474; *Dalton v. Angus*, *supra*, at pp. 794, 795, 823. Compare also *Prinsep (Lady) v. Belgravian Estate, Ltd.*, [1896] W. N. 39 (1), C. A.; and see p. 247, *ante*.

(h) See p. 250, *ante*.

(i) *McManus v. Cooke* (1887), 35 Ch. D. 681. As to cases where agreements to grant other easements have been enforced although not under seal, see *Devonshire (Duke) v. Eglin* (1851), 14 Beav. 530; *Morelan Richardson* (1850), 22 Beav. 596; *Laird v. Birkenhead Rail. Co.* (1859), John. 500; *Mold v.*

SECT. 2.

Light.By implied
grant.

591. The right may also be created by implication of law (*j*). If a man owns a house, and also owns property of any kind adjoining that house, and then either conveys the house in fee simple or demises it for a term of years to another person, a right to light, unobstructed by anything to be erected on any land which at the time of the grant belonged to the grantor, passes to the grantee (*k*). It makes no difference whether the windows of the house are ancient lights or not (*l*). This principle holds good with regard to dispositions by will as well as to dispositions *inter vivos* and for valuable consideration (*m*), and applies in the case of a mortgagee selling under his statutory power of sale (*n*).

The extent, in point of duration, of the easement of light arising by implication of law is necessarily limited to the duration of the estate or interest which the common owner had in the servient tenement at the time when the easement arose (*o*). And this is so even although he may subsequently acquire an extended interest in that tenement (*p*).

No implied
reservation
of light.

592. But where a man owns a house and adjoining land or two adjoining houses and disposes of the land or one of the houses, retaining a house, no easement of light arises by implication in his favour (*q*) except perhaps in the case of great necessity (*r*).

Simultaneous
grants.

If the owner has two adjoining tenements and simultaneously disposes of both to different grantees, an easement of light is created

Wheatcroft (1859), 27 Beav. 510; *Carr v. Benson* (1868), 3 Ch. App. 524; *Newby v. Harrison* (1861), 1 John. & H. 393; *Bankart v. Tennant* (1870), L. R. 10 Eq. 141; and see generally, p. 246, *ante*. As to whether an easement is an interest in land within the meaning of the Statute of Frauds and whether the doctrine of part performance applies, see p. 237, *ante*.

(*j*) *Palmer v. Fletcher* (1663), 1 Lev. 122; *Birmingham, Dudley and District Banking Co. v. Ross* (1888), 38 Ch. D. 295, O. A.; *Bailey v. Teke* (1891), 64 L. T. 789; *Robinson v. Grave* (1873), 29 L. T. 7, C. A.; *Corbett v. Jonas*, [1892] 3 Ch. 137; *Phillips v. Low*, [1892] 1 Ch. 47; *Rigby v. Bennett* (1882), 21 Ch. D. 559, 567; *Pollard v. Gare*, [1901] 1 Ch. 834; *Godwin v. Schweppes, Ltd.*, [1902] 1 Ch. 926. As to the creation of easements by implication of law, see p. 251, *ante*. A contract for the sale of a house with windows overlooking the land of a third person does not imply any representation or warranty that the windows are entitled to the access of light over that land (*Greenhalgh v. Brindley*, [1901] 2 Ch. 324).

(*k*) *Leech v. Schweder* (1874), 9 Ch. App. 463, 472; *Palmer v. Fletcher* (1663), 1 Lev. 122; *Robinson v. Grave*, *supra*; *Coutts v. Gorham* (1829), Mood. & M. 396; *Born v. Turner*, [1900] 2 Ch. 211; *Davies v. Marshall* (1861), 9 W. R. 368; *Salaman v. Glover* (1875), L. R. 20 Eq. 444; *Pollard v. Gare*, *supra*. See also *Quicke v. Chapman*, [1903] 1 Ch. 659, O. A., *per* ROMER, L.J., at pp. 670, 671.

(*l*) *Leech v. Schweder*, *supra*; *Palmer v. Fletcher*, *supra*; *Coutts v. Gorham*, *supra*.

(*m*) *Phillips v. Low*, *supra*; *Barnes v. Loach* (1879), 4 Q. B. D. 494.

(*n*) *Born v. Turner*, *supra*.

(*o*) *Booth v. Alcock* (1873), 8 Ch. App. 663; *Godwin v. Schweppes, Ltd.*, [1902] 1 Ch. 926.

(*p*) *Booth v. Alcock*, *supra*; *Godwin v. Schweppes, Ltd.*, *supra*; compare *Rymer v. McIntroy*, [1897] 1 Ch. 528.

(*q*) *Wheeldon v. Burrows* (1879), 12 Ch. D. 31, C. A.; *White v. Bass* (1862), 7 H. & N. 722; *Curriers' Co. v. Corbet* (1865), 2 Drew. & Sm. 355, 360; *Ellis v. Manchester Carriage Co.* (1876), 2 C. P. D. 13. Compare *Russell v. Watts* (1885), 10 App. Cas. 590; *Cunham v. Fisk* (1831), 2 Cr. & J. 126, 128; *Muster v. Hansard* (1876), 4 Ch. D. 718, C. A.

(*r*) *Ray v. Hazeldine*, [1904] 2 Ch. 17.

by implication of law in favour of the grantee of each tenement against the grantee of the other (s).

SECT. 2.

Light.

By prescription.

593. The right to light may also be claimed under the doctrine of prescription or under the provisions of the Prescription Act, 1832 (t). For some time after the passing of that statute it was believed that the method of claiming the easement rested thenceforth solely upon its provisions (u); but it has since been held that the Act in no degree whatever altered the pre-existing law (v). There is no difference with regard to the nature and extent of the easement of light, whether the right to it be claimed under the doctrine of prescription at common law, or under the doctrine of a lost modern grant, or under the provisions of the Prescription Act, 1832 (w). The Act has only altered the conditions or length of user by which the right may be acquired (a), and neither enlarges the right of the dominant tenement nor adds to the burden of the servient tenement (b).

594. When the access and use of light to any dwelling-house, workshop, or other building has been actually enjoyed for the full period of twenty years without interruption, the right thereto is under the Prescription Act, 1832, deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (c).

Enjoyment under Prescription Act, 1832.

The Act has materially altered the nature of the enjoyment by which the right may be acquired; for enjoyment as of right is not necessary in order that a person may establish a prescriptive claim under the Act to the easement of light (d).

The statute has thus created a fresh origin for the right, differing in a most material manner from prescription at common law or

(s) *Allen v. Taylor* (1880), 16 Ch. D. 355; *Rigby v. Bennett* (1882), 21 Ch. D. 559, 567, C. A.

(t) 2 & 3 Will. 4, c. 71, s. 3.

(u) See *Tapling v. Jones* (1865), 11 H. L. Cas. 290, per Lord CRANWORTH, at p. 310; *Truscott v. Merchant Taylors' Co.* (1856), 11 Exch. 855, 863, Ex. Ch.

(v) *Kelk v. Pearson* (1871), 6 Ch. App. 809, per JAMES, L.J., at p. 811; *Aynsley v. Glover* (1875), 10 Ch. App. 283; *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, 198; see also *Norfolk (Duke) v. Arbuthnot* (1879), 4 C. P. D. 290, affirmed (1880), 5 C. P. D. 390, C. A.

(w) *Kelk v. Pearson*, *supra*; see also *Colls v. Home and Colonial Stores, Ltd.*, *supra*, per Lord DAVEY, at pp. 198, 199, and per Lord MACNAGHTEN, at p. 190; *Leech v. Schweder* (1874), 9 Ch. App. 463; *Aynsley v. Glover*, *supra*; *Scott v. Pape* (1886), 31 Ch. D. 554, C. A.

(a) *Colls v. Home and Colonial Stores, Ltd.*, *supra*, per Lord DAVEY, at p. 199.

(b) *Ibid.*, per Lord MACNAGHTEN, at p. 190.

(c) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3; see also p. 308, *post*. As to the custom of London relating to light, see *Wynstanley v. Lee* (1818), 2 Swan. 337; *Perry v. Eames*, [1891] 1 Ch. 658. Enjoyment under the Act defeats the custom (*Salters' Co. v. Jay* (1842), 3 Q. B. 109; *Truscott v. Merchant Taylors' Co.*, *supra*).

(d) *Truscott v. Merchant Taylors' Co.*, *supra*; *Frewen v. Philipps* (1861), 11 O. B. (N. S.) 449, Ex. Ch.; *Simper v. Foley* (1862), 2 John. & H. 555; *Harbidge v. Warwick* (1849), 3 Exch. 552; *Colls v. Home and Colonial Stores, Ltd.*, *supra*; *Kilgour v. Gaddes*, [1904] 1 K. B. 457, 462, C. A.; *Gardner v. Hodgson's Kingston Breweries Co.*, [1901] 2 Ch. 198, 215, C. A.; [1903] A. C. 229. As to the meaning of the expression "enjoyment," or "user as of right," see p. 262, *ante*.

SECT. 2.
Light.

Light must
be acquired
in respect of
a building.

under the doctrine of a lost modern grant, for the prescription of the Act is not based upon the supposition of any implied grant or covenant. If the requirements of the statute as to enjoyment for a certain period are fulfilled, any such supposition is unnecessary (e).

595. An easement of light can only be acquired under the Act in respect of a building (f), and cannot be acquired in respect of open land, such as a garden (g). The building in respect of which the claim is made must be some structure of the same nature as a dwelling-house or workshop (h). Every structure which is a "building" within the meaning of the Metropolitan Building Acts is not necessarily a building with respect to which a prescriptive claim to light can be successfully made under the provisions of the statute (i). Claims to light have been successfully made under the Act in respect of a church (k), an unconsecrated chapel (l), a greenhouse (m), a picture gallery (n), a factory (o), a cottage (p), a glass photographic studio (q), a hotel (r), and a cowshed (s); but have failed in the case of a sawpit or timber yard (t).

A right to light may be acquired under the Act in respect of a house which has not been inhabited, or even fit for habitation (u), during the whole or part of the statutory period (x).

(e) *Scott v. Pape* (1886), 31 Ch. D. 554, O. A., per BOWEN, L.J., at p. 571; *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, 205; *Truscott v. Merchant Taylors' Co.* (1856), 11 Exch. 855, Ex. Ch.; *Frewen v. Philipps* (1861), 11 C. B. (N. S.) 449, Ex. Ch.; *Simper v. Foley* (1862) 2 John. & H. 555; *Harbidge v. Warwick* (1849), 3 Exch. 552; *Morgan v. Fear*, [1907] A. O. 425.

(f) *Scott v. Pape*, *supra*; *Harris v. De Pinna* (1886), 33 Ch. D. 238, C. A.; *Collis v. Laugher*, [1894] 3 Ch. 659; *Courtauld v. Legh* (1869), L. R. 4 Exch. 126; *Ecclesiastical Commissioners for England v. Kino* (1880), 14 Ch. D. 213, C. A.; *Clifford v. Holt*, [1899] 1 Ch. 698; *Potts v. Smith* (1868), L. R. 6 Eq. 311; *A.-G. v. Queen Anne Garden and Mansions Co.* (1889), 60 L. T. 759; *Colls v. Home and Colonial Stores, Ltd.*, *supra*; and see p. 303, *ante*.

(g) *Potts v. Smith*, *supra*.

(h) *Harris v. De Pinna*, *supra*.

(i) *Ibid.* See also as to buildings, title METROPOLIS.

(k) *Ecclesiastical Commissioners for England v. Kino*, *supra*; *Anderson v. Francis*, [1906] W. N. 160. As to the question whether there is a right to light coming through an arch of the chancel of a church, see *Norfolk (Duke) v. Arbutnot* (1880), 5 C. P. D. 390, 392, C. A.; and see *Myers v. Cutterson* (1889), 43 Ch. D. 470, C. A.

(l) *A.-G. v. Queen Anne Garden and Mansions Co.*, *supra*.

(m) *Clifford v. Holt*, [1899] 1 Ch. 698.

(n) *A.-G. v. Queen Anne Garden and Mansions Co.*, *supra*; see also *Clifford v. Holt*, *supra*, at p. 702.

(o) See, e.g., *Warren v. Brown*, [1902] 1 K. B. 15, C. A.

(p) *Cowper v. Laidler*, [1903] 2 Ch. 337.

(q) *Lazarus v. Artistic Photographic Co.*, [1897] 2 Ch. 21†; see also *Clifford v. Holt*, *supra*, at p. 702.

(r) *Martin v. Price*, [1894] 1 Ch. 276, O. A.

(s) *Hyman v. Van den Bergh*, [1908] 1 Ch. 167, C. A., where, however, the claim failed because the light had been enjoyed by consent during part of the statutory period.

(t) *Roberts v. Macord* (1832), 1 Mood. & B. 230.

(u) *Colls v. Home and Colonial Stores, Ltd.*, *supra*; *Collis v. Laugher*, *supra*; *Courtauld v. Legh*, *supra*.

(x) *Collis v. Laugher*, *supra*, per ROMER, J., at p. 661. In this case it was held that time ran under the statute in favour of the owner of a house from a time when all external work was done, the walls finished, the windows placed in

596. There must, however, be both access and use of light, for access alone, that is to say, free passage of light over the servient tenement, is not sufficient (a). Thus, no right of light can be acquired in respect of windows barred by shutters which cannot be opened, or which are never in fact opened during the twenty years (b). The word "access" as used in s. 8 of the Prescription Act, 1832 (c), does not refer to access through the aperture or window, but to the freedom of passage of light over the servient tenement (d). The right acquired under the Act is governed and measured to a great extent by the access of light to the dominant tenement, and the aperture which lets the light into that tenement is a material element in defining the area which must be kept free over the servient tenement (e). But the size and situation of the aperture is not the exclusive test of the maximum and minimum measures of the right acquired, without reference to the use and enjoyment of the light to which it has given access (f).

SECT. 2.

Light.

Access of light without user does not create a right.

597. The apertures through which the light may come are not confined to ordinary windows, but may consist of skylights (g), unglazed windows in which there are not even sashes (h), the windows (i), and, probably, the arch of a church (k), a glazed door (l), the glass sides of a photographic studio (m), the roof and sides of a greenhouse or conservatory, whether it be attached or not to a dwelling-house (n), or the roof and sides of a vinery (o).

Nature of apertures.

598. No right to light can be successfully claimed under the provisions of the Prescription Act, 1832 where it is shown that

Enjoyment under agreement.

position, the joists in place for the different landings, and the roof put on and completely tiled, although neither the glass nor sashes of the windows had been put in, nor the joists laid on the floors, nor the pipes for gas and water fixed in place.

(a) *Scott v. Pape* (1886), 31 Ch. D. 554, 575, C. A.; *Cooper v. Straker* (1888), 40 Ch. D. 21, 26; *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, 205.

(b) *Courtauld v. Legh* (1869), L. R. 4 Exch. 126, as explained in *Smith v. Baxter*, [1900] 2 Ch. 138, 145.

(c) 2 & 3 Will. 4, c. 71.

(d) *Scott v. Pape*, *supra*. See also *Harris v. De Pinna* (1896), 33 Ch. D. 238, C. A.; *Colls v. Home and Colonial Stores, Ltd.*, *supra*.

(e) *Scott v. Pape*, *supra*; and see *Andrews v. Waite*, [1907] 2 Ch. 500.

(f) *Colls v. Home and Colonial Stores*, *supra*, at p. 206; *Kelk v. Pearson* (1871), 6 Ch. App. 809; *City of London Brewery Co. v. Tennant* (1873), 9 Ch. App. 212; *Leech v. Schweder* (1874), 9 Ch. App. 463; compare *Tupling v. Jones* (1865), 11 H. L. Cas. 290, 305, 306; *Yates v. Jack* (1866), 1 Ch. App. 295; *Culcraft v. Thompson* (1867), 15 W. R. 387.

(g) *Smith v. Baxter*, *supra*; *Easton v. Isted*, [1903] 1 Ch. 405, C. A.; *Harris v. Kinloch & Co.*, [1895] W. N. 60; *Presland v. Bingham* (1889), 41 Ch. D. 268, C. A.; *Cowper v. Laidler*, [1903] 2 Ch. 337.

(h) *Collis v. Laughler*, [1894] 5 Ch. 659.

(i) *Ecclesiastical Commissioners for England v. Kino* (1880), 14 Ch. D. 213, C. A.

(k) Compare *Norfolk (Duke) v. Arbuthnot* (1880), 5 O. P. D. 390, C. A.

(l) *Presland v. Bingham*, *supra*.

(m) *Lazarus v. Artistic Photographic Co.*, [1897] 2 Ch. 214. Compare *Harris v. De Pinna*, *supra*, at p. 262. In this case a prescriptive claim to light under the Act to a timber shed consisting of a roof and framework failed upon other grounds.

(n) *Clifford v. Holt*, [1899] 1 Ch. 698.

(o) *Born v. Turner*, [1900] 2 Ch. 211.

SECT. 2.

Light.

the alleged right has been enjoyed under some consent or agreement expressly given for that purpose by deed or writing (*p*). A writing signed by the owner of the dominant tenement and not by the owner of the servient tenement may be a sufficient agreement for this purpose (*q*).

Payment of rent.

The payment of rent by the owner or occupier of the dominant tenement for the use of the light, although not such an interruption as will prevent the easement of light being successfully claimed under the Prescription Act, 1832, after the statutory period has elapsed (*r*), will yet preclude any successful claim to the light if the payment be made under a written consent or agreement by virtue of which the enjoyment of the light is allowed (*s*).

Agreement must be with occupier of dominant tenement.

The occupier actually enjoying the access of light or the use of the dominant tenement is the only person whose consent or agreement in writing can be effectual to prevent the acquisition of light. Mere casual occupants, such as visitors, guests, lodgers or servants, residing in the house, or a caretaker of an empty house, or employees at a workshop, cannot effectually agree or consent, for their occupation and enjoyment is by leave and licence of the master of the house or workshop and is in truth his occupation and enjoyment. The occupier need not be the owner in fee simple. The acts or acquiescence of a disseisor during his occupation of the premises are equally effectual for the purpose of acquiring, defeating, or abandoning the right to light (*t*).

Statutory interruption.

599. No easement of light can be acquired under the provisions of the Act where there has been a statutory interruption in the enjoyment of the light (*a*). The word "interruption" in s. 3 bears the same meaning as in s. 4 (*b*). It refers to an adverse obstruction and not to a mere discontinuance of user (*c*). The question whether there has or has not been an effective interruption cannot be determined by simply considering whether an obstacle interposed to the enjoyment of the easement is fixed or movable, for although fixedness or movability of the obstacle are important elements to be taken into consideration, the decision of each case depends upon all the circumstances which are brought before the court (*d*). If

(*p*) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3; *Haynes v. King*, [1893] 3 Ch. 439; *Bewley v. Atkinson* (1879), 13 Ch. D. 283, C. A.; *Hyman v. Van den Bergh*, [1908] 1 Ch. 167, C. A. Compare *Mitchell v. Cuntrill* (1887), 37 Ch. D. 56; *Easton v. Isted*, [1903] 1 Ch. 405, C. A. See also *Ruscoe v. Grounsell* (1903), 89 L. T. 426, C. A., where an inscription on a stone built into a wall was held not to be a consent in writing.

(*q*) *Bewley v. Atkinson*, *supra*; *Mitchell v. Cuntrill*, *supra*, at p. 61.

(*r*) *Plasterers' Co. v. Parish Clerks' Co.* (1851), 6 Exch. 630, where the rent was paid under a verbal agreement.

(*s*) Prescription Act, 1832 (2 & 3 Will. 4 c. 71), s. 3.

(*t*) *Hyman v. Van den Bergh*, [1908] 1 Ch. 167, C. A., *per* FARWELL, L.J., at p. 179.

(*a*) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), ss. 3, 4; *Presland v. Bingham* (1889), 41 Ch. D. 268, C. A.; and see p. 273, *ante*.

(*b*) *Smith v. Baxter*, [1900] 2 Ch. 138, *per* STIRLING, J., at p. 146.

(*c*) *Smith v. Baxter*, *supra*; *Plasterers' Co. v. Parish Clerks' Co.*, *supra*, *per* Lord CAMPBELL, C.J., at p. 635; *Carr v. Foster* (1842), 3 Q. B. 581 (a decision under s. 1 of the Act); *Hollins v. Verney* (1884), 13 Q. B. D. 304, C. A.

(*d*) *Smith v. Baxter*, *supra*.

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Light.

it appears on the evidence of the person seeking to establish the easement that there has been an interruption of a permanent character, which from its nature is likely to be of a permanent character, then it lies on him to show that it did not in fact last for a year; but if it appears that the interruption is one not likely to be of a permanent character, or from its nature is not of a permanent character, it lies upon the party opposing the claim to show that there has been an interruption which has been existing and acquiesced in for more than a year (e).

600. A right to light may be acquired under the Prescription Act, 1832, against remaindermen and reversioners of the servient tenement, although during the statutory period the land has been in the hands of a tenant, and consequently they have been unable to oppose the user or enjoyment (f). This is due to the fact that the Act does not require the enjoyment to have been enjoyment as of right (g). Where the tenements are held by two persons under leases from the same landlord, the lessee of either tenement may during his term acquire under the Act an easement of light as against the other lessee and his own landlord as the reversioner of the servient tenement, in spite of the unity of seisin in the common landlord (h).

601. No right to light can be acquired under s. 3 of the Act as against the Crown (i). The Crown is mentioned in ss. 1 and 2, but not in s. 3, and by a rule of construction no Act of Parliament binds the Crown unless the Crown is expressly mentioned, or unless the intention to bind the Crown is clear and unmistakable (j). Similarly, no easement of light can be acquired under the statute as against a tenant holding under a lease from the Crown (k).

602. The Act has not created a class of easements which could not be gained by prescription at common law, such as an easement for a limited time only, or available only against particular owners or occupiers of the servient tenement (l). Consequently, as such easements could not be acquired as against the fee simple, they cannot be acquired at all (m).

Easement of
light cannot
be acquired
for a term.

(e) *Presland v. Bingham* (1889), 41 Ch. D. 268, C. A., per COTTON, L.J., at p. 274, in which case it was held that there was no interruption of light effected by piles of packing cases containing marble and stone which were removed from time to time as required and replaced by others.

(f) *Simper v. Foley* (1862), 2 John. & H. 555; compare *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, C. A.

(g) *Kilgour v. Gaddies*, [1904] 1 K. B. 457, 462, C. A.

(h) *Frewen v. Philipps* (1861), 11 C. B. (N. S.) 449, Ex. Ch.; *Mitchell v. Cantrill* (1887), 37 Ch. D. 56; *Robson v. Edwards*, [1893] 2 Ch. 146; *Morgan v. Fear*, [1907] A. C. 425; compare also *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, C. A.

(i) *Perry v. Eames*, [1891] 1 Ch. 638; *Wheaton v. Maple & Co.*, *supra*.

(j) *Perry v. Eames*, *supra*, at p. 665; *Wheaton v. Maple & Co.*, *supra*, per LINDLEY, L.J., at p. 64. See also title CONSTITUTIONAL LAW, Vol. VI., p. 485.

(k) *Wheaton v. Maple & Co.*, *supra*; compare *Bright v. Walker* (1834), 1 Cr. M. & R. 211.

(l) *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, 65, C. A.

(m) *Ibid.*

SECT. 3.

Water.

General
rights to
water.

SECT. 3.—*Water.*SUB-SECT. 1.—*In General.*

603. Water cannot in general form the subject-matter of property (*n*). A man cannot bring an action to recover possession of a pool or other piece of water as such; for water is a movable wandering thing, which must of necessity continue common by the law of nature (*o*). No action can be supported merely for taking water, unless the water be contained in a cistern or some other vessel in which the person bringing the action has placed it for his private use (*p*). So long, however, as water remains upon the land where it first rises from the earth, the owner of that land alone has a right to appropriate it, for no one else can do so without committing a trespass. When, however, it has left that land the owner has no more power over it or interest in it than a stranger (*q*).

Meaning of
grant of
watercourse.

The grant of a watercourse does not, therefore, mean the grant of the water itself. It may mean any one of three things, namely, a grant of the easement or the right to the running of water, or a grant of the channel-pipe or drain which contains the water, or a grant of the land over which the water flows (*r*). The meaning in the case of each particular grant is to be drawn from the context, and if there is no context from which the meaning can be gathered the word "watercourse" *prima facie* means an easement (*s*).

Distinction
between
natural and
acquired
right to
water.

604. An easement relating to water or watercourses must be carefully distinguished from the natural right to water which is enjoyed as an incident to the ownership of land (*t*). The easement is a right enjoyed over and above the natural right, and the burden of the easement involves, in general, a diminution or detraction from the natural right (*u*).

Nature of
easement.

605. Easements which relate to water and watercourses are very varied (*v*). Their nature depends largely upon the distinction,

(*n*) *Race v. Ward* (1855), 4 E. & B. 702, per Lord CAMPBELL, C.J., at p. 709; *Embrey v. Owen* (1851), 6 Exch. 353, 369, 370; *Ballard v. Tomlinson* (1885), 29 Ch. D. 115, 121, C. A.; *Williams v. Morland* (1824), 2 B. & C. 910, 917; compare *Rawstron v. Taylor* (1855), 11 Exch. 369; *Mason v. Hill* (1833), 5 B. & Ad. 1.

(*o*) 2 Bl. Com. 18; *Race v. Ward*, *supra*. He must sue, if at all, for recovery of the land covered by the water.

(*p*) *Race v. Ward*, *supra*; *Embrey v. Owen*, *supra*, per PARKE, B., at p. 369; *Mason v. Hill*, *supra*, at p. 24, cited in *Embrey v. Owen*, *supra*, at p. 369.

(*q*) *Race v. Ward*, *supra*, at p. 709.

(*r*) *Taylor v. St. Helen's Corporation* (1877), 6 Ch. D. 264, 271, C. A.

(*s*) *Ibid*.

(*t*) As to the natural right to water, see p. 311, *post*; for the law generally as to water and watercourses, see title WATERS AND WATERCOURSES.

(*u*) See p. 236, *ante*; *Wright v. Howard* (1823), 1 Sim. & St. 190.

(*v*) As to rights of drawing water from wells and springs on the land of another person, see *Race v. Ward*, *supra*. As to the right of discharging rainwater on another's land from spouts or eaves, see *Harvey v. Walters* (1873), L. R. 8 C. P. 162; *Moore v. Brown (Lady)* (1572), 3 Dyer, 319 b; *Baten's Case* (1610), 9 Co. Rep. 53 b; 2 Roll. Abr. 140 "Nusans," G. (5);

all-important for this purpose, between water flowing in a natural channel and water flowing in an artificial watercourse (*w*).

SECT. 3.
Water.

606. With regard to easements relating to water flowing in a natural channel the distinction between the easement and the natural right to water is of first importance; but this distinction has little bearing with regard to easements relating to water flowing in an artificial channel, because they depend in general upon some agreement, express or implied, which excludes all question of natural rights (*x*).

SUB-SECT. 2.—*Right to Water ex jure naturæ.*

607. Every owner of land adjacent to water running in a defined natural channel has at common law a right to have a continuance of the accustomed flow of water (*y*), both as regards quantity and quality (*z*). This right, which is generally called a natural right arising *jure naturæ* (*a*), is an incident arising by law from the ownership of each plot of land over or through which the water passes (*b*), with the result that there is a mutual benefit to and mutual burden upon each owner (*c*). Consequently one particular

Natural
right to
accustomed
flow.

1 Com. Dig. 118, Action on the Case for Nuisance, *A*. As to increasing the velocity of the stream, see *Williams v. Morland* (1824), 2 B. & C. 910. As to an easement of water for turning a mill wheel, see *Carlisle Corporation v. Blamire* (1807), 8 East, 487. As to opening sluices to avoid flood, see *Simpson v. Godmanchester Corporation*, [1897] A. C. 696. As to easements allowing pollution, see p. 318, *post*. As to the general rights of riparian owners, see title WATERS AND WATERCOURSES; and for forms, see *Encyclopædia of Forms*, Vol. V., pp. 533—545.

(*w*) *Greatrex v. Hayward* (1853), 8 Exch. 291, 293; *Wood v. Waud* (1849), 3 Exch. 748; *Rameshwar Pershad Narain Singh v. Kooj Behari Pattuk* (1878), 4 App. Cas. 121, 126, P. C.; *M'Evoe v. Great Northern Rail. Co.*, [1900] 2 I. R. 325, 333, C. A.; *Burrows v. Lang*, [1901] 2 Ch. 502, 507.

(*x*) *Kensit v. Great Eastern Rail. Co.* (1884), 27 Ch. D. 122, O. A., at pp. 133, 134, where COTTON, L.J., said, "It seems to me to be a contradiction in terms to say that any natural rights can ever be acquired in an artificial cut." See, however, *Sutcliffe v. Booth* (1863), 32 L. J. (Q. B.) 136, where it was held that although the particular watercourse in that case might have been artificial, it might still have been originally made under circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had if it had been a natural stream; and *Whitmores (Edenbridge), Ltd. v. Stanford*, [1909] 1 Ch. 427; see p. 315, *post*.

(*y*) *John Young & Co. v. Bankier Distillery Co.*, [1893] A. C. 691, 698; *Embrey v. Owen* (1851), 6 Exch. 353, 369; *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *Williams v. Morland* (1824), 2 B. & C. 910; *Miner v. Gilmour* (1858), 12 Moo. P. C. C. 131; *Ewart v. Belfast Poor-Law Guardians* (1881), 9 L. R. Ir. 172, 185, O. A.; *Bradford Corporation v. Ferrand*, [1902] 2 Ch. 655, 660; *Bealey v. Shaw* (1805), 6 East, 208, 214; *Bicket v. Morris* (1866), 14 L. T. 835, H. L.; *Norbury (Earl) v. Kitchin* (1866), 15 L. T. 501; *John White & Sons v. J. & M. White*, [1906] A. C. 72, 80; compare *Waller v. Manchester Corporation* (1861), 6 H. & N. 667.

(*z*) *John Young & Co. v. Bankier Distillery Co.*, *supra*.

(*a*) *Sury v. Pigot* (1626), Poph. 166; *Bradford Corporation v. Ferrand*, *supra*; *Chasemore v. Richards*, *supra*; *Ewart v. Belfast Poor-Law Guardians*, *supra*.

(*b*) *Embrey v. Owen*, *supra*; *Kensit v. Great Eastern Rail. Co.*, *supra*; *Chasemore v. Richards*, *supra*; *Bradford Corporation v. Ferrand*, *supra*.

(*c*) *Wright v. Howard* (1823), 1 Sim. & St. 190, 203; *Burrows v. Lang*, [1901] 2 Ch. 502, 506; *John Young & Co. v. Bankier Distillery Co.*, *supra*.

SECT. 8.
Water.

owner cannot in general appropriate the whole of the water, for not only has his land the advantage of being washed by the stream, but the lands of others have a similar advantage which must be preserved (*d*). Since the facts of nature constitute the foundation of his right the law recognises and follows the course of nature in every part of the stream (*e*). In the same manner as a riparian owner is bound to pay regard to the effect which the result of his user of the stream has upon the stream affecting the lands of others, so has he also a corresponding mutual benefit from a similar duty imposed upon other owners (*f*). And each riparian owner has a natural right subject to the similar rights of other riparian owners to the reasonable enjoyment of the water (*g*), and a right of action in respect of any unreasonable and therefore unauthorised use of this common benefit (*h*).

Reasonable
user.

608. It is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application, as the question is in each case one of degree, depending to a large extent on the magnitude of the stream as compared with the amount of water abstracted (*i*). There is, however, usually but little difficulty in determining whether a particular case falls within the permitted limits or not (*k*). A riparian owner may use the water for ordinary or primary purposes for his domestic wants and the general and usual requirements of his tenement, and he may also, subject to compliance with certain conditions, use it for other purposes—sometimes called extraordinary or secondary purposes—provided they are connected with or incident to his land (*l*). The dividing line between primary and secondary purposes has never been accurately fixed, and is probably incapable of accurate demarcation.

Limits of
user.

609. In the ordinary or primary use of the water the riparian owner is under no restriction, for in the exercise of these ordinary

(*d*) *Burrows v. Lang*. [1901] 2 Ch. 502; *Embrey v. Owen* (1851), 6 Exch. 353, at p. 369; *John Young & Co. v. Bankier Distillery Co.*, [1893] A. C. 691; compare, however, *McCartney v. Londonderry and Lough Swilly Railway*, [1904] A. C. 301, *per* Lord MACNAGHTEN, at p. 307.

(*e*) *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662, 682.

(*f*) *Embrey v. Owen*, *supra*.

(*g*) *Ibid.*; *John Young & Co. v. Bankier Distillery Co.*, *supra*.

(*h*) *Embrey v. Owen*, *supra*. See generally title WATERS AND WATERCOURSES.

(*i*) *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1875), L. R. 7 H. L. 697, 704.

(*k*) *Embrey v. Owen*, *supra*, *per* PARKE, B., at p. 372. As to the taking of water for the purposes of supplying a town, see *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.*, *supra*; as to a lunatic asylum and a gaol, see *Melway Co. v. Romney (Earl)* (1861), 9 C. B. (N. S.) 575. As to the taking of water for the use of locomotives, see *A.-G. v. Great Eastern Rail. Co.* (1871), 6 Ch. App. 572; *McCartney v. Londonderry and Lough Swilly Railway*, *supra*; differing from *Sandwich (Earl) v. Great Northern Rail. Co.* (1878), 10 Ch. D. 707. See, generally, *Owen v. Davies*, [1874] W. N. 175; *Ormerod v. Todmorden Mill Co.* (1883), 11 Q. B. D. 155, C. A.; *Roberts v. Gwyrfa District Council*, [1899] 2 Ch. 608, C. A.

(*l*) *McCartney v. Londonderry and Lough Swilly Railway*, *supra*, at p. 307; *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.*, *supra*.

SECT. 3.
Water.

rights he may exhaust the water altogether (*m*). In the exercise of the right to take water for extraordinary or secondary purposes his user must be reasonable, the purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character (*n*).

In no case can a riparian owner take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement (*o*).

610. Different considerations apply to the cases of water flowing in an unascertained channel (*p*), or water percolating through the earth in an indefinite channel (*q*). In these cases a landowner has no right at common law to the continuance of the flow (*r*). Consequently if a landowner does any act upon his own land which results in preventing the access to his neighbour's land of water which formerly came there by an unascertained channel or by mere percolation, he has committed no actionable wrong (*s*).

Water in unascertained or indefinite channel.

A landowner is entitled to interfere with the surface water on his land, although the result may be to prevent the water eventually reaching a defined channel, and even although another person may be entitled to the flow of the water in the defined channel (*t*).

611. In the case of a subterranean stream the course of which is well known, the rights of landowners with regard to the flow of the water are in general similar to those which arise in the case of water flowing upon the surface in a defined natural course (*a*).

Defined subterranean channel.

(*m*) *McCartney v. Londonderry and Lough Swilly Railway*, [1904] A. C. 301; *Miner v. Gilmour* (1858), 12 Moo. P. C. C. 131, 156; compare, however, *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1875), L. R. 7 H. L. 697, at pp. 704, 705.

(*n*) *McCartney v. Londonderry and Lough Swilly Rail. Co., Ltd.*, *supra*, per Lord MACNAGHTEN, at p. 307; *John Young & Co. v. Bankier Distillery Co.*, [1893] A. C. 691, 698; *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.*, *supra*. See also title WATERS AND WATERCOURSES.

(*o*) *McCartney v. Londonderry and Lough Swilly Railway*, *supra*, at p. 306.

(*p*) See, for instance, *Bradford Corporation v. Ferrand*, [1902] 2 Ch. 655.

(*q*) See, for instance, *Acton v. Blundell* (1843), 12 M. & W. 324, Ex. Ch.; *Rawstron v. Taylor* (1855), 11 Exch. 369.

(*r*) *Acton v. Blundell*, *supra*; *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *Rawstron v. Taylor*, *supra*; *New River Co. v. Johnson* (1860), 2 E. & E. 435; *Bradford Corporation v. Ferrand*, *supra*.

(*s*) *Bradford Corporation v. Ferrand*, *supra*; *Chasemore v. Richards*, *supra*; *New River Co. v. Johnson*, *supra*; compare *R. v. Metropolitan Board of Works* (1863), 3 B. & S. 710; *Brain v. Marfell* (1879), 41 L. T. 455, O. A.; *Ballacorkish Silver, Lead, and Copper Mining Co. v. Harrison* (1873), L. R. 5 P. O. 49; *Dickinson v. Grand Junction Canal Co.* (1852), 7 Exch. 282, 300; *Grand Junction Canal Co. v. Shugar* (1871), 6 Ch. App. 483.

(*t*) *Broadbent v. Ramsbotham* (1856), 11 Exch. 602; *Rawstron v. Taylor*, *supra*; *Bradford Corporation v. Ferrand*, *supra*, at p. 660. Compare *Grand Junction Canal Co. v. Shugar*, *supra*; *English v. Metropolitan Water Board*, [1907] 1 K. B. 588.

(*a*) *Dickinson v. Grand Junction Canal Co.*, *supra*, per POLLOCK, C.B., at pp. 300, 301; *Chasemore v. Richards*, *supra*; *Bradford Corporation v. Ferrand*, *supra*; *Bradford Corporation v. Pickles*, [1895] A. C. 587; *Broadbent v. Ramsbotham*, *supra*. See also *Black v. Ballymena Commissioners* (1886), 17 L. R. Ir.

SECT. 3.

Water.

Acquisition
of easement
of water.

SUB-SECT. 3.—Easements relating to Natural Watercourses.

612. Easements in respect of water in natural watercourses may be acquired by express grant (b), by implication of law (c), or under the doctrine of prescription (d).

Such easements may entitle the owner of the dominant tenement to interfere with the flow by taking water for extraordinary purposes not connected with his tenement, or for other purposes which would not be lawful as against other riparian owners had his right merely rested upon his natural rights as a riparian owner (e). He may also acquire as an easement a right to change the state of the water (f), or to divert the water so as entirely to deprive other riparian owners of their beneficial enjoyment of the water (g), and to discharge the water of the stream upon the land of another person (h).

459; *Ewart v. Belfast Poor-Law Guardians* (1881), 9 L. R. Ir. 172, O. A.; *Acton v. Blundell* (1843), 12 M. & W. 324, Ex. Ch.; *Dudden v. Clutton Union Guardians* (1857), 1 H. & N. 627, 630. As to the rights of riparian owners on the banks of a natural stream to prevent the owner of land upon which the stream first rises to the surface from intercepting or otherwise interfering with the water flow or rise of the spring, see *Dudden v. Clutton Union Guardians*, *supra*; *Mostyn v. Atherton*, [1899] 2 Ch. 360; and compare *Bunting v. Hicks* (1894), 70 L. T. 455, O. A., and, generally, title WATER AND WATERCOURSES.

(b) For instances in reported cases of easements in natural watercourses being created by express grant, see *Carlisle Corporation v. Blamire* (1807), 8 East, 487; *Nuttall v. Bracewell* (1866), L. R. 2 Exch. 1; *John White & Sons v. J. & M. White*, [1906] A. C. 72.

(c) For instances of easements of this kind arising by implication of law, see *Sury v. Pigot* (1626), Poph. 166; *Canham v. Fisk* (1831), 2 Cr. & J. 126; *Wardle v. Brocklehurst* (1860), 8 W. R. 241, Ex. Ch.

(d) For instances where prescriptive claims to easements of this kind have been established, see *Cooper v. Barber* (1810), 3 Taunt. 99; *Holker v. Porritt* (1875), L. R. 10 Exch. 59, 62, Ex. Ch.

(e) *Sampson v. Hoddinott* (1857), 1 O. B. (N. S.) 590, 611; *Wright v. Howard* (1823), 1 Sim. & St. 190; *Dalton v. Angus* (1881), 6 App. Cas. 740, 792; *John Young & Co. v. Bankier Distillery Co.*, [1893] A. C. 691, 698; *McCartney v. Londonderry and Lough Swilly Railway*, [1904] A. C. 301, 313.

(f) *Bazendale v. McMurray* (1867), 2 Ch. App. 790; *Wood v. Sutcliffe* (1851), 2 Sim. (N. S.) 163; *Carlyon v. Lovering* (1857), 1 H. & N. 784; *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478; *Wood v. Waud* (1849), 3 Exch. 748; *Wright v. Williams* (1836), 1 M. & W. 77; *McIntyre Brothers v. McGavin*, [1893] A. C. 268; *Eastwood Brothers, Ltd. v. Honley Urban Council*, [1901] 1 Ch. 645, O. A.

(g) *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 578, 586, 587; *Cooper v. Barber* (1810), 3 Taunt. 99.

(h) *Mason v. Shrewsbury and Hereford Rail. Co.*, *supra*, at p. 587. Rights of this kind are in general, however, rights in respect of artificial watercourses, for which see p. 315, *post*. For cases relating to easements in natural watercourses, see *Cox v. Matthews* (1673), 1 Vent. 237, 239; *Bealey v. Shaw* (1805), 6 East, 208 (water taken from river to supply a mill); *Sampson v. Hoddinott*, *supra*; *Dewhurst v. Wrigley* (1834), Coop. Pr. Cas. 329 (obstruction of water restrained); *Beeston v. Weate* (1856), 5 E. & B. 986 (easement established for damming a brook to get water for irrigation and farm purposes); *Murgatroyd v. Robinson* (1857), 7 E. & B. 391 (claim to throw cinders into river); *Nuttall v. Bracewell* (1866), L. R. 2 Exch. 1 (acknowledgment of right to obstruct); *Holker v. Porritt* (1875), L. R. 10 Exch. 59, Ex. Ch. (artificial division of stream); *Roberts v. Fellowes* (1906), 94 L. T. 279 (claim to abstract percolating water); *John White & Sons v. J. & M. White*, *supra* (prescriptive right to abstract water for use of a mill).

SUB-SECT. 4.—*Artificial Watercourses.*

SECT. 3.

Water.No natural
rights in
artificial
watercourse.

613. There is no natural right to water in an artificial watercourse (i). But a watercourse, though artificial in its nature, may have been originally made under such circumstances, and have been so used, as to give to persons through whose lands it flows all the rights which they would have had as riparian owners had the stream in fact been a natural one (k). And in cases where an artificial channel passes through the lands of several proprietors and water flows therein to serve the purposes of a lower proprietor, the proper grant to presume in the absence of evidence is the grant of a watercourse, and *primâ facie* every proprietor of land on the banks of the channel is entitled to that moiety of the bed of the channel which adjoins his land (l).

Easement in
artificial
watercourse.

614. The existence of every artificial watercourse, unless constructed and used by a landowner solely upon his own land (m), involves the existence of an easement. Such an easement may be created by express grant (n), or may arise by implication of law (o), or by prescription (p). It may be granted or implied in respect of an artificial watercourse constructed upon the maker's own land (q), or in respect of a watercourse constructed through the land of another person, and, in this case, whether the soil of the watercourse be acquired by the person making it (r), or the easement arises by almost necessary implication from the permission to make it given by the owner of the soil (s).

(i) *Kensit v. Great Eastern Rail. Co.* (1884), 27 Ch. D. 122, 133, 134, O. A.; *Sampson v. Hoddinott* (1857), 1 C. B. (N. S.) 590; *Rameshwar Pershad Narain Singh v. Koonj Behari Pattuk* (1878), 4 App. Cas. 121, 126, P. C.; *Burrows v. Lang*, [1901] 2 Ch. 502, 505, 506; *Wood v. Waud* (1849), 3 Exch. 748.

(k) *Sutcliffe v. Booth* (1863), 32 L. J. (Q. B.) 136, per WIGHTMAN, J., at p. 139. See also *Baily & Co. v. Clark, Son and Morland, Ltd.*, [1902] 1 Ch. 649, 664, O. A.; *Nuttall v. Bracewell* (1866), L. R. 2 Exch. 1.

(l) *Whitmores (Edenbridge), Ltd. v. Stanford*, [1909] 1 Ch. 427, per EVE, J., at pp. 434, 435.

(m) *Bunting v. Hicks* (1894), 70 L. T. 455, C. A.

(n) For instances in reported cases of express grants of easements in artificial watercourses, see the following cases: *Finlinson v. Porter* (1875), L. R. 10 Q. B. 188, where the question of easement or common drain was undecided; *Wood v. Saunders* (1875), 10 Ch. App. 582 (sewer); *Outram v. Maude* (1881), 17 Ch. D. 391 (underground goit). Compare *Roberts v. Rose* (1865), L. R. 1 Exch. 82, where a licence to construct a watercourse was granted by parol. The licence being subsequently revoked, the licensor was held entitled to obstruct the watercourse; see also *Nuttall v. Bracewell*, *supra*.

(o) For instances of easements of this kind arising by implication of law, see *Watts v. Kelson* (1871), 6 Ch. App. 166; *Bunting v. Hicks* (1894), 70 L. T. 455, O. A.; *Hall v. Lund* (1863), 1 H. & C. 676.

(p) *Magor v. Chadwick* (1840), 11 Ad. & El. 571; *Wood v. Waud*, *supra*; *Blackburne v. Somers* (1879), 5 L. R. Ir. 1; *Rameshwar Pershad Narain Singh v. Koonj Behari Pattuk*, *supra*; *Powell v. Butler* (1871), 5 I. R. O. L. 309; *Brown v. Dunstable Corporation*, [1899] 2 Ch. 378; *Bunting v. Hicks*, *supra*; *Wright v. Williams* (1836), 1 M. & W. 77; *A.-G. v. Copeland*, [1902] 1 K. B. 690, C. A.

(q) See, e.g., *Buckley (R. H.) & Sons, Ltd. v. Buckley (N.) & Sons*, [1898] 2 Q. B. 608, C. A.

(r) *Dynevor (Lord) v. Tennant* (1888), 13 App. Cas. 279; *Taylor v. St. Helen's Corporation* (1877), 6 Ch. D. 261, O. A.; *Burrows v. Lang*, [1901] 2 Ch. 502.

(s) *M'Evoy v. Great Northern Rail. Co.*, [1900] 2 I. R. 325, 333, O. A.; *Burrows v. Lang*, *supra*, at pp. 508, 509; *Magor v. Chadwick*, *supra*.

SMOT. 3.

Water.

Express
grants of
easement in
artificial
watercourse.

615. Where there is in existence an express grant of an easement or an express agreement relative to the construction and continuance of an artificial watercourse, the rights of all parties depend, of course, upon its terms (*t*). The rights of some of the parties may, however, be implied from the circumstances surrounding the execution of the agreement. In general, in such a case rights in the watercourse will not readily accrue apart from those given by the agreement (*a*).

Prescriptive
rights in
artificial
watercourse.

616. Under the doctrine of prescription an easement in an artificial watercourse will be more readily established where the watercourse appears to have been created for a permanent purpose, and to have been intended to continue permanently, than where the watercourse appears to have been intended for a temporary purpose only (*b*). The court therefore inquires carefully into the character of the watercourse, especially if there is a lease existing between the parties, with a view of finding whether it was intended that the watercourse should last for all time, or whether it was a temporary convenience the construction of which was perfectly consistent with the notion that it was to be enjoyed only so long as the parties continued their relation of landlord and tenant (*c*).

Temporary
purposes.

617. A prescriptive right to an easement in an artificial watercourse constructed only for a temporary purpose cannot in general be gained as against the maker of the watercourse or his successors in title (*d*). One of the reasons for this is that the enjoyment of the accommodation afforded by the watercourse to persons other than the maker is generally of a permissive character (*e*), so that there is no enjoyment as of right which is essential to the success of every prescriptive claim to an easement of water (*f*).

In this respect the meaning of the words "temporary purpose" is not confined to a purpose that lasts in fact for a few years only, but includes a purpose which is temporary in the sense that it may within the reasonable contemplation of the parties come to an

(*t*) *Sharp v. Waterhouse* (1857), 3 Jur. (N. S.) 1022. See also *Key v. Neath Rural District Council* (1906), 95 L. T. 771, C. A.

(*a*) *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 578, 587; *Gaved v. Murtyn* (1865), 19 O. B. (N. S.) 732; *Wood v. Waud* (1849), 3 Exch. 748; *Sampson v. Hoddinott* (1857), 1 C. B. (N. S.) 590; *Staffordshire and Worcestershire Canal Navigation (Proprietors) v. Birmingham Canal Navigation (Proprietors)* (1866), L. R. 1 H. L. 254; *Greatrex v. Hayward* (1853), 8 Exch. 291; *Arkwright v. Gell* (1839), 5 M. & W. 203, 231; *Burrows v. Lang*, [1901] 2 Ch. 502, 508, 509; *M'Evoy v. Great Northern Rail. Co.*, [1900] 2 I. R. 325, 333, C. A.

(*b*) *Baily & Co. v. Clark, Son and Morland, Ltd.*, [1902] 1 Ch. 649, 668, C. A.; *Whitmores (Edenbridge), Ltd. v. Stanford*, [1909] 1 Ch. 427; *Wood v. Waud*, *supra*, at p. 778; *Greatrex v. Hayward*, *supra*; *Burrows v. Lang*, *supra*, per FARWELL, J., at p. 507; *Mason v. Shrewsbury and Hereford Rail. Co.*, *supra*, per BLACKBURN, J., at p. 584. See also *Sutcliffe v. Booth* (1863), 32 L. J. (Q. B.) 136; *Roberts v. Richards* (1881), 44 L. T. 271; *Bunting v. Hicks* (1894), 70 L. T. 455, C. A.

(*c*) *Chamber Colliery Co. v. Hopwood* (1886), 32 Ch. D. 549, C. A., per BOWEN, L. J., at pp. 558, 559.

(*d*) *Arkwright v. Gell* (1839), 5 M. & W. 203.

(*e*) *Burrows v. Lang*, *supra*, at pp. 510, 511; *Hanna v. Pollock*, [1900] 2 I. R. 664, C. A.; *Chamber Colliery Co. v. Hopwood*, *supra*.

(*f*) *Chamber Colliery Co. v. Hopwood*, *supra*, at p. 558.

end (g). A watercourse is made for a temporary purpose within this meaning if it is not intended to be a permanent alteration of the face of nature, but merely a temporary alteration for the purpose of and co-extensive with the carrying on of a particular business (h).

SMOT. 3.
Water.

618. The rights claimed as easements in respect of artificial watercourses are usually either a right to continue the enjoyment of the discharge on to the claimant's land of an artificial flow of water from a watercourse made by someone else above (i), or a right to discharge water flowing through an artificial watercourse upon the land of someone below (k).

Right to
discharge
water.

The mere discharge of water by an upper proprietor upon the land of a lower proprietor may easily establish a right on the part of the upper proprietor to go on discharging, because so long as the discharge continues there is a submission on the part of the lower proprietor to proceedings which indicate a claim of right on the part of the proprietor above (l), but it is difficult for the lower proprietor to establish a right to have the flow continued (m).

SUB-SECT. 5.—Pollution.

619. In the absence of any easement a person cannot pollute the water of a natural watercourse to the prejudice of other persons entitled to the use of the water (n). A person who has acquired a

No general

(g) *Burrows v. Lang*, [1901] 2 Ch. 502, *per FARWELL, J.*, at p. 508.

(h) *Ibid.*, *per FARWELL, J.*, at p. 508, where it is said that if a man makes a watercourse leading to a mill pond for the use of his own mill on his own land, this is for a temporary purpose, because it is limited to the period for which he uses the mill; and similarly if a man pumps water from his mines for the purpose of draining them, that is a temporary purpose, as it is limited by the duration of the workings.

(i) *Chamber Colliery Co. v. Hopwood* (1886), 32 Ch. D. 549, C. A., *per BOWEN, L.J.*, at p. 558; see, for instance, *Ivimey v. Stocker* (1866), 1 Ch. App. 396. Compare *Greatrex v. Hayward* (1853), 8 Exch. 291.

(k) *Brown v. Dunstable Corporation*, [1899] 2 Ch. 378; *A.-G. v. Dorking Union* (1882), 20 Ch. D. 595, 601; *Carlyon v. Lovering* (1856), 1 H. & N. 784; *Wright v. Williams* (1836), 1 M. & W. 77.

(l) *Chamber Colliery Co. v. Hopwood*, *supra*.

(m) *Ibid.*, where BOWEN, L.J., pointed out, at p. 558, that it would be very difficult to make out that because a man's pump had dripped on to his neighbour's land the latter had a right after twenty years to say that the pump must go on leaking. See *Greatrex v. Hayward*, *supra*, where it was held that the flow of water from a drain for twenty years, for the purposes of agricultural improvements, did not give a right to a neighbour which would preclude the proprietor from altering the level of his drains for the greater improvement of his land; see also *Wood v. Waud* (1849), 3 Exch. 748, 778; *Arkwright v. Gell* (1839), 5 M. & W. 203; *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 578. Compare *Hanna v. Polluck*, [1900] 2 I. R. 664; *Magor v. Chadwick* (1840), 11 Ad. & El. 571; *Gaved v. Martyn* (1865), 19 O. B. (N. S.) 732.

(n) *Wood v. Waud*, *supra*; *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478; *Mason v. Hill* (1833), 5 B. & Ad. 1; *Goldsmid v. Tunbridge Wells Improvement Commissioners* (1866), 1 Ch. App. 349; *John Young & Co. v. Banker Distillery Co.*, [1893] A. C. 691; *Whaley v. Laing* (1857), 2 H. & N. 476; *Ballard v. Tomlinson* (1885), 29 Ch. D. 115, C. A. Compare *Hodgkinson v. Ennor* (1863), 4 B. & S. 229; *Womersley v. Church* (1867), 17 L. T. 190; and see titles NUISANCE; WATERS AND WATERCOURSES, as to pollution generally.

SECT. 3.
Water.

right to the use of the water in a watercourse or subterranean water, can prevent the pollution of the water, whether he has acquired that right under the doctrine of prescription or otherwise (o). A right to pollute the water may be acquired by express grant (p), by implication of law (q), or under the doctrine of prescription (r).

Right to discharge water does not involve right to pollute.

620. If an owner of an easement to discharge water upon the servient tenement exceeds his rights by sending down polluted water, the servient owner may stop the whole of the discharge, because it is impossible for him to separate the pure from the polluted water (s).

SUB-SECT. 6.—Repair.

Repair.

621. In general the owner of an easement in a watercourse may do all things necessary to repair it (a) and to keep it cleansed (b), whether the watercourse be natural (c) or artificial (d), and whether permanent (e) or of a temporary nature (f). But unless the easement is such as to entitle the owner thereof to remove permanent accretions to the river bed, neither the owner of an easement of water in a natural watercourse nor a riparian owner is entitled to remove such accretions, although he may in general keep the river or stream free of vegetable and temporary obstructions which interfere with the enjoyment of his rights (g). Probably a right of removing permanent accretions might be prescribed for (h).

A person who makes for his own use an artificial watercourse, whether upon his own or another's land, is, in the absence of express agreement to the contrary, bound to keep the watercourse in such a state of repair as will prevent damage to the servient

(o) *Magor v. Chadwick* (1840), 11 Ad. & El. 571; compare *Cawkwell v. Russell*, (1856), 26 L. J. (EX.) 34.

(p) See p. 245, *ante*.

(q) *Hall v. Lund* (1863), 1 H. & C. 676.

(r) *Wood v. Waud* (1849), 3 Exch. 748; *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478; *Wright v. Williams* (1836), 1 M. & W. 77; *A.-G. v. Dorking Union* (1882), 20 Ch. D. 595, 601; *Bazendale v. McMurray* (1867), 2 Ch. App. 790; *McIntyre Brothers v. McGavin*, [1893] A. C. 268.

(s) *Cawkwell v. Russell*, *supra*; *Charles v. Finchley Local Board* (1883), 23 Ch. D. 767; compare *Hill v. Cock* (1872), 26 L. T. 185.

(a) *Pomfret v. Ricroft* (1669), 1 Wms. Saund. 321, 322 b; *Hodgson v. Field* (1806), 7 East, 613; *Goodhart v. Hyett* (1883), 25 Ch. D. 182; *Humphries v. Cousins* (1877), 2 O. P. D. 239, 244; *Liford's Case* (1608), 11 Co. Rep. 46 b, 52 a; compare *Sandgate Local Board v. Leney* (1883), cited 25 Ch. D. 183, n.; *Finlinson v. Porter* (1875), L. R. 10 Q. B. 188; compare *Bceston v. Weate* (1856), 5 E. & B. 996; *Bell v. Twentyman* (1841), 1 Q. B. 766; *Egremont (Lord) v. Pulman* (1829), Mood. & M. 404; *Roberts v. Fellowes* (1906), 94 L. T. 279.

(b) *Hodgson v. Field*, *supra*; *Liford's Case*, *supra*; compare *Rhodes v. Airedale Drainage Commissioners* (1876), 1 O. P. D. 380, *per* Lord COLERIDGE, C.J., at pp. 392, 393; *R. v. Wharton* (1701), 12 Mod. Rep. 510; *Brown v. Best* (1747), 1 Wils. 174.

(c) *Hodgson v. Field*, *supra*; *Humphries v. Cousins*, *supra*.

(d) *Goodhart v. Hyett*, *supra*; *Hodgson v. Field*, *supra*; *Pomfret v. Ricroft*, *supra*.

(e) *Pomfret v. Ricroft*, *supra*.

(f) *Hodgson v. Field*, *supra*.

(g) *Withers v. Purchase* (1889), 60 L. T. 819.

(h) *Ibid*.

tenement, and, if he fails to do so, is responsible for any damage which may result (*i*). This is the case even though the servient owner may have acquired a right to the use of the water (*k*).

SECT. 3.
Water.

SUB-SECT. 7.—*Alteration of Watercourses.*

622. Neither a riparian owner nor an owner of an easement of water may (unless some special right entitles him to do so) alter the flow or bed of a river or stream so as to increase the burden of servitude upon the servient tenement, whether by increasing the strength of the current, altering its direction, or otherwise (*l*). Alteration of water-courses.

SECT. 4.—*Support.*

SUB-SECT. 1.—*Natural Right to Support.*

623. Every owner of land has *ex jure naturæ*, as an incident of his ownership, the right to prevent such use of the neighbouring land as will withdraw the support which the neighbouring land naturally affords to his land (*m*). In the natural state of land one part of it receives support from another, upper from lower strata, and soil from adjacent soil; and therefore if one piece of land be conveyed so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below it, the right to support passes with the land, not as an easement held by a distinct title, but as an incident to the land itself, *sine quo res ipsa haberi non debet* (*n*). Natural right to support.

624. This natural right to support does not entitle the owner of land to insist upon the adjoining land of his neighbour remaining in its natural state; but it is a right to have the benefit of support, which is infringed as soon as, and not until, damage is sustained in consequence of the withdrawal of that support (*o*). Extent of natural right.

(*i*) *Buckley (R. H.) & Sons, Ltd. v. Buckley (N.) & Sons*, [1898] 2 Q. B. 608, C. A.; and see *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330; *Nicols v. Marsland* (1876), 2 Ex. D. 1, C. A.; *Fletcher v. Smith* (1877), 2 App. Cas. 781.

(*k*) *Buckley (R. H.) & Sons, Ltd. v. Buckley (N.) & Sons*, *supra*.

(*l*) *Frechette v. La Compagnie Manufacturière de St. Hyacinthe* (1883), 9 App. Cas. 170, P. O.; *Bickett v. Morris* (1866), L. R. 1 Sc. & Div. 47; *Palmer v. Persse* (1877), 11 L. R. Eq. 616; *Norbury (Earl) v. Kitchin* (1866), 15 L. T. 501; *Belfast Ropeworks Co. v. Boyd* (1887), 21 L. R. Ir. 560; *Taylor v. St. Helen's Corporation* (1877), 6 Ch. D. 264; *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *Withers v. Purchase* (1889), 60 L. T. 819.

(*m*) *Humphries v. Brogden* (1850), 12 Q. B. 739, 744; *Backhouse v. Bonomi* (1861), 9 H. L. Cas. 503; *Rowbotham v. Wilson* (1857), 8 E. & B. 123, Ex. Ch.; *Dalton v. Angus* (1881), 6 App. Cas. 740, 791, 808; see also *North Eastern Rail. Co. v. Elliot* (1860), 1 John. & H. 145, *per* PAGE WOOD, V.-C., at p. 153; *Birmingham Corporation v. Allen* (1877), 6 Ch. D. 284, C. A.; *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165, 170, 171; *Jary v. Barnsley Corporation*, [1907] 2 Ch. 600.

(*n*) *Dalton v. Angus*, *supra*, *per* Lord SELBORNE, L.C., at p. 791, and *per* Lord BLACKBURN, at p. 808; see also *Backhouse v. Bonomi*, *supra*, at pp. 512, 513, where the weight of the buildings appears to have been treated as immaterial; *Proud v. Bates* (1865), 6 New Rep. 92; *Love v. Bell* (1886), 9 App. Cas. 286; *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16, 30, C. A.; *Jary v. Barnsley Corporation*, [1907] 2 Ch. 600; *Caledonian Rail. Co. v. Sprot* (1856), 2 Macq. 449, H. L.; *Davis v. Treharns* (1881), 6 App. Cas. 460, 466; and see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 574 *et seq.*

(*o*) *Dalton v. Angus*, *supra*, at p. 808.

SECT. 4.
Support.

The same principles apply both to lateral or adjacent support from adjoining land (*p*), as also to the subjacent support of underlying strata where the surface of the land and the strata beneath it are different freeholds and belong to different owners (*q*), and to the right of the owner of a subterranean stratum to the support of the further strata beneath (*r*).

Subjacent
support by
minerals.

625. *Primâ facie* the owner of the surface is entitled to support from the subjacent strata, and if the owner of the minerals works them it is his duty to leave sufficient support for the surface in its natural state (*s*). The latter may, however, substitute artificial support for the support afforded by the minerals (*t*).

Where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining or other operations, unless such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication (*a*).

Thus, where minerals are severed from the surface by deed, instrument, or Act of Parliament, the mineral owner is not entitled to let down the surface, unless by the deed, instrument, or Act of Parliament by which the minerals are severed it appears that the surface owner has parted with the right of support (*b*). The mineral

(*p*) *Hunt v. Peake* (1860), John. 705, 710, 711 (there were buildings upon the land in this case, but their additional weight was found not to have in anyway caused the subsidence); *Wyatt v. Harrison* (1832), 3 B. & Ad. 871; *Elliot v. North Eastern Rail. Co.* (1863), 10 H. L. Cas. 333; *Birmingham Corporation v. Allen* (1877), 6 Ch. D. 284, C. A.; *Jary v. Barnsley Corporation*, [1907] 2 Ch. 600; *Manchester Corporation v. New Moss Colliery Co., Ltd.*, [1906] 1 Ch. 278, 291. See also title MINES, MINERALS AND QUARRIES.

(*q*) *Humphries v. Brogden* (1850), 12 Q. B. 739, 744, 745; *Brown v. Robins* (1859), 4 H. & N. 186; *Davis v. Treharne* (1881), 6 App. Cas. 460, 466; *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16, C. A., at p. 30; *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301; *Jary v. Barnsley Corporation*, *supra*; see *Manchester Corporation v. New Moss Colliery Co., Ltd.*, *supra*, per FARWELL, J., at p. 291.

(*r*) *Dixon v. White* (1883), 8 App. Cas. 833, 842; see also *Butterley Co., Ltd. v. New Hucknall Colliery Co., Ltd.*, [1909] 1 Ch. 37, C. A. (an appeal to the House of Lords is now pending); *Locker-Lampson v. Staveley Coal and Iron Co.* (1908), 25 T. L. R. 136.

(*s*) *Smart v. Morton* (1855), 5 E. & B. 30, 46; *Harris v. Ryding* (1839), 5 M. & W. 60; *Humphries v. Brogden* (1850), 12 Q. B. 739, 744; *Roberts v. Haines* (1857), 6 E. & B. 643; 7 E. & B. 625, Ex. Ch.; *Love v. Bell* (1884), 9 App. Cas. 286; *Proud v. Bates* (1865), 6 New Rep. 92; *Dixon v. White*, *supra*; *Davis v. Treharne*, *supra*; *New Sharlston Collieries Co. v. Westmorland (Earl)*, (1900), cited at [1904] 2 Ch. 443, n., H. L.; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, 315; and see title MINES, MINERALS AND QUARRIES.

(*t*) *Rowbotham v. Wilson* (1857), 8 E. & B. 123, 157, Ex. Ch.

(*a*) *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, *supra*, per Lord MACNAGHTEN, at p. 313; and see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 594 *et seq.*

(*b*) *London and North Western Rail. Co. v. Evans*, *supra*; *Caledonian Rail. Co. v. Sprat* (1856), 2 Macq. 449, H. L.; *Love v. Bell* (1884), 9 App. Cas. 286; *Davis v. Treharne*, *supra*, at p. 466. See also title MINES, MINERALS AND QUARRIES.

owner's right to get the minerals is limited to getting them in such a manner as not to occasion injury to the surface (c).

SMOT. 4.
Support.

626. The owner of land has no natural right to the support afforded by water in or under his neighbour's land (d). A man can drain off water from his own land notwithstanding that his so doing deprives his neighbour of the support which it derived from the presence of the water (e). If, however, the support be derived from some substance which, though partially composed of water, possesses physical attributes altogether different from water, the owner of land has a natural right to insist upon its continuance (f).

Subjacent
support by
water.

627. The owner of land has no natural right to support for buildings or of the additional weight which the buildings cause (g). Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist (h).

Support for
buildings by
land.

The mere fact, however, that there are buildings upon his land does not preclude an owner from his right against a neighbour or subjacent owner who acts in such a manner as to deprive the land of support, so long as the presence of the buildings does not materially affect the question, or their additional weight did not cause the subsidence which followed the withdrawal of support (i).

628. The owner of land upon which there are buildings has no natural right, in respect of those buildings, to support afforded them by buildings upon his neighbour's land (k). If a man pulls down his house and thereby deprives the house of his neighbour of the support it has been enjoying, and his neighbour's house is thereby damaged, his neighbour (in the absence of an easement of support) has no cause of action. He must take care to interfere as little as possible with the adjoining house (l), but he is not called upon to take active steps for its protection, as, for instance, by shoring it

Support for
buildings by
buildings.

(c) *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16, 30, O. A.; compare *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A. O. 305. See, generally, title MINES, MINERALS AND QUARRIES.

(d) *Popplewell v. Hodgkinson* (1869), L. R. 4 Ex. Ch. 248; *Elliot v. North Eastern Rail. Co.* (1863), 10 H. L. Cas. 333, 359; see also *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, O. A., per VAUGHAN WILLIAMS, L.J., at pp. 245, 246.

(e) *Popplewell v. Hodgkinson*, *supra*. But compare *Littledale v. Lonsdale (Earl)* (1791), reported in [1899] 2 Ch. p. 233, n; and see *Gill v. Westlake*, [1910] A. O. 197.

(f) *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, *supra* (running silt); *Trinidad Ashphalt Co. v. Ambard*, [1899] A. O. 594, P. O. (semi-fluid pitch); *Gill v. Westlake*, *supra*.

(g) *North Eastern Rail. Co. v. Elliot* (1860), 1 John. & H. 145, 153; affirmed *Elliot v. North Eastern Rail. Co.*, *supra*; *Smith v. Thackerah* (1866), L. R. 1 O. P. 564; see also *Brown v. Robins* (1859), 4 H. & N. 186; *Hamer v. Knowles* (1861), 6 H. & N. 454; *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301, 312; *Wilde v. Minsterley* (1839), 2 Roll. Abr. 564, 565.

(h) *Dalton v. Angus* (1881), 6 App. Cas. 740, 792.

(i) *Brown v. Robins*, *supra*, at pp. 193, 194.

(k) *Peyton v. London Corporation* (1829), 9 B. & O. 725; *Wyatt v. Harrison* (1832), 3 B. & Ad. 871; *Chadwick v. Trower* (1839), 6 Bing. (n. c.) 1, Ex. Ch.; see also *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603, O. A., per COLLINS, L.J., at p. 612. Compare *Dodd v. Holmes* (1834), 1 Ad. & El. 493; see title NEGLIGENCE.

(l) *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, *supra*.

SECT. 4.
Support.

up (m). Where an owner pulls down his buildings and thereby withdraws natural support from his neighbour's house and damage is caused because the weak and fragile condition of his neighbour's house required the exercise of extra care, he is not liable for damage resulting from that condition where he has no notice of it (n).

SUB-SECT. 2.—*Easement of Support.*

Easement of
support.

629. The easement of support is a right acquired over and above the natural rights of support. It may either involve an enhancement to the dominant owner's natural right of support with a corresponding increase of the servient owner's obligations to refrain from interference (o), or it may involve a diminution of the obligations of the dominant owner to refrain from depriving the servient tenement of the support to which the servient owner would otherwise have been entitled (p).

The most common easement of support may be defined as the right of an owner of buildings to receive for them such support from the land or buildings of his neighbour as is sufficient to resist the effect of the law of gravitation and to maintain them in their existing state and position (q). This right involves the correlative right to prevent the owner of the servient tenement from using his land or the buildings upon it in such a manner as to deprive of such support the buildings upon the land of the dominant tenement (r).

The acquired right may be a right to have buildings supported by land, or a right to have buildings supported by other buildings (s); for the easement of support is as applicable to the support from an adjoining building as it is to the support from adjoining land (t). When the easement of support has once been acquired it is similar in character to the natural right of support (a).

Mode of
acquisition
of easement
of support.

630. A right of support for buildings must in each particular case be acquired by grant, or by some other means equivalent in law to grant, in order to make it a burden upon the land which in its natural state would be free from it (b). The easement

(m) *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603, C. A.

(n) *Chadwick v. Trower* (1839), 6 Bing. (N. C.) 1, Ex. Ch., per PARKE, B., at p. 10.

(o) As in the case of the ordinary easement of support for buildings, see *Dalton v. Angus* (1881), 6 App. Cas. 740.

(p) As in the case of an easement entitling the owner to let down the surface, see *Love v. Bell* (1884), 9 App. Cas. 286; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, 310; *Consett Waterworks Co. v. Ritson* (1889), 22 Q. B. D. 318.

(q) *Dalton v. Angus*, *supra*, per Lord SELBORNE, L.C., at p. 792, per Lord BLACKBURN, at p. 809. For forms, see *Encyclopædia of Forms*, Vol. V., p. 531.

(r) *Dalton v. Angus*, *supra*, per FRY, J., at p. 776.

(s) *Lemaître v. Davis* (1881), 19 Ch. D. 281, 290; *Brown v. Windsor* (1830), 1 Cr. & J. 20; *Richards v. Ross* (1853), 9 Exch. 218; *Waddington v. Naylor* (1889), 60 L. T. 480; *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Jones v. Pritchard*, [1908] 1 Ch. 630, per PARKER, J., at pp. 635, 636. Compare also *Chadwick v. Trower*, *supra*; *Langford v. Woods* (1844), 7 Man. & G. 625.

(t) *Lemaître v. Davis*, *supra*.

(a) *Dalton v. Angus*, *supra*, per Lord BLACKBURN, at p. 809; *Bonomi v. Backhouse* (1859), E. B. & E. 622, Ex. Ch., per WILLES, J., at p. 654; *Greenwell v. Low Beechburn Coal Co.*, *supra*, at p. 171.

(b) *Dalton v. Angus*, *supra*, per Lord SELBORNE, L.C., at p. 792.

may be created by express grant (c), or may arise by implication of law (d), or it may be established under the doctrine of prescription (e).

SECT. 4.
Support.

It may also be created either expressly or impliedly by Act of Parliament (f). Where a statute empowers undertakers to construct and maintain works for the benefit of the public upon the lands of private owners, and such works necessarily require support from subjacent soil, and provision is made in the statute for compensating the private owners for the damage to the surface and subjacent minerals to be caused by the contemplated works, a right of support from subjacent soil for the authorised works necessarily arises by implication, unless the Act negatives it (g). Where, however, no right of compensation is given by the statute the case is different (h).

Creation by
statute.

631. The general rules governing the creation of easements by implication of law upon a disposition of the dominant and servient tenements, or of either of them, also govern the creation of the easement of support on such an occasion (i). The easement of support is not in general an easement of necessity, so as to necessarily arise in favour of the common owner of the dominant and servient tenements, if he disposes of the servient tenement and retains the dominant tenement (k). But under special circumstances it may be an easement of necessity (l).

Implied grant
of easement
of support.

If the common owner of two closes conveys one of them he can do nothing which will derogate from his grant; and if he has conveyed the close with the express intention of having buildings erected upon it, neither he nor his successors in title can do any act upon the

(c) *Dalton v. Angus* (1881), 6 App. Cas. 740, at p. 809.

(d) *Dalton v. Angus*, *supra*; *Rigby v. Bennett* (1882), 21 Ch. D. 559, O. A.; *Richards v. Rose* (1853), 9 Exch. 218; compare *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, O. A.

(e) *Dalton v. Angus*, *supra*; *Lemaitre v. Davis* (1881), 19 Ch. D. 281; *Latimer v. Official Co-operative Society* (1855), 16 L. R. Ir. 305; *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Union Lighterage Co. v. London Graving Dock Co.*, *supra*, where, however, the prescriptive claim failed as the enjoyment had not been open; *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 614, 625; affirmed [1899] 2 Ch. 217, O. A.

(f) *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16, 31, O. A.; *Re Dudley Corporation* (1881), 8 Q. B. D. 86, O. A.; *Benfieldside Local Board v. Consett Iron Co.* (1877), 3 Ex. D. 54; *Jary v. Barnsley Corporation*, [1907] 2 Ch. 600. Compare *Great Northern Railway v. Inland Revenue Commissioners*, [1901] 1 K. B. 416, 428, 429, O. A.

(g) *London and North Western Rail. Co. v. Evans*, *supra*, per A. L. SMITH, L.J., at p. 31; and compare *Clippens Oil Co. v. Edinburgh and District Water Trustees*, [1904] A. C. 64, a Scotch case.

(h) *London and North Western Rail. Co. v. Evans*, *supra*; at pp. 28, 29; *Metropolitan Board of Works v. Metropolitan Rail. Co.* (1869), L. R. 4 C. P. 192, Ex. Ch., where there was no right to compensation given to the person against whom the support was claimed. See also *Roderick v. Aston Local Board* (1877), 6 Ch. D. 328, 332.

(i) For these rules, see p. 251, *ante*. See *Wheeldon v. Burrows* (1879), 12 Ch. D. 31, O. A.

(k) *Union Lighterage Co. v. London Graving Dock Co.*, *supra*.

(l) As, for instance, where the common owner retains a house which derives obvious and necessary support from the neighbouring house of which he has disposed; see *Richards v. Rose* *supra*; *Howarth v. Armstrong* (1897), 77 L. T. 62, O. A.; *Shubbrook v. Tufnell* (1882), 46 L. T. 886.

SECT. 4.
Support.

Prescriptive
right to
support.

retained close which deprives the buildings erected upon the other close of support (*m*).

632. Where an easement of support is claimed by prescription there is no enjoyment as of right (which is essential to the success of such a claim) unless the owner of the servient tenement has had a reasonable opportunity of becoming aware of the enjoyment of support from his property (*n*). The enjoyment of the support must be open, that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of it (*o*).

Prescription
Act, 1832.

633. The easement of support for buildings from land (*p*) or from other buildings (*q*) is an easement within the meaning of s. 2 of the Prescription Act, 1832 (*r*), and may be claimed under the provisions of that statute (*s*). It may also probably be claimed under the doctrine of a lost modern grant (*t*).

SUB-SECT. 3.—Interference.

Disturbance
of easement
of support.

634. An interference with an easement of support to buildings occurs when the support has been actually removed and a change in the state of the dominant tenement thereby effected (*a*). There is no interference where one mode of support is substituted for another, provided the actual support is still continued (*b*). Any interference gives rise to a cause of action, although the dominant owner may not have suffered pecuniary loss (*c*); for as soon as the condition of the dominant tenement has been in fact changed to a substantial extent by the withdrawal of the support the dominant owner has sustained an *injuria* for which he may maintain an action without proof of such loss (*d*).

(*m*) *North Eastern Rail. Co. v. Elliot* (1860), 1 John. & H. 145; *Caledonian Rail. Co. v. Sprot* (1856), 2 Macq. 449, H. L.; *North Eastern Rail. Co. v. Crossland* (1862), 2 John. & H. 565; see also *Siddons v. Short* (1877), 2 C. P. D. 572; *Rigby v. Bennett* (1882), 21 Ch. D. 559, C. A.; *Murchie v. Black* (1865), 19 C. B. (N. S.) 190.

(*n*) *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, 571, C. A.; *Lemaitre v. Davis* (1881), 19 Ch. D. 281; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585; *Gately v. Martin*, [1900] 2 I. R. 269. As to the meaning of the phrase "enjoyment as of right," see p. 262, *ante*.

(*o*) *Union Lighterage Co. v. London Graving Dock Co.*, *supra*, per ROMER, L.J., at p. 571.

(*p*) *Dalton v. Angus*, *supra*, at p. 798.

(*q*) *Lemaitre v. Davis*, *supra*.

(*r*) 2 & 3 Will. 4, c. 71.

(*s*) *Dalton v. Angus*, *supra*.

(*t*) *Ibid.*, at p. 811.

(*a*) *Hall v. Norfolk (Duke)*, [1900] 2 Ch. 493, 501.

(*b*) *Bower v. Peat* (1876), 1 Q. B. D. 321, 327; *Rowbotham v. Wilson* (1857), 8 E. & B. 123, 157, Ex. Ch.

(*c*) *A.-G. v. Conduitt Colliery Co.*, [1895] 1 Q. B. 301, 311; compare *Backhouse v. Bonomi* (1861), 9 H. L. Cas. 503, 512.

(*d*) *A.-G. v. Conduitt Colliery Co.*, *supra*, at p. 311, a case dealing with the natural right of support. The principle, however, is the same as regards the easement, see *Mitchell v. Darley Main Colliery Co.* (1884), 14 Q. B. D. 125, 137,

Where the change is very slight the rule *de minimis non curat lex* applies (e).

SECT. 4.
Support.

635. It is not the removal of the support but the causing of a change in the state of the dominant tenement which gives rise to the cause of action (f). Consequently the Statute of Limitations (g) does not commence to run against a dominant owner until the change has actually occurred (h). Each successive change or subsidence gives rise to a fresh cause of action (i), and in estimating the damages the depreciation in market value of the property due to the risk of future subsidence cannot be taken into account (k).

When cause
of action
arises.

A lessee (l), and probably an owner in fee (m), of minerals or underground strata is not liable to the owner of the surface who enjoys an easement of support in respect of his building for damage caused to such building during his possession, where such damage is the result of the removal of support by his predecessor.

Who is
liable for
disturbance.

SUB-SECT. 4.—Repair.

636. As a general rule, in the absence of express agreement to the contrary, the owner of the servient tenement burdened with an easement of support is under no obligation to repair in order to maintain the easement (n). The dominant owner may, however, enter the servient tenement for the purpose of doing such repairs as are necessary for the maintenance of the support (o).

Repair.

SUB-SECT. 5.—Analogous Rights.

637. There are certain other rights relating to the support of land, analogous to easements, known as "rights of letting down the surface." They are rights contrary to the natural rights of support which have already been mentioned, and they consist generally of acquired rights to deprive land of the support to which *ex jure*

Right to
let down
surface.

O. A.; see *contra* *Smith v. Thackerah* (1866), L. R. 1 O. P. 564, explained in *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301, by COLLINS, J., at p. 313.

(e) *A.-G. v. Conduit Colliery Co.*, *supra*, at p. 311; *Backhouse v. Bonomi* (1861), 9 H. L. Cas. 503, 512.

(f) *Lamb v. Walker* (1878), 3 Q. B. D. 389, 402; *Backhouse v. Bonomi*, *supra*; *Greenwell v. Low Beechburn Coal Co.*, [1897] Q. B. 165, 171, 172; *Crumbie v. Wallsend Local Board*, [1891] 1 Q. B. 503, O. A.; *West Leigh Colliery Co., Ltd. v. Tunncliffe and Hampson, Ltd.*, [1908] A. C. 27; compare *Whitehouse v. Fellowes* (1861), 10 O. B. (N. S.) 765.

(g) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3.

(h) *Backhouse v. Bonomi*, *supra*; *Spoor v. Green* (1874), L. R. 9 Exch. 99; *Hall v. Norfolk (Duke)*, [1900] 2 Ch. 493, at p. 501; *Greenwell v. Low Beechburn Coal Co.*, *supra*, at pp. 170, 171.

(i) *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; *Hall v. Norfolk (Duke)*, *supra*, at p. 501; *Crumbie v. Wallsend Local Board*, *supra*.

(k) *West Leigh Colliery Co., Ltd. v. Tunncliffe and Hampson, Ltd.*, *supra*; and see title DAMAGES, VOL. X., p. 310.

(l) *Greenwell v. Low Beechburn Coal Co.*, *supra*; *Hall v. Norfolk (Duke)*, *supra*.

(m) Compare *Greenwell v. Low Beechburn Coal Co.*, *supra*, per BRUCE, J., at p. 174.

(n) *Colebeck v. Girdlers Co.* (1876), 1 Q. B. D. 234.

(o) *Ibid.*; *Pomfret v. Ricroft* (1869), 1 Wms. Saund. 321; *Stockport and Hyde Highway Board v. Grant* (1882), 51 L. J. (Q. B.) 357; see also p. 249, *ante*, as to the obligation of repair in the case of easements generally.

SECT. 4.
Support.

natura the owner of that land would be otherwise entitled to enjoy (*p*).

These rights generally exist either directly or indirectly by virtue of some Act of Parliament (*q*). They may, however, form the subject-matter of a grant (*r*), and there seems, therefore, no reason why they should not be acquired by prescription.

Statutory obligation.

638. A binding obligation imposed by Act of Parliament upon a mineral owner not to work his minerals which imposes only a negative duty upon him to abstain from certain acts is not an easement even of a negative kind (*s*). Such a duty can only be created by statute or by covenant, but if created by covenant it does not bind all subsequent owners of the minerals (*t*).

SECT. 5.—Miscellaneous Easements.

Easement of air.

639. There are numerous easements which do not fall within any of the foregoing classes (*u*). Of these the most important is the easement of air.

The owner of property has no right *ex jure natura* to the passage of air to his tenement over his neighbour's land, and consequently he has no natural right to prevent his neighbour from using his land in such a way as to obstruct the free passage of air (*v*). A right, however, may be acquired as an easement whereby the owner of land upon which there are buildings can insist upon the continuance of the free passage of air to apertures in those buildings (*a*); and can prevent his neighbour who owns the servient tenement from interfering with the supply of air by building upon that tenement or otherwise (*b*). This easement of air is very

(*p*) See, for instance, *Love v. Bell* (1884), 9 App. Cas. 286; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, 310, 311; *Conselt Waterworks Co. v. Ritson* (1889), 22 Q. B. D. 318, 702, C. A., and title MINES, MINERALS AND QUARRIES.

(*q*) For the cases as to power to let down surface, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 576, note (*p*).

(*r*) *Rowbotham v. Wilson* (1860), 8 H. L. Cas. 348, per Lord CHELMSFORD, at p. 368; *Williams v. Bagnall* (1866), 15 W. R. 272; *Sitwell v. Londesborough (Earl)*, [1905] 1 Ch. 460.

(*s*) *Great Northern Railway v. Inland Revenue Commissioners*, [1901] 1 K. B. 416, 428, 429, C. A.

(*t*) *Ibid.* at pp. 428, 429; *Keppell v. Bailey* (1834), 2 My. & K. 517.

(*u*) As to the distinction between the purported creation of novel rights in respect of land, and the creation of novel forms of easements, see p. 248, *ante*. As to customary rights in *alieno solo* which partake of the nature of easements, see title CUSTOM AND USAGES, Vol. X., pp. 238 *et seq*.

(*v*) *Bland v. Moseley* (1587), cited in *Aldred's Case* (1610), 9 Co. Rep. 57 b, 58 a; *Gale v. Abbot* (1862), 8 Jur. (N. S.) 987; *Dent v. Auction Mart Co.* (1866), L. R. 2 Eq. 238; *Hull v. Lichfield Brewery Co.* (1880), 49 L. J. (OH.) 656; *Bass v. Gregory* (1890), 25 Q. B. D. 481; *Aldin v. Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; *Cable v. Bryant*, [1908] 1 Ch. 259.

(*a*) *Bryant v. Lefever* (1879), 4 O. P. D. 172, C. A.; *Webb v. Bird* (1863), 13 O. B. (N. S.) 841.

(*b*) See also cases cited in note (*v*), *supra*.

similar to the easement of light (c). It is essential that the easement, unless existing by virtue of express grant or contract, should be in respect of a strictly defined and limited aperture (d).

640. The easement of air may be acquired by express grant (e), it may arise by implication of law (f), and it may be acquired by prescription (g), and under the doctrine of a lost modern grant (h). There would appear to be no reason why it should not be an easement within the meaning of s. 2 of the Prescription Act, 1832 (i), and be capable of being acquired by prescription under the provisions of that statute (k).

A right to the general passage of air not flowing in any defined channel may be the subject of express grant or covenant (l), but is not capable of being claimed either by prescription at common law or by grant or under the Prescription Act, 1832 (m). Such a claim is too vague and indefinite to be recognised in law (n).

641. Every man has a natural right to enjoy the air pure and free from noxious smells or vapours, and anyone who sends on to or over his neighbour's land that which makes the air impure is guilty of a nuisance (o). But the right to send impure air over the tenement of a neighbour may be acquired by grant, express or implied, or by lapse of time (p).

 Right to
 pollute air.

642. A person may have an easement entitling him to create upon the dominant tenement what would otherwise constitute a nuisance by discharging gases and fluids or sending smoke over the tenement of his neighbour (q), or by making noises which are so audible to the servient owner that they would but for the easement cause an actionable nuisance (r). Similarly, he can acquire an

 Easements
 to create
 nuisance.

(c) *Cable v. Bryant*, [1908] 1 Ch. 259, 263.

(d) *Aldin v. Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437, 446; *Chastey v. Ackland*, [1895] 2 Ch. 389, C. A., per KAY, L.J., at p. 402; *Harris v. De Pinna* (1886), 33 Ch. D. 238, C. A.

(e) See *Cable v. Bryant*, *supra*; *Aldin v. Latimer Clark, Muirhead & Co.*, *supra*, at p. 445; *Bryant v. Lefever* (1879), 4 C. P. D. 172, C. A., per BRAMWELL, L.J., at p. 177.

(f) *Aldin v. Latimer Clark, Muirhead & Co.*, *supra*.

(g) *Cable v. Bryant*, *supra*, at p. 264; *Hall v. Lichfield Brewery Co.* (1880), 49 L. J. (CH.) 655; *Bass v. Gregory* (1890), 25 Q. B. D. 481.

(h) *Bass v. Gregory*, *supra*.

(i) 2 & 3 Will. 4, c. 71.

(k) See *Cable v. Bryant*, *supra*, at pp. 263, 264.

(l) *Harris v. De Pinna*, *supra*, per COTTON, L.J., at p. 258, and per FRY, L.J., at p. 263; *Chastey v. Ackland*, *supra*, per LINDLEY, L.J., at p. 402; *com-*
promised on appeal, [1897] A. C. 155.

(m) *Bryant v. Lefever*, *supra*, at p. 180, C. A.; *Webb v. Bird* (1863), 13 C. B. (N. S.) 841; *Harris v. De Pinna*, *supra*, at pp. 259, 260, 262, 263, 264, C. A.; *Chastey v. Ackland*, *supra*, at pp. 398, 402.

(n) *Webb v. Bird*, *supra*; *Chastey v. Ackland*, *supra*.

(o) *Chastey v. Ackland*, *supra*; see also title NUISANCE.

(p) *Crump v. Lambert* (1867), L. R. 3 Eq. 409, 413.

Ibid.

Ibid.; *Elliotson v. Feltham* (1835), 2 Bing. (N. C.) 134; compare *Mumford v. Worcester and Wolverhampton Rail. Co.* (1856), 1 H. & N., 34. See generally, *Soltau v. De Held* (1851), 2 Sim. (N. S.) 133; *Rushmer v. Polsue and Alfieri, Ltd.*, [1906] 1 Ch. 234, C. A.; affirmed on the facts, [1907] A. C. 121.

SECT. 5.
Miscellaneous
Easements.

easement allowing him to create vibrations and disturbances upon his tenement which but for that easement he would not be allowed to create (s). Again, a person may have an easement whereby the servient owner must submit to the passage of smoke through the flues of his house from the fires on the dominant tenement (t), or the discharge of rain-water by a spout or from eaves (u).

Miscellaneous
easements as
to erections
on or over
servient
tenement.

643. There may be an easement entitling the owner to erect and maintain on the soil of a common a signpost relating to his tavern (v), to affix and maintain a similar signboard on the wall of another's house, and to subject the latter to the annoyance of the creaking caused by the signboard swinging in the wind (w); to make use of another's kitchen for particular purposes (x); to place a post in a river bed for the purpose of mooring in connection with a wharf (y); to maintain a hatch and fender in a river to control the force and direction of the water (z); to place advertisement hoardings on another's land (a); to use a fascia on another person's house for the purpose of painting his name and trade upon it (b); and to use an adjacent wall for the purpose of nailing trees thereto (c).

An easement may consist of the right to place large stones or boulders upon the servient tenement to prevent sand or earth being washed away by the encroachments of the sea (d), or to erect spoil banks on the servient tenement in the course of mining operations (e).

There may be an easement entitling the owner of a dock to allow the bowsprits of vessels in the dock to protrude over the servient tenement (f), or to build so as to overhang the servient land (g), or to move a timber traveller over the servient tenement (h), or

(s) *Sturges v. Bridgman* (1879), 11 Ch. D. 852, O. A.; *Lyttelton Times Co., Ltd. v. Warners, Ltd.*, [1907] A. C. 476, P. C.; *Rushmer v. Polsue and Alfieri, Ltd.*, [1906] 1 Ch. 234, O. A.; affirmed on the facts, [1907] A. C. 121.

(t) *Jones v. Pritchard*, [1908] 1 Ch. 630; *Harvey v. Smith* (1855), 1 K. & J. 389.

(u) *Harvey v. Walters* (1873), L. R. 8 O. P. 162; *Thomas v. Thomas* (1835), 2 Cr. M. & R. 34.

(v) *Hoare v. Metropolitan Board of Works* (1874), L. R. 9 Q. B. 296; see also *Hoare & Co., Ltd. v. Lewisham Corporation* (1901), 85 L. T. 281.

(w) *Moody v. Steggles* (1879), 12 Ch. D. 261.

(x) *Heywood v. Mallalieu* (1883), 25 Ch. D. 357.

(y) *Lancaster v. Eve* (1859), 5 O. B. (N. S.) 717; see also *Cory v. Bristow* (1875), 1 O. P. D. 54.

(z) *Wood v. Hewett* (1846), 8 Q. B. 913; see also *Moody v. Steggles*, *supra*, at p. 266.

(a) *R. v. St. Pancras Assessment Committee* (1877), 2 Q. B. D. 561, 586, 587.

(b) *Francis v. Hayward* (1882), 22 Ch. D. 177, 182, O. A.

(c) *Hawkins v. Wallis* (1763), 2 Wils. 173.

(d) *Philpot v. Bath*, [1905] W. N. 114, O. A.

(e) *Rogers v. Taylor* (1857), 1 H. & N. 706; *Cardigan (Earl) v. Armitage* (1823), 2 B. & C. 197; see also *Marshall v. Borrowdale Plumbago Mines and Manufacturing Co.* (1892), 8 T. L. R. 275.

(f) *Suffield v. Brown* (1864), 33 L. J. (CH.) 249.

(g) *Lemmon v. Webb*, [1894] 3 Ch. 1, O. A., per KAY, L.J., at p. 18; affirmed, 895] A. C. 1. Such an easement cannot be acquired for overhanging trees *ibid.*.

(h) *Harris v. De Pinna* (1886), 33 Ch. D. 238, O. A.

SECT. 5.
Miscellaneous
Easements.

entitling the dominant owner to maintain a weir and coop in a non-navigable river for the purpose of catching migratory fish (*i*), or land nets on the servient tenement (*j*). There may also be an easement to hang clothes lines over the servient tenement (*k*); or to affix and maintain a name plate upon another's premises (*l*), or to affix telephone wires to buildings (*m*).

There may be an easement to mix manure upon the servient tenement for the purposes of an adjoining farm (*n*), or to discharge coal dust over neighbouring premises (*o*).

644. A person may have an easement entitling him to the use of a pew in a church (*p*), but such a right is not an easement within the meaning of s. 2 of the Prescription Act, 1832 (*q*). An easement may consist of the right to make a vault in a parish church, and to use it for the purposes of burial (*r*). Pews and vaults.

645. No easement can exist whereby a landowner can insist upon the preservation of the prospect enjoyed from his property (*s*). Nor is there an easement for privacy (*t*), although a covenant intended to secure this amenity may be enforced (*u*). There is no easement for the free access of wind (*v*). Prospect or privacy.
Wind.

(*i*) *Leconfield v. Lonsdale* (1870), L. R. 5 C. P. 657; *Rolle v. Whyte* (1868), L. R. 3 Q. B. 286; and see *Wood v. Hewett* (1846), 8 Q. B. 913.

(*j*) *Gay v. Bond* (1821), 2 Brod. & Bing. 667.

(*k*) *Drewell v. Towler* (1832), 3 B. & Ad. 735, in which, however, it was held that the right claimed was wider than the right proved. Lord TENTERDEN, C.J., refused to allow the plaintiff to amend inasmuch as he would not be precluded by the judgment from bringing another action if he was interrupted in the enjoyment of the limited right.

(*l*) *Lane v. Dixon* (1847), 3 C. B. 776.

(*m*) *Lancashire Telephone Co. v. Manchester Overseers* (1884), 14 Q. B. D. 267, 272, C. A.

(*n*) *Pye v. Mumford* (1848), 11 Q. B. 666, where, however, the right was claimed as a *profit à prendre*.

(*o*) *Royal Mail Steam Packet Co. v. George*, [1900] A. C. 480.

(*p*) *Mainwaring v. Giles* (1822), 5 B. & Ald., 356, 361; *Dawney v. Des* (1820), Cro. Jac. 605; *Brumfitt v. Roberts* (1870), L. R. 5 C. P. 224, 233, where the court described a right to sit in a pew as not an interest in land but an interest of a peculiar nature in the nature of an easement; see also *Greenway v. Hockin* (1870), L. R. 5 C. P. 235; *Philipps v. Halliday*, [1891] A. C. 228; *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749; and title ECCLESIASTICAL LAW, *post*.

(*q*) 2 & 3 Will. 4, c. 71; *Proud v. Price* (1893), 62 L. J. (Q. B.) 490; *Crisp v. Martin* (1876), 2 P. D. 15.

(*r*) *Bryan v. Whistler* (1828), 8 B. & C., 288; see also *Moreland v. Richardson* (1856), 22 Beav. 596; and titles BURIAL AND CREMATION, Vol. III., p. 474; ECCLESIASTICAL LAW, *post*. As to churchways, see title CUSTOM AND USAGES, Vol. X., p. 244.

(*s*) *Aldred's Case* (1610), 9 Co. Rep. 57 b, 58 b; *Butt v. Imperial Gas Co.* (1866), 2 Ch. App. 158; *Harris v. De Pinna* (1886), 33 Ch. D. 238, 262, C. A.; *Squire v. Campbell* (1836), 1 My. & Cr. 459; *Smith v. Owen* (1866), 14 W. R. 422; *A.-G. v. Doughty* (1752), 2 Ves. Sen. 453; *Fishmongers' Co. v. East India Co.* (1752), 1 Dick. 163. See also *Leech v. Schweder* (1874), 9 Ch. App. 463, 474, 475.

(*t*) *Chandler v. Thomson* (1811), 3 Camp. 80; *Potts v. Smith* (1868), L. R. 6 311.

Manners (Lord) v. Johnson (1875), 1 Ch. D. 673.

Webb v. Bird (1863), 13 C. B. (N. S.) 841, Ex. Ch.; *Goodman v. Gore* (1612), Godb. 189, cited in *Webb v. Bird* (1861), 10 C. B. (N. S.) 268, at p. 273, note.

Part VI.—Disturbance.

SECT. 1.

SECT. 1.—*Interference with Easements.*

Easements.

Interference
with ease-
ment is a
nuisance.

The wrongful interference with an easement constitutes a nuisance (a), that is to say, an injury done to a person in possession of property in land whereby his enjoyment of that property is adversely affected (b). There is, however, this difference between a nuisance in the case where no easement is affected and a nuisance arising from interference with an easement, that in the latter case the existence of the easement must be established before any redress can be obtained, whereas in the former case the rights infringed are rights which the law attaches to the enjoyment of property (c). Except in this respect, the wrong done in both cases is the same, and the remedies which are available to the injured party are to all intents and purposes identical (d).

Every inter-
ference is not
actionable.

647. Every interference with an easement does not amount to an actionable wrong, for, amongst other reasons, affirmative easements never give a right to an exclusive enjoyment of the servient tenement (e), while in the case of negative easements there must always be a substantial interference with the enjoyment to give rise to a cause of action (f). Thus, in the case of a right of way there is no disturbance if, according to its nature, the way can be practically and substantially exercised as conveniently as before the obstruction occurred (g).

Again, in the case of a disturbance of an easement of light there must be a substantial deprivation of the light, which renders the building uncomfortable according to the ordinary notions of mankind

(a) *Lane v. Cupsey*, [1891] 3 Ch. 411; *Thorpe v. Brumfitt* (1873), 8 Ch. App. 650; *Goldsmid v. Tunbridge Wells Improvement Commissioners* (1866), 1 Ch. App. 349; *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179; *Higgins v. Betts*, [1905] 2 Ch. 210. As to the distinction between a nuisance and a trespass, see title NUISANCE; TRESPASS.

(b) See 3 Bl. Com. 216; *Jones v. Chappell* (1875), L. R. 20 Eq. 539, 543. See also title NUISANCE.

(c) *Aldred's Case* (1610), 9 Co. Rep. 57 b; *Higgins v. Betts*, [1905] 2 Ch. 210. See title NUISANCE.

(d) *Higgins v. Betts*, *supra*.

(e) *Sketchley v. Berger* (1893), 69 L. T. 754, 755; *Olifford v. Hoare* (1874), L. R. 9 C. P. 362; *Strick & Co., Ltd. v. City Offices Co., Ltd.* (1906), 22 T. L. R. 667; *Hutton v. Hamboro* (1860), 2 F. & F. 218; *Reilly v. Booth* (1890), 44 Ch. D. 12, 26, C. A.; *Capel v. Buszard* (1829), 6 Bing. 150, 159, Ex. Ch. Compare *Thorpe v. Brumfitt* (1873), 8 Ch. App. 650, 656; *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.*, [1895] A. C. 117; *Southport Corporation v. Ormskirk Union Assessment Committee*, [1894] 1 Q. B. 196, 201, C. A.; see p. 243, *ante*.

(f) *Colls v. Home and Colonial Stores, Ltd.*, *supra*.

(g) *Hutton v. Hamboro*, *supra*, per COCKBURN, C.J., at p. 219. See also *Harding v. Wilson* (1823), 2 B. & C. 96, and *Clifford v. Hoare*, *supra*, where the interference with a right of way complained of consisted in the erection of a portico projecting only two feet into a roadway forty feet wide, and it was held that such an interference gave no rise to a cause of action. As to what amounts to a disturbance of a right of way, see p. 296, *ante*. As to the wrongful interference with the easements relating to water, see pp. 310 *et seq.*

and prevents the owner from carrying on his accustomed occupation on the premises as beneficially as he did prior to the obstruction (*h*).

SECT. 1.
Interference
with
Easements.

SECT. 2.—Remedies.

648. The wrongful interference with an easement may be remedied either by abatement or by action (*i*). To abate a nuisance the dominant owner may enter the servient tenement and remove the obstruction (*h*), and such an entry gives no cause of action to the servient owner (*l*). But in abating the nuisance the dominant owner must act reasonably (*m*).

Abatement.

649. A nuisance may be abated without notice to the owner of the land upon which the interference with the right may occur, provided it is not necessary to enter that land for the purpose of abating the nuisance (*n*). Where the abatement cannot be made without entering another's land, notice should (except in cases of urgency (*o*)) be given to remove such nuisance, if such entry is likely to lead to a breach of the peace (*p*).

Notice of
intention
to abate.

650. In abating a nuisance no more may be done than will actually remove the interference with the right (*q*). The owner of the dominant tenement must do nothing which is not practically necessary for the abatement of the nuisance (*r*). He must abate the nuisance in the most reasonable manner possible (*s*).

Mode of
abatement.

(*h*) *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179; *Back v. Stacey* (1826), 2 O. & P. 465. As to the interference with the easement of light, see p. 299, *ante*, and with the easement of support, pp. 319 *et seq.*, *ante*.

(*i*) *Baten's Case* (1610), 9 Co. Rep. 53 b, 54 b; *Penruddock's Case* (1598), 5 Co. Rep. 100 b; Bro. Abr. tit. Nuisance, f. 102 b, pl. 33; *R. v. Rosewell* (1698), 2 Salk., 459; *Perry v. Fitzhove* (1846), 8 Q. B. 757; *Thompson v. Eastwood* (1852), 8 Exch. 69; *Lane v. Capsey*, [1891] 3 Ch. 411.

(*k*) *Lane v. Capsey*, *supra*; *Baten's Case*, *supra*; *Hill v. Cock* (1872), 26 L. T. 185. Compare *Campbell Davys v. Lloyd*, [1901] 2 Ch. 518, O. A.; *Wigford v. Gill* (1592), Cro. Eliz. 269.

(*l*) *Baten's Case*, *supra*.

(*m*) *Roberts v. Rose* (1865), L. R. 1 Exch. 82, Ex. Ch.; *James v. Hayward* (1630), W. Jo. 221, 222; *Lane v. Capsey*, *supra*.

(*n*) *Lemmon v. Webb*, [1895] A. C. 1, 5. See also *Lonsdale (Earl) v. Nelson* (1823), 2 B. & C. 302, 311, and *City of London Sewers Commissioners v. Glass* (1872), 7 Ch. App. 466, 464, where JAMES, L.J., suggests that it is reasonable to give notice in every case.

(*o*) *Lane v. Capsey*, *supra*; *Jones v. Williams* (1843), 11 M. & W. 176.

(*p*) *Davies v. Williams* (1851), 16 Q. B. 546; *Lane v. Capsey*, *supra*.

(*q*) See *Greenslade v. Halliday* (1830), 6 Bing. 379, where the plaintiff, who had a right to irrigate his meadow by placing a dam of loose stones across a small stream, and occasionally a board or fender, fastened the board by means of two stakes, which had never been done previously. The defendant, who had rights in the same stream, removed not only the stakes, but the board also. A verdict having been given for the plaintiff in an action for the removal, the court refused to set it aside. TINDAL, O.J., at p. 384, said: "If a party who had a right to a stone weir were to erect buttresses, one who should oppose the erection of the buttresses could not justify demolishing the weir as well as the buttresses." See also *Perry v. Fitzhove* (1846), 8 Q. B. 757, 775; *Davies v. Williams*, *supra*, at p. 556; *Hill v. Cock*, *supra*.

(*r*) *Hill v. Cock*, *supra*, per WILLES, J., at p. 186; *Roberts v. Rose*, *supra*, at p. 87.

(*s*) *Hill v. Cock*, *supra*, per WILLES, J., at p.

2.
Remedies.

If there are two ways of abating the nuisance he must choose the least mischievous of the two. If by one of these alternative methods some wrong would be done to an innocent third party or to the public, then that method cannot be justified at all, although an interference with the wrong-doer himself might be justified. Therefore, where the alternative method involves such an interference it must not be adopted; and it may become necessary to abate the nuisance in a manner more onerous to the wrong-doer (t).

In cases of
excessive
user.

651. The same principles govern interferences with the enjoyment of the *quasi-servient* tenement, the owner of which may abate nuisances to his tenement caused by the wrongful or excessive user of an easement or *quasi-easement* by the owner of the dominant or *quasi-dominant* tenement. The servient owner cannot obstruct excessive user by one dominant owner if by so doing he obstructs the rightful user by others (a); but if the excessive user of an easement cannot be abated without obstructing the whole user of the easement by the person who is making an unlawful excess of the user, the owner of the servient tenement may obstruct the whole of that user (b). In the case of the easement of light, however, a servient owner cannot obstruct windows in respect of which his neighbour has not acquired an easement against him, if he thereby obstructs other windows in respect of which his neighbour has acquired such an easement (c).

Remedy by
action.

652. The remedy by action may be pursued whether the easement was created by grant, arose by implication of law, or is claimed under the doctrine of prescription (d).

Who may
sue.

653. Any person entitled to the possession of the dominant tenement may sue in respect of an interference with an easement appurtenant to that tenement (e). If the wrong done be such as to involve a permanent injury to the dominant tenement (f), or the interference be such that unless some step be taken that interference

(t) *Roberts v. Rose* (1865), L. R. 1 Exch. 82, Ex. Ch., per BLACKBURN, J., at p. 89.

(a) *A.-G. v. Dorking Union Guardians* (1882), 20 Ch. D. 595, C. A.; *A.-G. v. Acton Local Board* (1882), 22 Ch. D. 221.

(b) *Cawkwell v. Russell* (1856), 26 L. J. (EX.) 34.

(c) *Tapling v. Jones* (1865), 11 H. L. Cas. 290; *Newson v. Pender* (1884), 27 Ch. D. 43, C. A.; *Frechette v. Compagnie Manufacturière de St. Hyacinthe* (1883), 9 App. Cas. 170, P. C.; *Binckes v. Pash* (1861), 11 C. B. (N. S.) 324. Compare *Renshaw v. Bean* (1852), 18 Q. B. 112, which case was overruled by *Tapling v. Jones*, *supra*, and *Weatherley v. Ross* (1863), 1 Hem. & M. 349. *Hutchinson v. Copestake* (1861), 9 O. B. (N. S.) 863, Ex. Ch.; *Davies v. Marshall* (No. 1) (1861), 1 Drew. & Sm. 557; *Cooper v. Hubbuck* (1860), 30 Beav. 160.

(d) Com. Dig., Action on the Case for Disturbance (A. 2); *Chollocombe v. Tucker* (1613), 1 Roll. Abr. 109, pl. 38.

(e) As to actions by a tenant for life, see *Simper v. Foley* (1862), 2 John. & H. 555; *Goldsmid v. Tunbridge Wells Improvement Commissioners* (1866), 1 Ch. App. 349; by a tenant from year to year, see *Jacomb v. Knight* (1863), 11 W. R. 812. As to weekly tenants, see *Jones v. Chappell* (1876), L. R. 20 Eq. 539.

(f) *Shadwell v. Hutchinson* (1829), 3 O. & P. 615; *Barter v. Taylor* (1832), 4 B. & Ad. 72; *Jackson v. Peaked* (1813), 1 M. & S. 234; *Queen's College Oxford (Provost etc.) v. Hallett* (1811), 14 East, 489. Compare *Bell v. Twentyman* (1841), 1 Q. B. 766; *Egremont (Lord) v. Fulman* (1829), Mood. & M. 404.

SECT. 2.
Remedies.

will operate as a denial of right (*g*), a person interested in the dominant tenement in reversion or remainder may sue in respect of the interference with the easement. In such cases, both the person in possession and the person in remainder or reversion may recover damages for their respective losses (*h*). But in the absence of these prejudicial elements a person in reversion or remainder cannot sue (*i*). Thus, where the injury is of a purely temporary nature (*k*), or where the remainderman or reversioner cannot be prejudiced by any adverse acts, because such adverse acts could not involve acquiescence on his part, the remainderman or reversioner cannot maintain an action (*l*).

654. Where a person entitled to sue in respect of an interference with an easement proceeds by action, the relief granted may take the form of damages, or of an injunction to restrain the continuance or repetition of the obstruction, or of both damages and an injunction (*m*). Under certain circumstances a mandatory injunction

Form of
relief by
action.

Injunction.

(*g*) *Kidgill v. Moor* (1850), 9 C. B. 364; *Bell v. Midland Rail. Co.* (1861), 10 C. B. (N. S.) 287; *Bower v. Hill* (1835), 1 Bing. (N. C.) 549, 555; *Shadwell v. Hutchinson* (1831), 2 B. & Ad. 97, 98; *Metropolitan Association v. Patch* (1858), 5 C. B. (N. S.) 504. Compare *Raine v. Alderson* (1838), 4 Bing. (N. C.) 702; *Young v. Spencer* (1829), 10 B. & C. 145; *Jesser v. Gifford* (1767), 4 Burr. 2141.

(*h*) *Bower v. Hill* (1835), 1 Bing. (N. C.) 555.

(*i*) *Baxter v. Taylor* (1832), 4 B. & Ad. 72; *Jackson v. Pesked* (1813), 1 M. & S. 234. Compare *Simpson v. Savage* (1856), 1 C. B. (N. S.) 347; *Mumford v. Oxford, Worcester, and Wolverhampton Rail. Co.* (1856), 1 H. & N. 34.

(*k*) *Baxter v. Taylor*, *supra*.

(*l*) *Ibid.* Compare *Farquhar v. Newbury Rural Council*, [1909] 1 Ch. 12, C. A.

(*m*) Prior to the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), the remedy by injunction was peculiar to the Court of Chancery. This Act empowered certain other courts to grant injunctions in particular cases. Prior to Lord Cairns' Act, Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), an injunction was obtained as a matter of right. By that Act the court was given a discretion to substitute damages where it thought proper. This discretion is a judicial one (*Smith v. Smith* (1875), L. R. 20 Eq. 500, 505). Until the Judicature Act, 1873 (36 & 37 Vict. c. 66), with these exceptions, the remedy remained peculiar to the Court of Chancery. The latter statute transferred the jurisdiction of that court to the High Court of Justice, and declared (s. 25 (8)) that an injunction might be granted by an interlocutory order of the court in all cases in which it should appear to the court to be just or convenient that such order should be made; and that any such order might be made either unconditionally or upon such terms and conditions as the court should think just. This was not intended to give an injunction to parties who before had no legal right whatever. It was only intended to give the court, when dealing with legal rights which were under its jurisdiction independently of the last-mentioned section, power, if thought just or convenient, to super-add to the previous remedy a remedy by injunction. It gives no new rights to parties, but merely enables the court to modify the principle on which it had previously proceeded in granting injunctions; so that where there is a legal right the court may, without being hampered by its old rules, grant an injunction where it is just or convenient. Where there is a legal right independently of the Act, capable of being enforced either at law or in equity, the court may interfere for the protection of that right, whatever may have been the previous practice (*North London Rail. Co. v. Great Northern Rail. Co.* (1883), 11 Q. B. D. 30, C. A., *per* COTTON, L.J., at pp. 39, 40. See also *Cummins v. Perkins*, [1899] 1 Ch. 16, C. A., *per* LINDLEY, M.R., at p. 20, where he said that s. 25 "has not revolutionized the law, but it has enabled the

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may be granted ordering the removal or partial removal of the obstruction. The mere interference with a legal right will entitle the plaintiff to damages (*n*). The proof of actual damage is not essential; for if a right has been violated the law will assume damage (*o*). But the mere interference with a legal right does not *ipso facto* entitle a plaintiff to an injunction (*p*), for the court will not necessarily grant an injunction where the wrongful interference is trivial or occasional, or where there has been *laches* on the part of the plaintiff (*q*). The broad principle upon which the court grants an injunction is that the remedy by damages is insufficient (*r*). The court may grant an injunction and award damages as well, or it may award damages and refuse to grant an injunction (*s*).

Grounds for
granting
injunction.

Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds: the first that the injury is irreparable, and the second that it is continuous, and unless restrained would result in incessant actions, which would be an intolerable burden upon the plaintiff (*a*). Moreover, the court will not compel the plaintiff to submit to what is virtually a compulsory purchase of his easement by awarding damages for its deprivation (*b*). An injunction will

court to grant injunctions in cases in which it used not to do so previously. I will not say where it had no jurisdiction to do so, that would be going too far, but where in practice it never did"). See, generally, title INJUNCTION.

(*n*) *Sampson v. Hoddinott* (1857), 1 O. B. (N. s.) 590, 611. See, generally, title DAMAGES, Vol. X., p. 301.

(*o*) *Embrey v. Owen* (1851), 6 Exch. 353; *Wilts and Berks Canal Navigation Co. v. Swindon Waterworks Co.* (1874), 9 Ch. App. 451; (1875), L. R. 7 H. L. 697; *Norbury (Earl) v. Kitchin* (1866), 15 L. T. 501; *M'Glone v. Smith* (1888), 22 L. R. Ir. 559. Compare *John Young & Co. v. Bankier Distillery Co.*, [1893] A. C. 691; *Roberts v. Gwyrfa District Council*, [1899] 2 Ch. 608, O. A.

(*p*) See, e.g., *A.-G. v. Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304, 320, 321, O. A., and cases cited in note (*r*), *infra*; *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, 212; *Curriers' Co. v. Corbett* (1865), 2 Drew. & Sm. 355; *Robson v. Whittingham* (1866), 1 Ch. App. 442; *National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co.* (1877), 6 Ch. D. 767, 761. Compare *Imperial Gas Light and Coke Co. v. Broadbent* (1859), 7 H. L. Cas. 600, 612.

(*q*) *Cowper v. Laidler*, [1903] 2 Ch. 337, 341.

(*r*) *Dent v. Auction Mart Co.* (1866), L. R. 2 Eq. 238, 246; *Colls v. Home and Colonial Stores, Ltd.*, *supra*, at p. 212; *Cooke v. Forbes* (1867), L. R. 5 Eq. 166; *A.-G. v. Sheffield Gas Consumers Co.*, *supra*, at p. 320; *London and Blackwall Rail. Co. v. Cross* (1886), 31 Ch. D. 354, 369, O. A.; *Smith v. Smith* (1875), L. R. 20 Eq. 500, 504.

(*s*) *Theed v. Debenham* (1876), 2 Ch. D. 165; *Warren v. Brown*, [1902] 1 K. B. 15, O. A.; *Parker v. First Avenue Hotel Co.* (1883), 24 Ch. D. 262, O. A. Compare *Martin v. Price*, [1894] 1 Ch. 276, O. A.; *Colls v. Home and Colonial Stores, Ltd.*, *supra*, at pp. 193, 212; see also *Chapman, Morsons & Co. v. Auckland Union Guardians* (1889), 23 Q. B. D. 294, O. A.; *Warwick and Birmingham Canal Navigation Co. v. Burman* (1890), 63 L. T. 670, 673; *Cowper v. Laidler*, *supra*; *Dent v. Auction Mart Co.*, *supra*; *Aynsley v. Glover* (1874), L. R. 18 Eq. 544, 552.

(*a*) *A.-G. v. Cambridge Consumers' Gas Co.* (1868), 4 Ch. App. 71, at p. 80; *A.-G. v. Birmingham Borough Council* (1858), 4 K. & J. 528, 541.

(*b*) *Dent v. Auction Mart Co.*, *supra*, at p. 246; *Colls v. Home and Colonial Stores, Ltd.*, *supra*, at p. 193; *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, 316, O. A.; *Cowper v. Laidler*, *supra*; *Aynsley v. Glover*, *supra*;

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not, however, be granted where the obstruction is either of a temporary or a trivial nature (c). It does not follow that an injunction ought to be granted merely because the case is such that substantial damages would be given at law (d). The court may grant an interlocutory injunction (e), but the plaintiff must show a *prima facie* right to protection (f).

The court may grant a mandatory injunction either upon the trial of the action (g) or upon an interlocutory application (h). Such an injunction is in the form of an order directing the defendant to do some positive act (i).

The court when granting an injunction may suspend its operation until some future date (k).

655. County courts have jurisdiction to try any action in which the title to any easement comes in question, where neither the value nor reserved rent of the dominant or servient tenement exceeds the annual sum of £100 (l). These provisions apply only to easements strictly so called, and not to rights claimed by a person as a member of the public, or to rights analogous to easements, but where either the dominant or the servient tenement is lacking (m).

Smith v. Smith (1875), L. R. 20 Eq. 500, 505; *Greenwood v. Hornsey* (1886), 33 Ch. D. 471, 477.

(c) *Coulson v. White* (1743), 3 Atk. 21; *A.-G. v. Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G., 304, C. A., at p. 322; *Smith v. Smith*, *supra*, at p. 501; *Cowper v. Laidler*, [1903] 2 Ch. 337.

(d) *Ibid.*

(e) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8).

(f) *Challender v. Royle* (1887), 36 Ch. D. 425, C. A.

(g) *Myers v. Catterson* (1889), 43 Ch. D. 470, C. A.; *Dicker v. Popham, Radford & Co.* (1890), 63 L. T. 379; *Lawrence v. Horton* (1890), 62 L. T. 749; *Greenwood v. Hornsey*, *supra*; *Smith v. Smith*, *supra*; *Krehl v. Burrell* (1878), 7 Ch. D. 551; *Parker v. Stanley & Co., Ltd.* (1900), 50 W. R. 282; *Durell v. Pritchard* (1865), 1 Ch. App. 244. Compare *City of London Brewery Co. v. Tennant* (1873), 9 Ch. App. 212.

(h) *Daniel v. Ferguson*, [1891] 2 Ch. 27, C. A.; *Von Joel v. Hornsey*, [1895] 2 Ch. 774, C. A. See title INJUNCTION.

(i) *Jackson v. Normanby Brick Co.*, [1899] 1 Ch. 438, C. A. For cases where mandatory injunctions to remove obstructions to light have been granted, see *Smith v. Smith*, *supra*; *Myers v. Catterson* (1889), 43 Ch. D. 470, C. A.; *Daniel v. Ferguson*, [1891] 2 Ch. 27, C. A.; *Dicker v. Popham, Radford & Co.*, *supra*; *Shiel v. Godfrey & Co.*, [1893] W. N. 115; *Von Joel v. Hornsey*, *supra*; *Kine v. Jolly*, [1905] W. N. 2, C. A., where, however, the Court of Appeal ([1905] 1 Ch. 480) held that the remedy ought to be damages (affirmed [1907] A. O. 1). See also *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179; *Kelk v. Pearson* (1871), 6 Ch. App. 809; *Smith v. Day* (1880), 13 Ch. D. 651, C. A.; *Baxter v. Bower* (1875), 23 W. R. 805; *Lawrence v. Horton* (1890), 62 L. T. 749; *Gaskin v. Balls* (1879), 13 Ch. D. 324, C. A.; *Webster v. Whewall* (1880), 42 L. T. 868.

(k) *A.-G. v. Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146; *A.-G. v. Birmingham Borough Council* (1858), 4 K. & J. 528.

(l) County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 56, 60, amended by the County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3. See *Howorth v. Sutcliffe*, [1895] 2 Q. B. 358, C. A. Compare *Latham v. Spedding* (1851), 17 Q. B. 440.

(m) *Hawkins v. Rutter*, [1892] 1 Q. B. 668; *Howorth v. Sutcliffe*, *supra*, at p. 362; and see title COUNTY COURTS, Vol. VIII., pp. 430 *et seq.*

Part VII.—Profits à Prendre ⁽ⁿ⁾.

SECT. 1.

Nature of Profits à Prendre.

Definition.

What may be taken is a profit à prendre

SECT. 1.—Nature of Profits à Prendre.

656. A *profit à prendre* is a right to take something off the land of another person (o). It may be more fully defined as a right to enter the land of another person and to take some profit of the soil, or a portion of the soil itself (a), for the use of the owner of the right (b). The term "*profit à prendre*" is used in contradistinction to the term "*profit à rendre*," which signifies a benefit which has to be rendered by the possessor of land after it has come into his possession (c). A *profit à prendre* is a servitude (d).

657. The subject-matter of a *profit à prendre*, that is, the substance which the owner of the right is by virtue of the right entitled to take, may consist of animals (e), including fish and fowl (f) which are on the land, or of vegetable matter growing (g) or deposited upon the land by some other agency than that of man (h), or of any part of the soil itself (i), including mineral accretions to the soil by natural forces (k). The right may extend to the taking of the whole of such animal or vegetable matters or

(n) This part of the article only deals with the general principles relating to all *profits à prendre*, whether enjoyed in common or in severalty. The majority of cases dealing with *profits à prendre* relate to commonable rights, which will be found dealt with under title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 441 *et seq.* For particular forms of *profits à prendre* enjoyed in severalty, see titles FISHERIES; GAME; MINES, MINERALS AND QUARRIES.

(o) *Sutherland (Duke) v. Heathcote*, [1892] 1 Ch. 475, O. A., *per* LINDLEY, L.J., at p. 484; *Webber v. Lee* (1882), 9 Q. B. D. 315, O. A.

(a) *Manning v. Wasdale* (1836), 5 Ad. & El. 758, *per* PATTESON, J., at p. 764: "A *profit à prendre* . . . must be something taken out of the soil." And see p. 238, note (c), *ante*.

(b) For judicial dicta from which the nature of a *profit à prendre* may best be gathered, see the following cases:—*Manning v. Wasdale*, *supra*, *per* Lord DENMAN, C.J., at p. 763, *per* PATTESON, J., at p. 764; *Sury v. Pigot* (1626), Poph. 166, *per* WHITLOCK, C.J.; *Wickham v. Hawker* (1840), 7 M. & W. 63, *per* PARKE, B., at p. 79; *Race v. Ward* (1855), 4 E. & B. 702, at p. 709; *Webber v. Lee*, *supra*. In *Benson v. Chester* (1799), 8 Term Rep. 396, at p. 401, Lord KENYON, C.J., speaks of a right of common which is a *profit à prendre* as an "easement over the soil." See also *Warburton v. Parke* (1857), 2 H. & N. 64, *per* BRAMWELL, B., at p. 69.

(c) Co. Litt. 141 b, 142 a.

(d) See p. 238, *ante*.

(e) *De la Warr (Earl) v. Miles* (1881), 17 Ch. D. 535, O. A.; *Wickham v. Hawker*, *supra*; *Ewart v. Graham* (1859), 7 H. L. Cas. 331, 344, 345.

(f) *Wickham v. Hawker*, *supra*; *Webber v. Lee*, *supra*; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139.

(g) *De la Warr (Earl) v. Miles*, *supra*; *Bean v. Bloom* (1773), 2 Wm. Bl. 926; *Dowglass v. Kendal* (1610), Oro. Jac. 256; *Willingale v. Mailland* (1866), L. R. 3 Eq. 103.

(h) See *Smart v. Jones* (1864), 15 C. B. (N. S.) 717, 724, where a right to take cinders from a cinder-tip is treated upon the footing of its not being a *profit à prendre*.

(i) See, e.g., *Maxwell v. Martin* (1830), 6 Bing. 522.

(k) *Blewett v. Tregonning* (1835), 3 Ad. & El. 554, where it was held that a right to take sand which had been deposited on the land by the wind was a *profit à prendre*.

SECT. 1.
Nature of
Profits à
Prendre.

merely a part of them (*l*). Rights have been established as *profits à prendre* to take acorns and beech mast (*m*), brakes, fern, heather and litter (*n*), thorns (*o*), turf and peat (*p*), boughs and branches of growing trees (*q*), rushes (*r*), freshwater fish (*s*), stone (*t*), sand and shingle from the seashore (*a*), and ice from a canal (*b*); also the right of pasture (*c*) and of shooting pheasants (*d*). The property in animals *feræ naturæ* while they are upon the soil belongs to the owner of the soil, and he may grant to others as a *profit à prendre* a right to come and take them by a grant of hunting, shooting, fowling, and so forth (*e*).

658. The subject-matter of a *profit à prendre* must be something which is capable of ownership (*f*); for otherwise the right would amount to a mere easement (*g*). A right to take water is not a *profit à prendre*, because water is not capable of being owned (*h*). Subject-matter must be capable of ownership.

659. The right constituting the *profit à prendre* may be exercisable to the exclusion of all other persons, in which case it is said to be a right in severalty or a several *profit à prendre* (*i*); or it may be exercisable in common with one or more persons, including the Several and common rights.

(*l*) *Webber v. Lee* (1882), 9 Q. B. D. 315, C. A., 319.

(*m*) *Chilton v. London Corporation* (1878), 7 Ch. D. 562. As to pannage, the right to feed pigs on acorns, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 476.

(*n*) *De la Warr (Earl) v. Miles* (1881), 17 Ch. D. 535, C. A.

(*o*) *Dowglass v. Kendal* (1610), Cro. Jac. 256. Compare *Bailey v. Stephens* (1862), 12 C. B. (N. S.) 91.

(*p*) As to turbary, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 464; *Hayward v. Cunnington* (1668), 1 Lev. 231. Compare *Valentine v. Penny* (1604), Noy, 145; *Peardon v. Underhill* (1850), 16 Q. B. 120.

(*q*) *Willingale v. Maitland* (1866), L. R. 3 Eq. 103.

(*r*) *Bean v. Bloom* (1773), 2 Wm. Bl. 926.

(*s*) *Smith v. Kemp* (1692), 2 Salk. 637; *Holford v. Bailey* (1849), 13 Q. B. 426, Ex. Ch.; *Fitzgerald v. Firbank*, [1897] 2 Ch. 96, C. A.; *Ecroyd v. Coulthard*, [1897] 2 Ch. 554, affirmed [1898] 2 Ch. 358, C. A.; *Grove v. Portal*, [1902] 1 Ch. 727. As to the question whether the right of taking oysters is or is not a *profit à prendre*, see *Goodman v. Saltash Corporation* (1882), 7 App. Cas. 633; *Mills v. Colchester Corporation* (1867), L. R. 2 C. P. 476. See also *Colchester Corporation v. Brooke* (1845), 7 Q. B. 339; *Truro Corporation v. Rowe*, [1902] 2 K. B. 709, C. A.; *Parker v. Lord Advocate*, [1904] A. C. 364 (mussels).

(*t*) *Maxwell v. Martin* (1830), 6 Bing. 522; compare *Clayton v. Corby* (1843), 5 Q. B. 415.

(*a*) *Constable v. Nicholson* (1863), 14 C. B. (N. S.) 230.

(*b*) *Newby v. Harrison* (1861), 1 John. & H. 393.

(*c*) *Johnson v. Barnes* (1873), L. R. 8 C. P. 527, Ex. Ch.

(*d*) *Low v. Adams*, [1901] 2 Ch. 598; compare *Rigg v. Lonsdale (Earl)* (1857), 1 H. & N. 923, Ex. Ch.; *Devonshire (Duke) v. Lodge* (1827), 7 B. & C. 36.

(*e*) *Ewart v. Graham* (1859), 7 H. L. Cas. 331, per Lord CAMPBELL, L. C., at pp. 345 and 346; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139; and see title ANIMALS, Vol. I., p. 367.

(*f*) *Race v. Ward* (1855), 4 E. & B. 702, per Lord CAMPBELL, C. J., at p. 709; 2 Bl. Com. 14.

(*g*) *Ibid.*; *Weekly v. Wildman* (1698), 1 Ld. Raym. 405, at p. 407. For the distinction between a *profit à prendre* and an easement, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 445, and p. 238, *ante*.

(*h*) *Race v. Ward*, *supra*; *Manning v. Wasdale* (1836), 5 Ad. & El. 758.

(*i*) As to the distinction between several rights and rights of common, see generally *Robinson v. Duleep Singh* (1879), 11 Ch. D. 798, C. A.; *Chesterfield (Lord) v. Harris*, [1908] 2 Ch. 397, 423, 424, C. A.; and see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 460, 461.

SECT. 1.
Nature of
Profits à
Prendre.

Classification
of profits à
prendre.

Profits à
prendre
appendant.

owner of the land (*k*). In the latter case it is called a *profit à prendre* in common, or more usually a right of common (*l*).

660. By analogy to the case of easements, the land over which the right to a *profit à prendre* is exercised is called the "servient tenement" and the owner of that land the "servient owner." If the right is enjoyed as appendant or appurtenant to the ownership of other land, such land is called the "dominant tenement" and the owner of it the "dominant owner" (*m*). But a *profit à prendre*, unlike an easement, may also exist in gross, that is to say, may exist as a right of property in favour of a man and his heirs or for any other estate or interest, quite unconnected with any estate or interest which the owner may have in any land (*n*). Where a *profit à prendre* exists in gross there is not of course any dominant tenement (*o*).

661. *Profits à prendre* connected with the holding of a dominant tenement are either appendant or appurtenant, the latter being the more usual. A *profit à prendre* appendant is a right which arose at common law upon the grant of arable land prior to the Statute of Quia Emptores, 1289 (*p*). Before the passing of this statute, when a lord of the manor enfeoffed a person of some parcels of arable land the feoffee became *ipso facto* entitled to certain ancillary rights with respect to other lands in the manor (*q*). After the statute was

(*k*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 445. Almost all rights of common are *profits à prendre*, but all *profits à prendre* are not necessarily rights of common. The right to take a particular substance from another man's land may in one case be a right in severalty, and in another a right of common.

(*l*) *Profits à prendre* are rights which are almost entirely based upon the ancient system of landholding as it formerly existed. Many of these rights have existed from a very early date; others are governed by considerations and requirements the pertinency of which no longer exists, but which are directly or indirectly attributable to the manorial system as formerly obtaining. The communal enjoyment of *profits à prendre* is the direct outcome of that system, and occurs not only in localities where that system remains intact, but also in places where most other traces of the system have disappeared. Enjoyment of *profits à prendre* as rights in severalty—a mode of enjoyment less prevalent than communal enjoyment—is, on the whole, of more modern origin, although instances occur in early times. As to the origin of *profits à prendre*, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 444.

(*m*) See *Warburton v. Purke* (1857), 2 H. & N. 64, at pp. 68 *et seq.*; and p. 236, *ante*.

(*n*) *Shuttleworth v. Le Fleming* (1865), 19 O. B. (N. S.) 687; *Chesterfield (Lord) v. Harris*, [1908] 2 Ch. 397, O. A., per BUCKLEY, L. J., at p. 421; *Webber v. Lee* (1882), 9 Q. B. D. 315, O. A. See also *Coulam v. Slack* (1812), 15 East, 108, per Lord ELLENBOROUGH, C. J., at p. 115; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139, 161, where a claim to a *profit à prendre* in gross failed for want of proof. For instances of *profits à prendre* existing in gross, see *Daniel v. Hanslip* (1672), 2 Lev. 67; *Johnson v. Burnes* (1873), L. R. 8 O. P. 527, Ex. Ch. (a right of pasturage owned by the corporation of Colchester); *Shuttleworth v. Le Fleming*, *supra* (a right of fishing); *Webber v. Lee*, *supra* (a right to shoot and take away game); *Spooner v. Day* (1636), Cro. Car. 432.

(*o*) See p. 236, *ante*.

(*p*) 18 Edw. 1, c. 1. See also title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 416, where the distinction between rights of common appendant and appurtenant is discussed.

(*q*) 2 Co. Inst. 85; *Dunraven (Lord) v. Llewellyn* (1850), 15 Q. B. 791, 810.

passed these rights no longer arose upon a grant of the land. Consequently all *profits à prendre* appendant must have come into existence prior to 1290. *Profits à prendre* appendant are therefore said to be "of common right" (r).

SECT. 1.
Nature of
Profits à
Prendre.

662. *Profits à prendre* appurtenant are "against common right"; they are rights attached to the ownership of a particular piece of land, not as the necessary consequence of the original tenure, but attached thereto by grant, prescription, or other extraneous means. They cannot be severed or enjoyed apart from the dominant tenement, and they pass with the dominant tenement into the hands of each successive owner (s).

*Profits à
prendre
appurtenant.*

663. Where a *profit à prendre* exists as a right in gross it may be assigned and dealt with as a valuable interest, according to the ordinary rules of property (t). In default of any disposition *inter vivos* or by will a *profit à prendre* in gross descends to the heir-at-law as an ordinary incorporeal hereditament (u).

*Profits à
prendre in
gross.*

664. Where a *profit à prendre* is claimed under the doctrine of prescription as being appendant to land, it can only be claimed in connection with the enjoyment of the dominant tenement; the extent of the right claimed is necessarily measured by the size or nature or wants of the estate in respect of which the prescription is made (x). Thus, if the claim be for common of pasture it must be for cattle levant and couchant—that is to say, it must be limited by the number of cattle capable of being supported during the winter upon the estate in respect of which the prescription is made. So, if it be for common of turbary this must be limited by the number of chimneys or hearths in which the turf may be burnt. If it be for plough-bote or cart-bote it must be limited by the instruments of tillage which have to be repaired (a).

Limit of
*profit à
prendre.*

It appears to be doubtful whether a *profit à prendre* unlimited by any considerations as to the nature of the dominant tenement can be made appurtenant to land, even by express grant (b). Such a *profit à prendre* can, however, exist in gross (c).

(r) *Tyrringham's Case* (1584), 4 Co. Rep. 36 b; and see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 447.

(s) *Warrick v. Queen's College, Oxford* (1871), 6 Ch. App. 716.

(t) *Welcome v. Upton* (1840), 6 M. & W. 536, per Lord ABINGER, O.B., at p. 542; see also *Goodman v. Sultash Corporation* (1882), 7 App. Cas. 633, 658.

(u) See generally, title DESCENT AND DISTRIBUTION, p. 1, ante.

(x) *Bailey v. Stephens* (1862), 12 C. B. (N.S.) 91; *Chesterfield (Lord) v. Harris*, [1908] 2 Ch. 397, O. A.; *Clayton v. Corby* (1843), 5 Q. B. 415, per Lord DENMAN, O.J., at p. 419; *Edgar v. English Fisheries Special Commission* (1870), 23 L. T. 732, per WILLES, J., at pp. 737, 738; *A.-G. v. Mathias* (1858), 4 K. & J. 579, 591, 592.

(a) *Chesterfield (Lord) v. Harris*, supra, per BUCKLEY, L.J., at p. 421; per COZENS-HARDY, M.R., at p. 410: "The very idea of a *que* estate seems to involve some relation between the needs of the estate or its owner and the extent of the *profit à prendre*"; and see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 468.

(b) *Ibid.*, per COZENS-HARDY, M.R., at p. 410.

(c) *Ibid.*, per BUCKLEY, L.J., at p. 423; *Mellor v. Spateman* (1669), 1 Wms. Saund. 343.

SECT. 1.

Nature of Profits à Prendre.

Duration of profit à prendre.
Rights of owner of profit à prendre.

Profit à prendre is interest in land.

Distinction between profits à prendre and licences.

665. A *profit à prendre* may be created for an estate in perpetuity analogous to an estate in fee simple, or for any less period or interest such as a term of years (*d*), and is a tenement in the strict legal sense of the term (*e*).

666. The owner of a *profit à prendre* has rights of a possessory nature, and can bring an action for trespass at common law for their infringement (*f*). A profit differs from an easement in this respect, for the owner of an easement cannot sustain trespass, but can only protect his rights by abatement or an action of nuisance (*g*), which remedies are not available for the owner of a profit (*h*).

667. A *profit à prendre* is an interest in land, and for this reason falls within the provisions of the Statute of Frauds (*i*), and a *profit à prendre* which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce (*k*).

668. *Profits à prendre*, though sometimes called "licences" (*l*), must be carefully distinguished from mere licences which are not tenements, and do not pass any interest or alter or transfer property in anything, but only make an act lawful which otherwise would have been unlawful (*m*). A licence is not transferable, nor can it be perpetual; it is not binding on the tenement affected, but is a personal matter between the licensor and the licensee. It is always revocable and merely excuses a trespass until it is revoked (*n*).

(*d*) *Hooper v. Clark* (1867), L. R. 2 Q. B. 200; *Birkbeck v. Paget* (1862), 31 Beav. 403. See, for instance, *Fitzgerald v. Firbank*, [1897] 2 Ch. 96, C. A.; *Grove v. Portal*, [1902] 1 Ch. 727; *Holford v. Bailey* (1849), 13 Q. B. 426, 446, Ex. Ch.

(*e*) *Doe v. Wood* (1819), 2 B. & Ald. 724; *Muskett v. Hill* (1839), 5 Bing. (N. C.) 694; *Martyn v. Williams* (1857), 1 H. & N. 817, 827; Co. Litt. 20 a. See also *R. v. Piddletrenthide (Inhabitants)* (1790), 3 Term Rep. 772, where a rabbit warren was held to be a tenement within the meaning of the Poor Relief Act, 1662 (14 Car. 2, c. 12). "'Tenement' signifies everything that may be holden, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind" (2 Bl. Com. 16; *Beauchamp (Earl) v. Winn* (1873), L. R. 6 H. L. 223).

(*f*) *Fitzgerald v. Firbank*, *supra*, per LINDLEY, L.J., at p. 101; *Holford v. Bailey*, *supra*; *Lowe v. Adams*, [1901] 2 Ch. 598.

(*g*) See p. 331, *ante*.

(*h*) *Fitzgerald v. Firbank*, *supra*, per LINDLEY, L.J., at p. 102.

(*i*) *Webber v. Lee* (1882), 9 Q. B. D. 315, C. A.; *Smart v. Jones* (1864), 15 C. B. (N. S.) 724, per WILLES, J.

(*k*) *Webber v. Lee*, *supra*.

(*l*) See *Doe v. Wood*, *supra*.

(*m*) *Thomas v. Sorrell* (1673), Vaugh. 330, 351, Ex. Ch. As to licences generally, see title REAL PROPERTY AND CHATTELS REAL.

(*n*) *Hewlins v. Shippam* (1826), 5 B. & C. 221, 232. "If one license me and my heirs to come and hunt in his park, I must have a writing (that is, a deed) of that license, for a thing passes by the license which indures in perpetuity: but if he license me one time to hunt, this is good without deed, for no inheritance passes" (*Purrie v. Green* (1495), Y. B. 11 Hen. 7, fol. 8 a, per KENLE, Serjt., in his argument at 8 b, cited in *Wickham v. Hawker* (1840), 7 M. & W. 63, per PARKER, B., at p. 79). For the distinction between licences and *profits à prendre*, see *Hooper v. Clark*, *supra*.

A *profit à prendre* when granted is never revocable at the will of the grantor, but subsists throughout the currency of the estate or interest for which it is created.

SECT. 1.
Nature of
Profits à
Prendre.

Waste.

669. A *profit à prendre* must also be distinguished from a right to take a portion of the soil inherent in some estate or interest in the land (o). For the person entitled to some of the recognised estates less than the fee simple has at law a right to take portions of the soil (p). A tenant in tail is not, as a rule, impeachable for waste; and a tenant for life is not guilty of waste if he continues the mines existing at the commencement of his tenancy (q), or digs or quarries for gravel, earth, or stone in pits and places usually dug or quarried when his tenancy commenced (r).

SECT. 2.—Creation.

SUB-SECT. 1.—By Grant or Statute.

670. A *profit à prendre* appurtenant or in gross, whether to be enjoyed in common or in severalty, may be created by express grant (s), but a *profit à prendre* appendant cannot now be created in this way (a). *Profits à prendre* cannot be created at common law except by deed (b), and are therefore said to lie in grant and not in livery and to pass by mere delivery of the deed (c). No estate or interest, whether in fee simple (d), for life (e), for a term of years (f), or even for a single hour, can be created otherwise than by deed (g), with the exception of two cases—first, where the circumstances are such that it would be inequitable to deny the existence of a *profit à prendre*, although the proper legal formalities for its creation have not taken place (h), as where a mere executory agreement for the

Express
grant.

(o) *Wilkinson v. Proud* (1843), 11 M. & W. 33.

(p) Thus, a person may own a substratum, and in respect of that ownership he may remove the whole or part of his property.

(q) Co. Litt. 54 b; *Coppinger v. Gubbins* (1846), 3 Jo. & Lat. 397.

(r) Co. Litt. 53 b; *Viner v. Vaughan* (1840), 2 Beav. 466; *Elias v. Snowdon Slate Quarries Co.* (1879), 4 App. Cas. 454.

(s) *Cowlam v. Slack* (1812), 15 East, 108; *Fitzgerald v. Firbank*, [1897] 2 Ch. 96, O. A.; *Goodman v. Saltash Corporation* (1882), 7 App. Cas. 633, 658.

(a) See p. 338, *ante*.

(b) *Wood v. Leadbitter* (1845), 13 M. & W. 838, where ALDERSON, B., at pp. 842, 843, said: "That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed is a proposition so well established, that it would be mere pedantry to cite authorities in its support"; *Holford v. Bailey* (1849), 13 Q. B. 426, Ex. Ch.; Co. Litt. 42 a; Bac. Abr. Grants, E; 14 Vin. Abr. Grant, G (a); 2 Roll. Abr. Grant (g); *Somerset (Duke) v. Fogwell* (1826), 5 B. & C. 875; compare *Marshall v. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732, per COCKBURN, C.J., at pp. 746, 747; *Hopkins v. Robinson* (1671), 2 Lev. 2.

(c) *Wood v. Leadbitter*, *supra*, per ALDERSON, B., at p. 842.

(d) *Ibid.*

(e) *Ibid.*

(f) *Somerset (Duke) v. Fogwell*, *supra*; *Bird v. Higginson* (1837), 6 Ad. & El. 824, Ex. Ch.; *Wood v. Leadbitter*, *supra*.

(g) *Holford v. Bailey*, *supra*, per PARKE, B., at p. 446.

(h) See *Lowe v. Adams*, [1901] 2 Ch. 598; and generally, pp. 246 *et seq.*, *ante*.

SECT. 2.
Creation.

granting of a profit creates an equitable interest (i); and, secondly, where an interest which the law does not require to be created by deed is created in the land to which a profit is appurtenant (k).

By statute.

671. A *profit à prendre* may be created by statute. Private Inclosure Acts frequently reserved or created rights of shooting to lords of manors over the lands allotted to the commoners (l).

No particular
form of grant
necessary.

672. No particular form of grant and no particular words are necessary to create a *profit à prendre* (m). If the effect of a deed or other instrument, when the words are taken as a whole, is to create a right of the nature of a *profit à prendre*, the instrument will be construed as a grant of such right, and all the legal incidents of the right will be established (n), provided the subject-matter of the deed is of such a nature that the law allows it to be created as a *profit à prendre* (o).

How far
grant confers
exclusive
right.

673. A grant of a *profit à prendre* does not *prima facie* confer on the recipient an exclusive right to the whole substance the taking of which constitutes the right (p), to the exclusion of the owner of the servient tenement (q). Such exclusive right may, however, be granted if the words of the grant are clear and explicit (r), and a grant purporting to create a *profit à prendre* may be so extensive and interfere with the ordinary uses and enjoyment of land to such an extent that it will be construed as a grant of the land itself.

Who may
take profits d
prendre under
a grant.

674. The owner of a *profit à prendre* may in general take the subject-matter of the right either in person or by his servants; and he may also get the benefit of his right by selling or leasing an interest in the *profit à prendre*, for a longer or shorter term, to any person capable of taking such an interest, and so long as that

(i) For illustrations of this principle, see the analogous case of easements, at p. 246, *ante*.

(k) *E.g.*, a quarterly tenancy.

(l) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 483, 576—578, where the authorities are collected.

(m) *Wickham v. Hawker* (1840), 7 M. & W. 63, 79; *Fitzgerald v. Firbank*, [1897] 2 Ch. 96, 103, O. A.; *Huntington (Earl) v. Mountjoy (Lord)* (1853), 4 Leon. 147. Compare *Holford v. Bailey* (1849), 13 Q. B. 426, Ex. Ch., and see also *Doe v. Wood* (1819), 2 B. & Ald. 724, where a *profit à prendre* is spoken of as a licence.

(n) *Fitzgerald v. Firbank*, *supra*; *Sutherland (Duke) v. Heathcote*, [1892] 1 Ch. 475, 484 C. A.

(o) *Fitzgerald v. Firbank*, *supra*, per RIGBY, L.J., at p. 103.

(p) *Huntington (Earl) v. Mountjoy (Lord)*, *supra*; *Newby v. Harrison* (1861), 1 John. & H. 393, 398, 399; compare *Chetham v. Williamson* (1804), 4 East, 469.

(q) *Sutherland (Duke) v. Heathcote*, *supra*, at pp. 484, 485, 486, O. A., where it was held that a grant of the full and free liberty to take coal did not exclude the right of the owner of the land from working mines, provided he did not disturb the grantee in his working operations when and where the latter carried them on.

(r) *Ibid.*, at p. 485; *Huntington (Earl) v. Mountjoy (Lord)*, *supra*; *Chetham v. Williamson*, *supra*; *Doe v. Wood* (1819), 2 B. & Ald. 724; *Carr v. Benson* (1868), 3 Ch. App. 524, 534, 535; *Newby v. Harrison*, *supra*; *Wilkinson v. Proud* (1843), 11 M. & W. 33.

interest endures the donee has an irrevocable licence to take so much of the profit as has thus been granted to him (s).

SECT. 2.
Creation.

675. *Profits à prendre* cannot strictly form the subject of a reservation or exception (a), although sometimes expressed to be reserved or excepted from a conveyance or other disposition (b). When an owner of land conveys it to another, and purports to reserve a *profit à prendre*, the true effect is to create a *profit à prendre de novo* by regrant (c).

Effect of
reservation
of *profits à
prendre*.

It appears improbable that the doctrine of an implied grant founded on the principle that a man cannot derogate from his grant, as applied to easements (d), could be applied to *profits à prendre*, which can hardly be apparent and continuous, nor can they arise as rights of necessity.

Implied grant.

SUB-SECT. 2.—By Prescription.

676. A *profit à prendre* may be claimed by prescription at common law, including prescription under the doctrine of a lost modern grant (e), and *profits à prendre* which are appendant or appurtenant may also be claimed under the provisions of the Prescription Act, 1832 (f), which, however, does not apply to *profits à prendre* in gross (g). Claims by prescription to profits of this class are exceedingly rare (h).

*Profits à
prendre*
claimed by
prescription
or lost grant.

677. A *profit à prendre* cannot exist by custom (i), except in the

Not claimable
by custom.

(s) *Goodman v. Saltash Corporation* (1882), 7 App. Cas. 633, per Lord BLACKBURN, at p. 658; *Grove v. Portal*, [1902] 1 Ch. 727.

(a) *Doe d. Douglas v. Lock* (1835), 2 Ad. & El. 705, per Lord DENMAN, at p. 743; *Wickham v. Hawker* (1840), 7 M. & W. 63, per PARKE, B., at p. 76. "A reservation is always of a thing not *in esse*, but newly created or reserved out of the land or hereditament demised, an exception is ever of part of the thing granted and of a thing *in esse*" (Co. Lit. 47 a).

(b) E.g., *Wickham v. Hawker*, *supra*.

(c) *Ewart v. Graham* (1859), 7 H. L. Cas. 331, per Lord CAMPBELL, L.C., at p. 345.

(d) See pp. 251 *et seq.*, *ante*.

(e) As to prescription generally, see p. 256, *ante*. See *Warrick v. Queen's College, Oxford* (1871), 6 Ch. App. 716; *Dowglass v. Kendal* (1610), Cro. Jac. 256; *English v. Burnell* (1765), 2 Wils. 258; *Cowlam v. Slack* (1812), 15 East, 108; *Johnson v. Barnes* (1873), L. R. 8 O. P. 527, Ex. Ch.; *Potter v. North* (1869), 1 Wms. Saund. 347; *Welcome v. Upton* (1840), 6 M. & W. 536; *Carr v. Foster* (1842), 3 Q. B. 581; *Hopkins v. Robinson* (1871), 2 Lev. 2; *Davies v. Williams* (1851), 16 Q. B. 546; *Baylis v. Tyssen-Amhurst* (1877), 6 Ch. D. 500; *Hanmer v. Chance* (1865), 4 De G. J. & Sm. 626; *Haigh v. West*, [1893] 2 Q. B. 19, C. A.

(f) 2 & 3 Will. 4, c. 71, s. 1.

(g) *Shuttleworth v. Le Fleming* (1865), 19 O. B. (N. S.) 687, 709; *Welcome v. Upton*, *supra*.

(h) For cases of prescription for *profits à prendre* in gross, see *Barrington's (Sir Francis) Case* (1610), 8 Co. Rep. 136 b; *Welcome v. Upton*, *supra* (a right of pasturage); *R. v. Churchill* (1825), 4 B. & O. 750; *Johnson v. Barnes*, *supra*.

(i) *Grimstead v. Marlowe* (1792), 4 Term Rep. 717; *Hardy v. Hollyday* (1765) (cited in the last-mentioned case at p. 718); *Davies's Case* (1688), 3 Mod. Rep. 246; *Rockey v. Huggens* (1631), Cro. Car. 220; *Race v. Ward* (1855), 4 E. & B. 702, 709; *A.-G. v. Mathias* (1858), 4 K. & J. 579, 590, 591; *City of London Sewers Commissioners v. Glass* (1872), 7 Ch. App. 456, 465; *Allgood v. Gibson* (1876), 34 L. T. 883, 884; *Blowett v. Tregonning* (1835), 3 Ad. & El. 554, 575; *Bland v. Lipscombe* (1854), 4 E. & B. 713, n.; *Pitts v. Kingsbridge Highway Board* (1871), 19 W. R. 884; *Lloyd v. Jones* (1848), 6 O. B. 81, 89; *Constable*

SECT. 2.
Creation.

General rules
of prescrip-
tion to
easements
apply to
*profits à
prendre*.

case of copyholders and in certain mining localities (*j*), because were it otherwise, the subject-matter would soon become exhausted (*k*), and the servient tenement would be subjected to an unreasonable burden, a release from which could never be obtained from the owners of the right who would necessarily be members of an undefined and fluctuating body (*l*).

In general, the rules regulating the doctrine of prescription at common law as applied to easements (*m*) apply also to *profits à prendre*. The same kind of evidence of user is necessary, namely, user or enjoyment as of right neither by force, stealth, nor permission (*n*). Similarly, twenty years' enjoyment as of right is presumptive evidence of the enjoyment from time immemorial (*o*); and if the origin of the alleged right is shown to have been since the time of the commencement of legal memory, the prescriptive claim at common law will fail (*p*).

Who can
claim *profits
à prendre*
by prescrip-
tion.

678. A *profit à prendre* can only be claimed by prescription in favour of persons who are or whose predecessors in title were capable of taking a grant; it cannot be claimed by an undefined and fluctuating body of persons not incorporated for the purpose of taking the grant (*q*). But a grant of the right to a *profit à prendre* may be made by the Crown to persons composing such a class; for there is this distinction between a grant by the Crown and a grant by a private individual, that as the Crown has power to create corporations, if it be necessary for the purpose of establishing the validity of the grant, the grantees will be treated as a corporation *quoad* the grant, whereas in the case of a grant by a private individual who has no power of creating a corporation, the grantees cannot be so treated (*r*).

v. Nicholson (1863), 14 O. B. (N.S.) 230, 239, 240, 242; *Chilton v. London Corporation* (1878), 7 Ch. D. 735; *De la Warr (Earl) v. Miles* (1881), 17 Ch. D. 535, 577, C. A.; *Tilbury v. Silva* (1890), 45 Ch. D. 98, 107, C. A.; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139, 163. See also title CUSTOM AND USAGES, Vol. X., p. 238. It seems that "occupiers" even of copyhold tenements of a manor cannot claim by custom (*Austin v. Amhurst* (1877), 7 Ch. D. 689; but see *Fox v. Amhurst* (1875), L. R. 20 Eq. 403).

(*j*) For these special mining customs in Cornwall, Derbyshire and elsewhere, see title MINES, MINERALS AND QUARRIES.

(*k*) See title CUSTOM AND USAGES, Vol. X., pp. 238, 239.

(*l*) *A.-G. v. Mathias* (1858), 4 K. & J. 579, 591.

(*m*) See p. 260, *ante*.

(*n*) See p. 262, *ante*; *Mills v. Colchester Corporation* (1867), L. R. 2 O. P. 476, 486. As to user based on a mistaken conception of the rights of the parties, see *De la Warr (Earl) v. Miles*, *supra*; *Campbell v. Wilson* (1803), 3 East, 294; *Rivers (Lord) v. Adams* (1878), 3 Ex. D. 361; and see p. 263, *ante*.

(*o*) First Report of the Real Property Commissioners.

(*p*) *Ibid.*, see p. 261, *ante*; *Addington v. Clode* (1775), 2 Wm. Bl. 989; and see generally *R. v. Ashby Folville (Inhabitants)* (1806), L. R. 1 Q. B. 213; *Bryant v. Foot* (1868), L. R. 3 Q. B. 497, Ex. Ch.; *Mill v. New Forest Commissioner* (1856), 18 C. B. 60.

(*q*) *Rivers (Lord) v. Adams*, *supra*; *Tilbury v. Silva* (1890), 45 Ch. D. 98, C. A.; *Baker v. Brereman* (1835), Cro. Car. 418; see *Goodman v. Saltash Corporation* (1882), 7 App. Cas. 633, 648, 655.

(*r*) *Willingale v. Maitland* (1866), L. R. 3 Eq. 103, *per* Lord ROMILLY, M.R., at p. 109.

679. In order to support an alleged right which can be shown to have been long exercised by the free inhabitants of an ancient borough, and to clothe such user with legality, the court may in its desire to find a legal origin presume a grant to the corporation of that borough upon a trust in favour of the inhabitants (*s*).

SMOT. 2.
Creation.

Presumption
of grant to
trustees for
inhabitants.

680. Claims to *profits à prendre* under the doctrine of a lost modern grant are governed by the same rules as apply to claims under this doctrine in respect of easements (*a*). Thus a lost modern grant of a *profit à prendre* will not be presumed where such a grant would have been in contravention of the express provisions of a statute (*b*).

Claims to
*profits à
prendre* by
lost modern
grant.

681. By the provisions of the Prescription Act, 1832 (*c*), relating to prescriptive claims to *profits à prendre* appendant or appurtenant, no claim to any right of common or other profit or benefit to be taken or enjoyed from or upon any land of the Crown, or the Duchies of Lancaster and Cornwall, or any ecclesiastical or lay person or body corporate, where such right, profit, or benefit has been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, can be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years. But such a claim may be defeated in any of the other ways by which it might have been defeated at the time the Act was passed. When such a right, profit, or benefit has been enjoyed for the full period of sixty years, the right thereto is deemed absolute and indefeasible, unless it appears that it was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (*d*).

Claims to
*profits à
prendre*
under
Prescription
Act, 1832.

Each of these two periods of thirty and sixty years is to be deemed the period next before some suit or action wherein the claim or matter to which such period may relate has been or is brought into question (*e*), and no act or other matter is to be deemed to be an interruption within the meaning of the statute unless the same has been submitted to or acquiesced in for one year after the party interrupted has notice of the interruption and of the person making it or authorising it to be made (*f*).

Periods of
enjoyment.

Uninterrupted enjoyment for the full period of thirty years must be shown, and the onus of proof is on the claimant (*g*).

(*a*) *Goodman v. Saltash Corporation* (1882), 7 App. Cas. 633. See also *Haigh v. West*, [1893] 2 Q. B. 19; *Re Faversham Free Fishermen* (1887), 36 Ch. D. 329, C. A.

(*a*) See p. 261, *ante*.

(*b*) *Neaverson v. Peterborough Rural Council*, [1902] 1 Ch. 557, C. A.; *Mill v. New Forest Commissioner* (1856), 18 C. B. 60.

(*c*) 2 & 3 Will. 4, c. 71, s. 1. As to claims under the Act to rights of common, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 484 *et seq.*

(*d*) See p. 269, *ante*; and title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 489.

(*e*) See p. 272, *ante*; *Richards v. Fry* (1838), 7 Ad. & El. 698; *Wright v. Williams* (1836), 1 M. & W. 77.

(*f*) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 4.

Bailey v. Appleyard (1836), 8 Ad. & El. 161.

SECT. 2.
Creation.
Disabilities.

The time during which any person otherwise capable of resisting any claim to any *profit à prendre* is an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit is pending and which has been diligently prosecuted (*h*) is to be excluded in the computation of the two periods of thirty and sixty years, except only in cases where the right has been enjoyed for the period of sixty years without any written consent, in which case the fact that any of the disabilities already mentioned exists is wholly immaterial (*i*).

SECT. 3.—*Extinguishment.*

SUB-SECT. 1.—*By Act of Parliament.*

By statute.

682. An Act of Parliament may extinguish a *profit à prendre* either expressly or impliedly.

Such an extinguishment is often the result of a statutory enactment of which the extinguishment does not form any substantive part, but is the outcome of the exercise of some power expressly given by the Act or the fulfilment of some duty expressly imposed by it (*k*).

SUB-SECT. 2.—*By Release.*

By release.

683. A *profit à prendre* may be extinguished by release either expressly (*l*) or by a regrant of the right to the owner of the servient tenement. Such a grant or release operates as an extinguishment of the right under the doctrine of merger, the rule being that a man cannot have a right to take a profit out of his own land as a separate right apart from the ordinary incidents of ownership (*m*). The release must be by all persons interested in the right (*n*).

How effected.

A *profit à prendre* being an incorporeal hereditament can only be released or regranted by deed, except in cases where release arises by implication of law (*o*).

Release of
part of the
servient
tenement,

The rule relating to rights of common whereby if the owner of the right release the right in respect of a portion of the land the right is extinguished as regards the whole (*p*) does not apply to

(*h*) *Bailey v. Appleyard* (1838), 8 Ad. & El. 161.

(*i*) *Wright v. Williams* (1836), 1 M. & W. 77, and other cases relating to easements, p. 270, *ante*.

(*k*) As, for instance, by awards made in pursuance of the Inclosure Acts.

(*l*) *Johnson v. Barnes* (1873), L. R. 8 O. P. 527, Ex. Ch. Compare *Broome v. Wenham* (1893), 68 L. T. 651. See title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 526.

(*m*) Co. Litt. 280 a, where it is said "a man cannot have land and a common of pasture issuing out of the same land, *et sic de cæteris*."

(*n*) *Benson v. Chester* (1799), 8 Term Rep. 396.

(*o*) Co. Litt. 264 b, where it is pointed out that there is a difference between a release in deed and a release in law, and that a release in deed or express release must of necessity be by deed, whereas releases in law may or may not be by deed; *Miles v. Etteridge* (1692), 1 Show. 349.

(*p*) *Rotherham v. Green* (1697), Cro. Eliz. 593; *Morse v. Well* (1610), 1 Brownl. 180; *Miles v. Etteridge*, *supra*; *Johnson v. Barnes*, *supra*; compare *Benson v. Chester*, *supra*, per Lord KENYON, C.J., at p. 401. See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 526, 527.

profits à prendre existing as rights in severalty, and consequently separate parts of the servient tenement may be released from time to time from the burden of such several rights (g). SECT. 3.
Extinguish-
ment.

A release of a *profit à prendre* which has been established will not be presumed from mere non-user (r). Where, however, in answer to a prescriptive claim, the existence of the alleged *profit à prendre* is put in issue, proof of non-user may be effective in negating the existence of the right. Effect of
non-user.

SUB-SECT. 3.—By Unity of Ownership.

684. When the ownership of the right constituting a *profit à prendre* and the ownership of the servient tenement become united in the same person, the *profit à prendre* is extinguished (s). But there can be no extinguishment by unity of ownership unless the estate of the common owner in the servient tenement is at least as large as his estate in the *profit à prendre* (t). Unity of
ownership.

SUB-SECT. 4.—By Exhaustion.

685. If the subject-matter of a *profit à prendre* become exhausted, the right may be thereby extinguished (a). But the mere temporary exhaustion of the subject-matter does not necessarily extinguish the right (b), for in cases where there is a possibility of the subject-matter coming into existence again the right is only suspended, and in the event of a re-appearance of the subject-matter will again become exercisable (c). Exhaustion
of subject-
matter.

SUB-SECT. 5.—By Alteration.

686. An alteration of the character of the dominant tenement by the dominant owner may be such as to indicate an intention on his part to abandon the right, in which case an implied release of the right will be presumed against him and he will not be allowed to set up a claim to its continuance (d). Alteration of
dominant
tenement.

(g) *Johnson v. Barnes* (1873), L. R. 8 C. P. 527, Ex. Ch.

(r) *Seaman v. Vawdrey* (1810), 16 Ves. 390; see also *Smith v. Lloyd* (1854), 9 Exch. 562; *Moore v. Rawson* (1824), 3 B. & C. 332, 339; *Carr v. Foster* (1842), 3 Q. B. 581.

(s) *Tyrringham's Case* (1584), 4 Co. Rep. 36 b; *Wyat Wild's Case* (1609), 8 Co. Rep. 78 b; *Bradshaw v. Eyre* (1597), Cro. Eliz. 570; *Nelson's Case* (1585), 3 Leon. 128; *Musgrave v. Inclosure Commissioners* (1874), L. R. 9 Q. B. 162, 174; *Lloyd v. Powis (Earl)* (1855), 4 E. & B. 485; *Hall v. Byron* (1877), 4 Ch. D. 667; Co. Litt. 122 a; *Kimpton v. Bellamy* (1586), 1 Leon. 43; *Worledge v. Kingswell* (1600), Cro. Eliz. 794. And see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 523 *et seq.*

(t) *R. v. Hermitage (Inhabitants)* (1692), Carth. 239; *Bradshaw v. Eyre*, *supra*; *Wyat Wild's Case*, *supra*; Co. Litt. 114 b.

(a) *Clarkson v. Woodhouse* (1782), 5 Term Rep. 412, n.; *Carr v. Lambert* (1866), L. R. 1 Exch. 168, Ex. Ch.; *Spoor v. Green* (1874), L. R. 9 Exch. 99. Compare *Scholes v. Hargreaves* (1792), 5 Term Rep. 46; *Grant v. Gunner* (1809), 1 Taunt. 435. See title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 527.

(b) Compare *Robertson v. Hartopp* (1889), 43 Ch. D. 484, 517, C. A.; *Ely (Dean and Chapter) v. Warren* (1741), 2 Atk. 189.

(c) *Ely (Dean and Chapter) v. Warren*, *supra*.

(d) *Moore v. Rawson*, *supra*, at p. 338; *R. v. Chorley* (1848), 12 Q. B. 515; *Carr v. Lambert* (1866), L. R. 1 Exch. 168, Ex. Ch. See title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 527.

SECT. 3.
**Extinguish-
 ment.**

Alteration of
 servient
 tenement.

An alteration of the servient tenement may also extinguish a *profit à prendre* if the owner of the profit acquiesce in an alteration which practically amounts to a destruction of the subject-matter of the profit (e).

(e) *Scrutton v. Stone* (1893), 9 T. L. R. 478 (right of pasture claimed over part of lands which had gradually become covered with buildings).

EASTER OFFERINGS.

See ECCLESIASTICAL LAW.

ECCLESIASTICAL CHARITIES.

See CHARITIES; ECCLESIASTICAL LAW.

ECCLESIASTICAL CORPORATIONS.

See CORPORATIONS; ECCLESIASTICAL LAW.

ECCLESIASTICAL LAW.

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Part I.—Introductory.

Definition
and scope of
"Ecclesi-
astical Law."

687. The phrase "Ecclesiastical Law" may in England be considered either as confined to the law of the Church of England as administered by the Ecclesiastical Courts, or in a wider sense as including within its scope all laws relating to a church or *ecclesia* as such, whether derived from the law of the State, the laws of nature and of right reason, the divine law, or the laws of independent societies^(a). The title "Ecclesiastical Law" is here taken to include the law of England administered by the courts of this country so far as it relates to any particular Church,

(a) Hooker's Ecclesiastical Polity, Book I., s. 16.

whether established (b) or not, or the members thereof as such, or to any spiritual person or ecclesiastical officer as such, or to any property which is an ecclesiastical charity (c).

The wide scope thus given to this article corresponds to the increased recognition in recent years by the State of religious bodies other than the Church of England, but at the same time the fact that the courts take judicial notice of the "Ecclesiastical Law of England" only in the more limited sense makes it expedient to deal separately and in the first instance with ecclesiastical law in this stricter sense, *i.e.*, the law administered in the courts ecclesiastical, consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm as altered and supplemented by statutes (d). Accordingly the ensuing five parts of this article deal with ecclesiastical law in this narrower sense; and the law of England so far as it relates to religious bodies other than the Church of England is separately dealt with in Part VII. (e); while in this part such propositions are dealt with as bear upon the relation of the State to religious bodies generally.

688. The change from a narrower to a wider meaning of the word "ecclesiastical" has been accompanied by a similar change in the meaning of the word "Church" (f) when used of a religious body,

Meaning of
the word
"Church."

(b) As to the meaning of the word "established," see note (c), p. 364, *post*.

(c) The scope thus given to the word "ecclesiastical" is in accordance with the statutory definition of "ecclesiastical charity." In the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (2), and in the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 23 (3), unless the context otherwise requires, the expression "ecclesiastical charity" includes a charity the endowment whereof is held for some one or more of the following purposes: (a) For any spiritual purpose which is a legal purpose, or (b) for the benefit of any spiritual person or ecclesiastical officer as such, or (c) for use, if a building, as a church, chapel, mission-room, or Sunday school, or otherwise by any particular church or denomination, or (d) for the maintenance, repair, or improvement of any such building as aforesaid, or for the maintenance of divine service therein, or (e) otherwise for the benefit of any particular church or denomination, or of any members thereof as such, provided that where any endowment of a charity other than a building held for any of the purposes aforesaid is held in part only for some of the purposes aforesaid, the charity so far as that endowment is concerned shall be an ecclesiastical charity within the meaning of the Acts. As to this definition, see further p. 713, *post*.

(d) *Mackonochie v. Penzance* (Lord) (1881), 6 App. Cas. 424, 446.

(e) The law relating to the Church of England in the colonies, India, and elsewhere abroad has been included in Part II., as, although it is not strictly speaking "ecclesiastical law" within the narrower sense, it is more closely allied to that law than to the law relating to religious bodies other than the Church of England (see p. 483, *post*).

(f) The word "church" (*κυριακή*) having in the first instance been used as a name of the Christian house of worship, was with the conversion of the Teutonic nations assumed as the naturalised equivalent of *ecclesia*, and was used for that word in all its senses. It was thus used as the name of the one great religious organisation the Catholic Church, especially as represented by its ministers, the clergy or ecclesiastical order, and the extension to other churches took place as these were practically recognised. As the different portions of the congregation of the faithful sought visible embodiment in outward organisations which followed the lines of provincial, national, and linguistic distinctions there arose provincial and national churches as parts or branches of the Church

PART I.
Intro-
ductory.

and the very wide signification given in ordinary legal parlance to that word when so used (*g*) makes it advisable to base any propositions as to the relations between the State and a Church on a careful definition of what that word when so used connotes. Although the words "Church" and "denomination" are sometimes used in juxtaposition in a manner which might appear to imply that a "Church" is to be distinguished from a "denomination," there is no legal definition of the word "denomination" (*h*) which would enable any useful inference to be drawn from this implication, and the word "Church" is in fact used of any ecclesiastical organism which is complete within itself and separate from other churches (*i*).

Recognition
of the Church
by the State.

689. The extent to which such organisms are recognised by the State may be gauged by reference to the statutory facilities afforded to any congregation or society or body of persons associated for religious purposes (*k*), even though they object to be designated by any distinctive religious appellation (*l*). This wide recognition of religious bodies by the State is a development of the recognition which was accorded by the Roman civil law to the Christian Church and to other religious bodies (*m*). From the date of the

Catholic. Thus, after the first great division the word was applied to the Eastern Church and the Western Church, and, after the separate organisation on a national basis of various portions of the Western Church, the word was applied in each case to that portion of the Church Catholic which was thus separately organised (New English Dictionary, *sub voce* "Church"). Locke (1692) defines it as "a voluntary society of men joining themselves together of their own accord in order to the publick worshipping of God in such manner as they judge acceptable to him" (*ibid.*).

(*g*) The word "Church" is no longer confined in legal parlance to Christian Churches; for instance, it is used in reference to an association for the purposes of the Mahomedan religion (*Ibrahim Esmail v. Abdool Carrim Peermamode*, [1908] A. C. 526, 535, P. C.). In this case properties which had been purchased for the whole Mahomedan congregation of Mauritius, consisting of immigrants from C., H., and S., had been settled by deeds upon trusts which gave the exclusive management to a body of immigrants from C., and it was decided that although the congregation, not having been authorised by the State, had no legal existence as a religious community vested with a right to hold property, yet that as it formed a society *de facto* the aggrieved members of the society from H. and S. had a right to relief, and the deeds were set aside.

(*h*) "Denomination" is only "sect" writ large (*MacLaughlin v. Campbell*, [1906] 1 I. R. 588, 598, O. A.).

(*i*) "Church" has two distinct meanings; it may mean either the aggregate of the individual members of the Church, or it may mean the *quasi*-corporate institution which carries on the religious work of the denomination whose name it bears. If used in conjunction with the name of the denomination (*e.g.*, the Church of Rome or Church of Ireland) it *prima facie* imports the operative institution which ministers religion and gives spiritual edification to its members (*MacLaughlin v. Campbell*, *supra*, at p. 597).

(*k*) Trustee Appointment Act, 1850 (13 & 14 Vict. c. 28), s. 1.

(*l*) Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), Sched. A; see p. 369, *post*.

(*m*) "A considerable portion of the globe still retains the impression which it received from the conversion of Constantine, and the ecclesiastical institutions of his reign are still connected by an indissoluble chain with the opinions, the passions, and the interests of the present generation" (Gibbon's *Decline and Fall of the Roman Empire*, Chap. XX., Milman's Edition, Vol. III., p. 1).

PART I.
Intro-
ductory.

Milan decree of the Emperor Constantine (A.D. 313) (*n*) the Empire, while at first still tolerating other religions, recognised the organisation of the Christian Church (*o*), accepted the decrees of general and provincial councils, admitted the jurisdiction of Ecclesiastical Courts (*p*), and respected the right of the Church to enjoy the benefit of property given or bequeathed to it (*q*).

690. Recognition on similar lines has been accorded to the Church by all those countries which have adopted the Roman civil law. Such recognition necessarily presupposes that individual persons can express their religious beliefs in some form capable of recognition, that such expression may reasonably be taken to be characteristic of them as individuals (*r*), and that a society of

Elements
involved in
recognition.

(*n*) The edict was received as a general and fundamental law of the Roman world. It provided for the restitution of all the civil and religious rights of which the Christians had been deprived, enacted that the places of worship and public lands which had been confiscated should be restored to the Church, and guarded the future tranquillity of the faithful on the principles of equal toleration. "The two Emperors (Constantine and Licinius) proclaim to the world that they have granted a free and absolute power to the Christians and to all others of following the religion which each individual thinks proper to prefer to which he has addicted his mind and which he may deem the best adapted to his own use" (Gibbon's *Decline and Fall of the Roman Empire*, Chap. XX., Milman's Edition, Vol. III., p. 5).

(*o*) Jovian restored to the Church *τον ἀρχαίον κόσμον* (*ibid.*, Chap. XXV., p. 228, n. 2).

(*p*) The devotion of individuals was the first circumstance which distinguished the Christians from the Platonists; the second was the authority of the Church. The Christians formed a numerous and disciplined society, and the jurisdiction of their laws and magistrates was strictly exercised over the minds of the faithful. The loose wanderings of the imagination were gradually confined by creeds and confessions; the freedom of private judgment submitted to the public wisdom of synods; the authority of a theologian was determined by his ecclesiastical rank; and the episcopal successors of the apostles inflicted the censures of the Church on those who deviated from the orthodox belief (*ibid.*, Chap. XXI., p. 52).

(*q*) The means by which the Roman law gave effect to gifts of property for the benefit of the Church differed from the means by which the English law gives effect to such gifts in that the Roman law did not require, as the English law does, that a foundation which took the form of a *pia causa*, i.e., was devoted to pious uses, should be vested in some person capable of owning it. The act whereby the founder dedicated the property to charitable uses was sufficient without more to constitute the *pia causa* a foundation in the legal sense, i.e., to make it a new subject of legal rights, and it was thenceforth regarded as an ecclesiastical and, consequently, as a public institution, and as such shared that corporate capacity which belonged to all ecclesiastical institutions by virtue of a general rule of law, and was subjected to the control of the Church, that is, of the bishop or the ecclesiastical administrator, as the case might be (Sohm's *Institutes of Roman Law* (2nd English ed., 1901), pp. 207 *et seq.*). As to the existence of similar foundations in England, see p. 714, *post*.

(*r*) "There is a presumption of consistency of opinion on serious, especially religious, questions. If I were called on, even in a criminal proceeding, to show an individual to have been a Roman Catholic on a particular day I might surely prove his attendance at mass both before and after and through the whole course of his life to induce the reasonable conclusion that he was of that faith on the day in question. I might therefore prove the attendance over ten years before, not as the whole, but as part of the evidence" (*Shore v. Wilson*, *Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, H. L., *per* COLERIDGE, J., at p. 531). A person born and bred a Protestant and of a Protestant family must be presumed to be a Protestant unless he has done some act to denote a change in his religious persuasion (*Yelverton v. Longworth* (1864), 10 Jur. (N. S.) 1209, H. L.).

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persons having some religious tenets in common expressed in some form which is capable of recognition, can have a continued existence independent of the individuals comprising the society. It therefore pre-supposes a statement or other outward expression of the common faith, and some organisation by means of which the individuals comprising the society may be retained in or brought into relationship with this outward expression, and accordingly a Church *vis-à-vis* the State may be regarded as a society of individuals characterised by religious beliefs capable of expression in some common form, such society being organised on the basis of such religious beliefs.

**Relations of
the State to
the Church.**

691. The relations of the State to such a society of individuals may result from or consist of acts which either (1) relate to the individual members of the society regarded, not as members, but as individuals characterised by such religious beliefs; or (2) relate to the individual members *quâ* members of the society (*s*); or (3) relate to the society regarded as a society having an existence independent of the individuals composing it.

So long as the Church recognised was the one undivided Catholic Apostolic Church, the relations of the State to the Church were concerned only with that Church and the members of it as such, and the various States which adopted the Roman civil law followed that law in admitting the right of the Church to legislate for itself in all ecclesiastical matters by acts of a general or provincial council, to administer the disciplinary law of the Church by its own courts, and to own property for its own purposes (*a*).

**Division of
the Catholic
Church,**

But in course of time the Catholic Church became divided along lines defined either by reference to differences in the outward expression of the common faith or by differences in the organisation by means of which the individual members were retained in or brought into relationship with this outward expression (*b*). In the latter case, inasmuch as the organisation was materially affected by the variations of the laws of the various states which had been included in the Roman Empire, the sub-divisions tended to follow the territorial limits of those states. As the civil government developed in any one of those states the relations between the state and that portion of the Church which was within the particular state (that is, such of the

(*a*) An illustration of the distinction here drawn is afforded by the incidence of those portions of the law of the Church of England which were formerly binding on all individuals, but are now regarded (see pp. 379, 482, *post*) as binding only on the clergy and such of the laity as are members of the Church.

(*a*) As to the recognition of these rights in England, see pp. 371, 717, *post*.

(*b*) The expressions "Roman Catholic" and "members of the Church of Rome" alike describe that subdivision of the general body of Christians who believe in "One Catholic and Apostolic Church" and also acknowledge the authority of the Pope and accept the decrees of the Council of Trent—in other words, the Church which professes the Roman Catholic religion; and the same function of identification is fulfilled with regard to other subdenominations of the same general body by the words "The Protestant Episcopal Church of England and Ireland" and "The Protestant Presbyterian Church of Scotland" (*Gussen v. Hynes*, [1906] 1 I. R. 539, 543, 544, O. A.).

members and so much of the system of organisation of the Church as came within the jurisdiction of the state), became qualified by the system of civil government in force within that jurisdiction (c), and, in so far as the qualifications thus introduced involved dissociation of the organisation of that portion of the Church from the organisation of the whole Church, the Church in the particular state was recognised as a separate Church (d).

(c) "It is not necessary that traditions and ceremonies be in all places one and utterly like; for at all times they have been divers and may be changed according to the diversities of countries times and men's manners so that nothing be ordained against God's word. . . . Every particular or national Church hath authority to ordain change and abolish ceremonies or rites of the Church ordained only by man's authority so that all things be done to edifying" (Articles of Religion, XXXIV.). A modern instance of the qualifying effect of a system of civil government on the organisation of a Church is afforded by the case of *Zacklinski v. Polushie*, [1908] A. O. 65, P. O., which relates to a church built in Canada by Ruthenian emigrants from Galicia, who before emigration had been compelled by the civil power to conform to those doctrines of the Church of Rome as to which that Church differs from the Greek Church, but on coming to a land where no such compulsion was possible were held to have resumed allegiance to the Greek Orthodox Church to which their forefathers had belonged; see also *Merriman v. Williams* (1882), 7 App. Cas. 484, 507, P. O.

(d) Thus, in England the organisation of the Church under the protection of the State gradually developed (see pp. 375, 714, *post*), without any admission that the country formed part of the Holy Roman Empire such as on the Continent subjected countries to the Pope as spiritual and the Emperor as civil head, but also without any occasion arising on which it was possible to say definitely that the Church of England thenceforth existed as a society separate from the rest of the Catholic Church until the Conquest had consolidated the civil powers. From that time the separate existence of the Church was recognised, and the view accepted by Parliament was that expressed in their petition presented in 1307 A.D., rehearsed in stat. (1351—2) 25 Edw. 3, stat. 6, and according to the recital in stat. (1389—90) 13 Ric. 2, stat. 2, c. 2, made a statute: "The Holy Church of England was founded in the Estate of Prelacy within the realm of England by the King and the Barons to inform them and the people of the Law of God and to make hospitalities alms and other works of charity in the places where the churches were founded for the souls of the founders their heirs and all Christians; and certain possessions as well in fees lands rents as in advowsons which do extend to a great value were assigned to the prelates and other people of the Holy Church of the said realm to sustain the same charge." This is the Church of England as to which by the name *Ecclesia Anglicana* Magna Charta enacts that she shall be free and shall have all her rights and liberties inviolable, and as from year to year this protective clause has remained in force it is reasonable to presume that this same Church it is which has been recognised by the names of "Seinte Eglise d'Engleterre" (stat. (1351—2) 25 Edw. 3, stat. 6), "the Church of Christ in the Kingdom of England" (Westminster Confession), and "the Church of England as by law established" from the time of Magna Charta to the present day. "The accepted legal doctrine is that the Church of England is a continuous body from its earliest establishment in Saxon times" (*Marshall v. Graham*, [1907] 2 K. B. 112, 126). It is sometimes stated that the statutes passed by Henry VIII. to exclude the exercise of papal exactions and jurisdiction (stat. (1533—4) 25 Hen. 8, cc. 19 to 21) made such great and fundamental changes that they should be regarded as establishing the Church for the first time as it now exists, but this view is directly contradicted by the statutes themselves, which not only refer to the Church of England as an existing Church, and to the prelates and clergy of the realm as representing the said Church in their synods and convocations (stat. (1533—4) 25 Hen. 8, c. 21, s. 2) independent of the Bishop of Rome, called the Pope, whose authority within the realm is regarded as having been an usurpation, but also expressly (*ibid.*, s. 19) disclaim

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Similarly, whenever by any act of state, *e.g.*, by cession, conquest, or division into separate self-governing communities, the organisation of any portion of the Catholic Church is divided in accordance with some new division of the supreme civil power, the portion of the Church within the state thus separated may become a separate Church (*e*), and where the separated state is a nation the corresponding portion of the Church may become a national Church (*f*).

The Church thus formed may be identical with the portion of the Church existing before the overt acts which result in the separation (*g*), and retain all those powers of organisation, discipline, and self-government which previously existed, and its identity is not

any intention "to decline or vary from the congregation of Christ's Church in any things concerning the very Articles of the Catholic Faith of Christendom, or in any other things declared by Holy Scripture and the Word of God necessary for salvation, but only to make an Ordinance by policies necessary and convenient to repress vice, and for good conversation of this realm in peace, unity, and tranquility from ravin and spoil, insuing much the old ancient customs of this realm in that behalf." Moreover, many statutes of earlier date prove that this was no new departure, inasmuch as the Church of Rome was never recognised by statute *eo nomine*, but was referred to either as "la court de Rome" (stat. (1351—2) 25 Edw. 3, stat. 6; stat. (1389—90) 13 Ric. 2, stat. 2, c. 2) or "nostre saint pere le Pape" (stat. (1389—90) 13 Ric. 2, stat. 2, c. 2), and this was recognised by contemporaneous legal opinion (Strype, *Ecclesiastical Memorials*, I., p. 276). There is no doubt as to the continuous existence of the Church of England from the Reformation to the present day (*Baker v. Lee* (1860), 8 H. L. Cas. 495, 504), and accordingly that portion of the Catholic Church which developed into the Church of England referred to in Magna Charta may be said to have had a continuous existence from its origin as a separate organism and to be one with the Church of England as it now exists, which may be considered as: That part of the congregation of Christ's Catholic Church which retains the Articles of the Catholic Faith of Christendom necessary to salvation and conforms to the liturgy and ordinances of the Church of England as by law established.

(*e*) The Lambeth Conference of 1908 resolved (Resolution 20) that the organisation of different races, living side by side, into separate Churches on the basis of race or colour is inconsistent with the vital and essential principle of the unity of Christ's Church.

(*f*) In the case of the *Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, [1904] A. C. 515, Lord MACNAGHTEN, dissenting, said, at p. 636: "I cannot form a conception of a national Church untrammelled and unfettered by connection with the State which does not at least possess the power of revising and amending the formulæ of subscription required of its own office bearers and the power of pronouncing authoritatively that some latitude of opinion is permissible to its members in regard to matters which according to the common apprehension of mankind are not matters of faith." In the judgment of the majority of the law lords the Free Church of Scotland was held not to be so untrammelled or unfettered, but, seeing that the trammels and fetters in the particular case arose from the acceptance of the establishment principle and the Westminster Confession, the judgment of the majority does not necessarily preclude the application of Lord MACNAGHTEN's words to any national Church formed as suggested in the text by mere cleavage along national lines from a pre-existing Church.

(*g*) It appears from the judgment in *Merriman v. Williams* (1882), 7 App. Cas. 484, 510, P. C., that a clear indication, authoritatively made on behalf of the Church thus divided off, that it desires and intends to retain its identity in faith, doctrine, and discipline with the pre-existing Church may affect the weight to be attached to differences of organisation as evidence that the identity has not been retained.

necessarily affected by any changes which may result from the united action of the civil power and of its own power of self-government (*h*).

The civil power may even, when no division takes place of the territory subject to its jurisdiction, limit the recognition of the organisation of a Church to such portion of that territory as it thinks fit, and the Church organised in relation to such portion of the territory will retain its identity with that part of the Church which previously existed within that portion (*i*).

692. A Church which has not thus derived its tenets and organisation by cleavage from a pre-existing Church may be formed, or a part of a Church already existing may be formed, into a separate Church either—

Formation of
Churches.

I. By a direct act of the civil power imposing on individuals the expression of religious beliefs in some common form (*k*), or creating an organisation for the association of persons on the basis of religious beliefs expressed in some common form (*l*). A Church so formed may be extended, or two or more Churches formed on the basis of the same religious beliefs may be united to any extent within the jurisdiction of the civil power (*m*): or

(*h*) The identity of the Church of England from the Reformation to the present day cannot be questioned, whatever changes may have been made by the united action of Parliament and Convocation (*Baker v. Lee* (1860), 8 H. L. Cas. 495, 504).

(*i*) Thus, the Irish Church Act, 1869 (32 & 33 Vict. c. 42), dissolved the union created by Act of Parliament between the Churches of England and Ireland (*ibid.*, s. 2; see note (*m*), *infra*), but left the Church of England untouched, and while it abolished in Ireland the existing ecclesiastical corporations and all jurisdiction of ecclesiastical courts, and vested all property of any ecclesiastical person in the commissioners appointed by the Act, it preserved the continuity of the Church by enacting that the existing ecclesiastical law, articles, doctrines, rites, rules, discipline, and ordinances of the Church, with such modifications as should after the disestablishment of the Church be made according to the constitution thereof, should be deemed to be binding on the members for the time being thereof, as if such members had mutually contracted and agreed to abide by and observe the same, and should be capable of being enforced by the temporal courts in relation to any property reserved or given to or taken and enjoyed by the Church under the Act, as if such property had been expressly given upon trust to be held, occupied, and enjoyed by persons who should observe and keep and be in all respects bound by the said ecclesiastical law, articles, doctrines, rites, rules, discipline, and ordinances.

(*k*) Many statutes (for instance, (1552) 5 & 6 Edw. 6, c. 1, s. 1; (1558) 1 Eliz. c. 2, s. 14; (1581) 23 Eliz. c. 1; (1587) 29 Eliz. c. 6) impose directly on any person who does not dissent from the doctrines of the Church of England and attend some other place of worship the duty of attending his parish church or chapel; see p. 481, *post*.

(*l*) The Crown has power in a Crown colony to create, and, until recently, habitually did create by patent, organisations in Crown colonies for the profession of religious beliefs, according to the liturgy of the Established Church or of any other Church which it had undertaken by treaty to support; see p. 487, *post*.

(*m*) The Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 5, enacted that the Churches of England and Ireland, as then by law established, should be united into one Protestant Episcopal Church to be called the United Church of England and Ireland, and that the doctrine, worship, discipline, and government of the said United Church should be and should remain in full force

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II. By the voluntary association of individuals (*n*), or the voluntary provision by individuals of an organisation for association on the basis of religious beliefs expressed in some common form (*o*). A Church so formed may be extended to any extent permitted by its system of organisation (*p*) either by the voluntary association of other individuals conscientiously in agreement with it (*q*), or by the union with it of other Churches organised on the basis of the same religious beliefs, or capable by the *bond fide* exercise of powers provided for that purpose of being altered so as to be expressed in forms which are not essentially different; or may be divided to any extent consistent with its system of organisation by the secession of individuals (*r*), or groups of individuals, characterised by some additional expression relating to their religious beliefs, or

for ever as the same was then by law established for the Church of England. This union was dissolved in 1869; see note (*i*), p. 361, *ante*.

(*n*) A Christian Church may consist of a voluntary and unincorporated association of Christians united on the basis of agreement in certain religious tenets and principles of worship, discipline, and Church government (*Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, [1904] A. O. 515, 643).

(*o*) *A.-G. v. Pearson* (1817), 3 Mer. 353.

(*p*) The appeals in the case of *Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, *supra*, were based upon the ground that the union of the Free Church and the United Presbyterian Church could not be legally effected consistently with the constitutions and standards of the Free Church. If, as was held to be the case, the General Assemblies had not power to relax the fetters which bound the Free Church from its birth, then those appeals were bound to succeed. If, as the courts in Scotland had held, the General Assemblies had power to do what they had done, then the appeals would have failed. But even if the powers necessary to relax such fetters have been given, they are subject to the condition which is implied in all instruments creating powers that the powers shall be *bond fide* used for the purposes for which they are conferred, and if a synod or council under colour of exercising their authority were to destroy the Church which they are appointed to preserve, or to abrogate the doctrines which they are appointed to maintain, their acts would be *ultra vires* and invalid in point of law, and it would be the duty of every court in the United Kingdom so to hold if the question ever involved a controversy as to civil rights and so arose for judicial decision (*ibid.*, per Lord LINDLEY, at p. 695).

(*q*) *Ibid.*, per Lord HALSBURY, L.O., at p. 616, citing *Dill v. Watson* (1836), Jo. Ex. Ir. 48, 91: "I do not conceive that I appeal from the Word of God to that of man, by proclaiming or attesting by my signature that I concur in the interpretation given by a numerous body of my fellow Christians to certain passages of Scripture. They agree with me: I agree with them in construction and consequent creed . . . each with God's assistance, and the subordinate and pious aid of human instruction interprets as well as man's infirmity will permit, both coincide in the same interpretation, that interpretation regulates their faith and all who thus coincide become members of the same religion."

(*r*) Any individual member of a Church is free to secede from his membership of the Church, subject to the fulfilment of any contractual obligations which he may have entered into in relation to his membership. "I do not suppose that anyone will dispute the right of any man or any collection of men to change their religious beliefs according to their own consciences" (*Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, *supra*, per Lord HALSBURY, L.O., at p. 626); but the change of faith must be *bond fide*, and if it is fraudulent and colourable it will be null and void so far as any legal consequences are concerned (*Swift v. Swift* (1833), 3 Knapp, 303).

by the *bond fide* exercise of powers provided for that purpose (s):
or

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III. By a combination of these methods (t).

693. The forms in which religious beliefs are expressed as the basis of association in a Church are called doctrines, creeds, confessions, formularies, or tests, and the identity of a religious community described as a Church is determined by reference to its principles or standards as so expressed (a). Identity of a Church.

694. The system of organisation of a Church may include provisions for the alteration of the outward expression of the fundamental doctrines by which it is identified (b), and where such Alteration of doctrine.

(s) Where a group of individuals secede from an existing Church on the basis of some alteration common to all the group in the expression of their religious beliefs, they are usually spoken of as a sect. A sect may erect any point or any punctilio into an article of faith (*Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, [1904] A. C. 515, 636), and if by so doing it differentiates itself from the parent Church, it loses all right to share in the property of the parent Church (*ibid.*; *A.-G. v. Pearson* (1817), 3 Mer. 353; *Craigdallie v. Aikman* (1820), 1 Dow, 1; 2 Bli. 529, H. L.; *Foley v. Wontner* (1820), 2 Jac. & W. 245), and is entitled to avail itself as a separate Church of all the facilities which the State provides. Where the alteration on the basis of which separation takes place involves a contradiction in some material particular of the received expression of the doctrine of the Church, the separation is called a schism, and the sect separated off is said to be schismatic, and automatically ceases to form part of the Church (compare *Canones Ecclesiastici* (1603), 9), or to have any right to share in the property held in trust for it unless the case of a schism has been expressly provided for in the instrument of foundation (*Craigdallie v. Aikman, supra*, at p. 16).

(t) The Church of England as by law established results from a combination of voluntary association and State-imposed forms of expressing religious beliefs seeing that the law of the Church is binding on the clergy who voluntarily accept orders in it and on those of the laity who voluntarily adhere to it (see pp. 481, 482, *post*). Most of the Nonconformist Churches result from a combination of voluntary associations and organisations based on facilities created for the purpose by the State (see p. 368, *post*). Most of the colonial Churches derive their organisations from voluntary associations of individuals who after association obtain from the civil power such statutory recognition and powers as they require (see p. 493, *post*).

(a) Speaking generally, the identity of a religious community described as a Church must consist in the unity of its doctrines. Its creeds, confessions, formularies, and so forth, are apparently intended to insure the unity of the faith which its adherents profess, and certainly among all Christian Churches the essential idea of a creed or confession of faith appears to be the public acknowledgment of such and such religious views as the bond of union which binds them together as one Christian community (*Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, *supra*, per Lord HALSBURY, L.C., at p. 612). The statement in the head-note in that case that "The identity of a religious community described as a Church consists in the identity of its doctrines creeds confessions formularies and tests" is capable of being read as meaning that the identity of the Church is lost if any material change is made in any one of the specified characteristics. In this sense the statement is not justified by the judgments.

(b) Thus the Preface of the Book of Common Prayer recognises that the particular forms of divine worship and the rites and ceremonies appointed to be used in the public liturgy of the Church of England being things in their own nature indifferent and alterable, and so acknowledged, it is but reasonable that upon weighty and important considerations according to the various exigency of times and occasions such changes and alterations should be made therein as to those that are in place of authority should from time to time :

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provisions exist such alteration may be made within the scope of these provisions without affecting the identity of the Church; but where the State has by legislative acts established (c), that is, given its support and assistance to, a Church identified by certain doctrines, such Church cannot while retaining the benefit of such establishment exercise any power of altering these doctrines without the legislative sanction of the State (d). Where the system of organisation of a congregation not trammelled by any connection with the State includes no provision for or against alteration, it may, so far as property is concerned, be competent for the congregation, acting unanimously and with the concurrence where they have trustees of those trustees, to introduce new regulations which are not in

either necessary or expedient, and the thirty-fifth of the Articles of Religion lays down that "Every particular or national Church hath authority to ordain change and abolish ceremonies or rites of the Church ordained only by man's authority so that all things be done to edifying." See also *Forbes v. Eden* (1867), L. R. 1 Sc. & Div. 568.

(c) The word "established" is used in relation to a Church in various significations. In one sense every religious body recognised by the law and protected in the ownership of its property and other rights may be said to be by law established (*A.-G. v. Pearson* (1817), 3 Mer. 353, 376); and Lord MANSFIELD, C.J., in *Harrison v. Evans* (1767), 3 Bro. Parl. Cas. 465, said of the Dissenters' way of worship that being permitted and allowed by the Toleration Act "it is established" (Furneaux, *Letters to Blackstone*, 2nd ed., p. 265; see also *R. v. Barker* (1762), 1 Wm. Bl. 352); in another sense the words "established church" are used to mean the Church as by law established in any country as the public or State-recognised form of religion (*New English Dictionary*, *sub voce* "Church"). "The process of establishment means that the State has accepted the Church as the religious body in its opinion truly teaching the Christian faith and given to it a certain legal position and to its decrees if given under certain legal conditions certain legal sanctions" (*Marshall v. Graham*, [1907] 2 K. B. 112, 126). What is called the "establishment" principle in relation to the Church is the principle that there is a duty on the civil power to give support and assistance to the Church (*Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, [1904] A. C. 515), not necessarily by way of endowment (*ibid.*, p. 680), but by taking order that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed (Westminster Confession, xxiii. (3), *ibid.*, p. 733), and where this principle prevails a Church is said to be established when it receives such support and assistance. In the fullest sense a Church is said to be established when all the provisions constituting the system of organisation of the Church receive the sanction of a law which establishes that system throughout the State and excludes any other system (*ibid.*, at p. 726). Thus, the Union with Scotland Act, 1706 (8 Ann. c. 11), pursuant to the Articles of Union, included an Act for securing the Protestant religion and Presbyterian Church government within the Kingdom of Scotland, and established and confirmed "the said true Protestant religion and the Worship discipline and government of this Church to continue without any alteration to the people of this land in all succeeding generations" and for ever confirmed the Act (1 Will. & Mar. c. 5) ratifying the confession of faith and settling Presbyterian Church government (Art. XXV.). The Church of England is not "established" in any similar sense, and the Act for Ministers to be of Sound Religion (stat. (1571) 13 Eliz. c. 12) and the Act of Uniformity (stat. (1662) 14 Car. 2, c. 4) are not binding on the laity excepting as members of the Church.

(d) An unestablished religion is free from State control as regards doctrine, government, and discipline, and that freedom differentiates a voluntary association from an established Church (*Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, *supra*, at p. 648).

contravention of any deed of trust or foundation nor subversive of the original constitution, nor opposed in principle to it (e).

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695. Churches whose fundamental doctrines do not differ (f) can unite without losing their respective identities, provided that the alterations of organisation which are required for their union are within the scope of the provisions for alteration contained in their respective systems of organisation, that the powers of making such alterations are *bonâ fide* exercised, and that the legislative sanction, if any, required for such alterations is obtained (g), and can without uniting enter into mutual agreements for intercommunion, and can therein provide for the recognition by each of the duly constituted officers and recognised members of the other Church, so far as such officers and members comply with the conditions regarded by both Churches as essential (h).

Legal
recognition.

696. When a dispute in reference to any particular Church arises before any tribunal which is competent to decide it, any relevant question as to the identity of the Church (i.e., as to its principles or standards as expressed in its doctrines, creeds, formularies, confessions and tests, and the power, if any, to alter such expression) is to be determined by that tribunal, subject to any relevant legislative provisions, like any other question of fact (i).

(e) *A.-G. v. Murdoch* (1851) 1 De G. M. & G. 86, O. A., *per* KNIGHT BRUCE, L.J., at p. 114; and see *Brown v. Montreal (Curé)* (1874), L. R. 6 P. C. 157, 210.

(f) When one Church is to be connected with another, what is required is a substantial identity in their standard of faith and doctrine. Differences such as necessarily result from the differences of political circumstances may not be sufficient to work a disconnection, and *semble* declarations which refer to a possible alteration of the creeds or formularies by a general assembly or the constitution of separate ecclesiastical courts or a different system of appointing bishops may not work a disconnection, but any exclusion by one Church of a substantial portion of the faith and doctrine of the other Church does disconnect them, and prevents the one Church continuing to enjoy the benefit of property held in trust in connection with the other Church (*Merriman v. Williams* (1882), 7 App. Cas. 484, 507, P. C.).

(g) An agreement between two associated bodies of Christians to keep their separate religious views where they differ, and to unite for administrative purposes on the basis of formularies so elastic as to admit those who accept either of the different views, does not constitute a Church at all (*Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, [1904] A. C. 515, 628). For an example of legislative sanction, see United Methodist Church Act, 1907 (7 Edw. 7, c. lxxv.), and note (e), p. 492, *post*.

(h) Report of the Lambeth Conference of 1908, resolutions 62, 63, 64, 72, and 75; the Colonial Clergy Act, 1874 (37 & 38 Vict. c. 77); and pp. 485, 494, *post*. See also *A.-G. v. Shore* (1843), 11 Sim. 592, *per* SHADWELL, V.C., at p. 613: "English Presbyterians do not cease to be English Presbyterians merely because they are in amity with the Established Church of Scotland, or with the Secession or Relief Church. Presbyterians in amity with the Secession Church and with the Established Church of Scotland have participated in Lady Hewley's charities, and of the orthodoxy of both there is no doubt. It appears from the affidavits that they hold the Westminster Confession, which substantially agrees with the Articles of the Church of England." As to the subsequent declaration excluding from participation the ministers of Churches in connection with the Secession Church, see *A.-G. v. Wilson* (1848), 16 Sim. 210, 220, n.

(i) The question in each case where property is held in trust for a Church is: "What were the religious tenets and principles which formed the bond of union of the association for whose benefit the trust was created?" The court has no

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ductory

The courts of law may by legislative or other action of the civil power be given particular powers and duties in reference to any questions arising in relation to particular Churches. Save in so far as such particular powers and duties extend, all religious bodies are regarded by the courts of law as in the same position in respect of the protection of their rights and the sanction given to their respective organisations (*k*). Their endowments and any other rights which they may possess will be equally enforced by the law, and any rules they may adopt for enforcing discipline within their body will be binding on those who expressly or by implication have assented to them (*l*).

Endowments. **697.** So far as the endowments of religious bodies are concerned, in the absence of any special provisions affecting a particular Church, the courts will administer the ordinary law relating to charitable trusts (*m*), but will, in construing the deeds of trust relating to property owned for the benefit of a Church, look at them as part and parcel of the whole machinery by which the particular Church is kept together and carried on (*n*).

Discipline. **698.** So far as the discipline of a Church is concerned, it cannot externally affect any person except by the express sanction of the civil power or by the voluntary submission of the particular person (*o*), but for the purpose of enforcing discipline within the Church, any religious body may constitute a tribunal to determine whether the rules of the body have been violated by any of the members or not and what shall be the consequence of such

test by which it can pronounce that any tenet is not vital, essential, or fundamental unless the parties have themselves declared it not to be so. The bond of union may contain within itself a power in some recognised body to control, alter, or modify the tenets and principles at one time professed by the association, but the existence of such a power would have to be proved like any other tenet or principle of the association (*Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, [1904] A. C. 515, 645).

(*k*) *Long v. Cape Town (Bishop)* (1863), 1 Moo. P. O. C. (N. S.) 411, 461; *Brown v. Montreal (Curé)* (1874), L. R. 6 P. O. 157.

(*l*) The positive laws which inflicted penalties for non-conformity to the rites of the Church of England having been repealed, the courts have felt bound to recognise the right of anyone, not only to secede from that Church, but also to form religious institutions of their own, and have undertaken to enforce the execution of trusts for such institutions so long as they do not contravene any other positive laws relating thereto (*Burn, Ecclesiastical Law*, Vol. II., p. 206; *Davis v. Jenkins* (1814), 3 Ves. & B. 151, 158).

(*m*) In deciding what the trusts are which affect any property held for a religious body it is permissible to look at contemporaneous documents and Acts of Parliament for the purpose of seeing in what sense the words in the instrument of foundation were used in the age when the instrument was executed, and also to examine the circumstances by which the author of the instrument was surrounded for the purpose of showing that words of doubtful meaning had a particular signification to a religious body by which the phraseology found in the instrument was used and that the founder was a member of that body (*Shore v. Wilson, Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, H. L.; *Drummond v. A.-G.* (1849), 2 H. L. Cas. 837; *A.-G. v. Hutton* (1844), Drury temp. Sug. 480).

(*n*) *Warren's (Dr.) Case* (1835), Grindrod's Compendium, 371, 373, 376, approved in *Long v. Cape Town (Bishop)*, *supra*, at p. 462.

(*o*) *Middleton v. Crofts* (1786), 2 Atk. 650, 669.

violation (*p*). The decision of such tribunal will be binding and will be enforced by the courts of law when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice (*q*); but if any member of such a body has been injured as to his rights in any matter of a mixed spiritual and temporal character the courts of law will, on due complaint being made, inquire into the laws and rules of the tribunal or authority which has inflicted the injury, and will ascertain whether any sentence pronounced was regularly pronounced by competent authority, and will give such redress as justice demands (*r*).

699. The civil power, while thus exercising complete control over all states and degrees, whether they be ecclesiastical or temporal, and affording all necessary protection from wrongful acts (*s*), refrains from exercising any purely spiritual functions (*t*), and, save in so far as positive law may otherwise provide, recognises and has always recognised the right of all to follow the dictates of their consciences in the religious opinions which they hold (*a*). Liberty of conscience.

(*p*) *Long v. Cape Town (Bishop)* (1863), 1 Moo. P. C. C. (N. S.) 411, 461.

(*q*) *Ibid.*

(*r*) *Murray v. Burgess* (1866), L. R. 1 P. O. 362; *Brown v. Montreal (Curé)* (1874), L. R. 6 P. O. 157.

(*s*) All dissenters from the Established Church had a right to the protection of the Court of King's Bench if interrupted in their decent and quiet devotions before they were expressly protected by the Acts against brawling (*R. v. Wroughton* (1765), 3 Burr. 1683).

(*t*) Articles of Religion, XXXVII.

(*a*) There never was a single instance from the Saxon times down to our own in which a man was ever punished for erroneous opinions concerning rites or modes of worship, but upon some positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions. For atheism, blasphemy, and reviling the Christian religion there have been instances of persons prosecuted and punished upon the common law, but bare non-conformity is no sin by the common law (*Evans v. London Corporation*, (1767), per Lord MANSFIELD, C.J., Burn, Ecclesiastical Law, Vol. II., p. 218, also reported, but not at length, 3 Bro. Parl. Cas. 465).

The positive enactments requiring conformity with the liturgy of the Church of England were limited by the Toleration Act, 1688 (1 Will. & Mar. c. 18), which provided (s. 2), now repealed, see *infra*, that none of the persons who took the oaths and made the declarations required by that Act should be prosecuted in any Ecclesiastical Court for or by reason of their non-conforming to the Church of England. By the Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59), it was enacted that so much of the Act of Uniformity of Service and Administration of Sacraments (stat. (1551—2) 5 & 6 Edw. 6, c. 1) as required all persons to attend on Sundays and holy days their parish church or chapel accustomed should be repealed so far as it affected persons dissenting from the worship or doctrines of the Church of England and usually attending some place of worship other than the Established Church. The Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59), also repealed numerous enactments in so far as they imposed penalties for conforming to any form of service other than that of the Established Church or for refusing to conform to the liturgy of that Church, or for affirming anything contrary to the Royal Supremacy, or for teaching without episcopal licence. The provisions in the Toleration Act, and many other Acts requiring the taking of oaths or making of declarations as qualifications for office and other purposes, were amended by the Promissory Oaths Acts, 1868 (31 & 32 Vict. c. 72) and 1871 (34 & 35 Vict. c. 48), and the penalties imposed on non-conformity having been as above mentioned abrogated, the Promissory Oaths Act, 1871 (34 & 35

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Facilities
provided by
the State.

Liberty of
religious
worship.

700. The sanction thus accorded has been reinforced in England by statutory enactments, which have afforded exceptional assistance and protection to religious bodies in relation to their formation and endowment and the exercise of their religious rites. Thus, in addition to the enactments which relate to the Church of England or to other religious bodies in particular, there are enactments providing generally for (1) liberty of religious worship; (2) protection of religious worship; (3) registration and user of places of religious worship; and (4) tenure of property held for the benefit of any religious body.

701. The first of these objects is obtained by the Act for securing the liberty of religious worship (*b*). This Act provides that the then existing enactments, by which no congregation or assembly for religious worship, at which there should be present more than twenty persons besides the immediate family and servants of the person in whose house or upon whose premises such meeting, congregation, or assembly was held, was permitted until the place of meeting was certified (*c*), should not apply to any congregation or assembly for religious worship held in any parish by or by the authority of the incumbent or, in case the incumbent is not resident, by the curate, or to any congregation or assembly for religious worship meeting in a private dwelling-house or on the premises belonging thereto, or meeting occasionally in any building or buildings not usually appropriated to purposes of religious worship. Provision has also been made allowing the performance at burials of a religious service according to the rites of any church or congregation, other than the Established Church, by any minister recognised as such by the religious community or society to which he belongs (*d*); and for the performance of any such orderly religious service used by any church, denomination, or person professing to be Christian, as the person having the charge of the burial thinks fit (*e*); and for the erection and maintenance of chapels for funeral services according to the rites of any denomination (*f*). Provision has also been made in respect of religious services at marriages performed in any buildings registered as places of religious worship and registered for solemnising marriages therein (*g*).

Vict. c. 48), repealed the provisions in s. 2 of the Toleration Act (stat. (1688) 1 Will. & Mar. c. 18) as being no longer required. The effect of these various enactments in emancipating particular religious bodies from penalties and tests is dealt with in Part VII, *post*; speaking generally, their effect has been to abrogate all positive laws which formerly qualified the right, referred to in the text, of all to follow the dictates of their consciences in the religious opinions which they hold.

(*b*) Liberty of Religious Worship Act, 1855 (18 & 19 Vict. c. 86).

(*c*) Toleration Act, 1688 (1 Will. & Mar. c. 18), amended by the Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), extended to Roman Catholics and Jews by the statutes referred to in s. 2 of the Liberty of Religious Worship Act, 1855 (18 & 19 Vict. c. 86).

(*d*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 36.

(*e*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 6; see generally, title BURIAL AND CREMATION, Vol. III., pp. 517 *et seq.*

(*f*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 2.

(*g*) Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 4.

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702. The protection of religious worship is provided for by an Act which replaces the jurisdiction of the Ecclesiastical Courts in certain cases of brawling by penalties recoverable before justices, to be inflicted on any person who is guilty of riotous, violent, or indecent behaviour in any church or chapel of any religious denomination or in any certified place of religious worship, whether during divine service or at any other time, or in any churchyard or burial ground, or who molests, lets, disturbs, vexes or troubles, or by any other unlawful means disquiets or misuses any preacher duly authorised to preach therein (*h*); and especial protection is afforded to religious services in connection with funerals (*i*) and marriages (*k*).

Protec-
tion of
religious
worship.

703. Any place of meeting for religious worship of any body or denomination of persons other than the Church of England may be certified in writing to the Registrar-General by any person (*l*), and is thereupon registered (*m*) as a place of meeting for religious worship by a congregation or assembly of persons, who may be described by any religious appellation adopted by the persons on whose behalf the building is certified, or, if they object to describe themselves by any appellation, may be described as persons who object to be designated by any distinctive religious appellation (*m*).

Registra-
tion of places
of worship.

704. Any religious body recognised by law is protected in the enjoyment of its endowments (*n*), and it is the duty of a court of justice to give effect to the intent of the founder of any charity for the benefit of such a body, so far as can be done without infringing any known rule of law. Where the instrument of foundation of the charity uses phraseology which leaves that intent in doubt, extrinsic evidence is admissible to prove the existence of a religious body by whom that phraseology is used, the manner in which it is used, and the fact that the founder is or was a member of that body (*o*); and in order to facilitate such proof it has been enacted that any meeting-house held in trust for the worship of God by Protestant dissenters or persons impugning the doctrine of the Holy Trinity, without any express terms being embodied in any document stating the doctrines or opinions or mode of regulating worship which are required or forbidden to be taught or observed therein, is to be held on the basis that the usage for twenty-five

Tenure
of property.

(*h*) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32). As to brawling, see further, p. 663, *post*.

(*i*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), ss. 7, 8.

(*k*) Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 12.

(*l*) Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 2.

(*m*) *Ibid.*, Schedule A.

(*n*) The effect of the Toleration Act (stat. (1688) 1 Will. & Mar. c. 18) was to render the practice of their religion by Nonconformists within the limits prescribed by that Act not only permissible, but lawful (Burn, Ecclesiastical Law, Vol. II., pp. 180—206), to afford the protection of the law to the various types of religion which were practised by those who did not conform to the Church of England, and to make it the duty of a court of justice to give effect to the intent of the founder of any charity for the benefit of any of these various types so far as could be done without infringing any known rule of law (*A.-G. v. Pearson* (1817), 3 Mer. 353).

(*o*) *Shore v. Wilson, Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, H. L.

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years of the congregation frequenting the meeting-house is conclusive evidence that the doctrines, opinions, or mode of worship which have prevailed throughout such period may properly be continued (*p*), and that in any suit relating to such meeting-house the right of the congregation to hold such meeting-house, together with any burial ground, school, or minister's house attached, and any fund for the benefit of such congregation, or of the minister or his widow, or of any other officer of such congregation, shall not be called in question on the ground of such doctrines, opinions, or modes of worship (*q*). Statutory facilities have also been provided for conveying or assuring property acquired by, or by trustees in connection with (*r*), any congregation or society or body of persons (*s*) associated for religious purposes, so that the conveyance or assurance may vest the estate not only in the parties named therein as trustees, but also in their successors in office for the time being (*t*).

Part II.—The Constitution of the Church of England.

SECT. 1.—Constitutional Status.

The Church of England defined.

705. The Church of England is that branch of the Holy Catholic and Apostolic Church (*a*) which was founded in England when the English were gradually converted to Christianity between the years 597 and 686. It contains the two provinces of Canterbury and York, which the four Welsh dioceses formally joined in 1115 (*b*).

(*p*) Pending a suit for the regulation of a dissenting meeting-house the minister will, if found in possession and ministering in the way in which it was the meaning of the congregation that he should, and preaching the doctrines intended, in general be continued whether duly appointed or not (*Foley v. Wontner* (1820), 2 Jac. & W. 245).

(*q*) Nonconformists Chapels Act, 1844 (7 & 8 Vict. c. 45), s. 2. This Act, commonly called Lord Lyndhurst's Act, was introduced in consequence of the difficulties arising in *Shore v. Wilson*, *Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, H. L. (see p. 819, *post*). It does not apply where there is an express direction in the trust deed (*A.-G. v. Anderson* (1888), 57 L. J. (CH.) 543), but it applies in a case where the recent usage is not inconsistent with the natural meaning, although it differs from the strict meaning of an express term used by the founder (*A.-G. v. Bunce* (1868), L. R. 6 Eq. 563); see also *A.-G. v. Hutton* (1844), Drury temp. Sug. 480.

(*r*) Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19), s. 2. This Act is commonly called Fowler's Act.

(*s*) Such body of persons may comprise several congregations or other sections or divisions or component parts (*ibid.*); but it should be made clear in the trust deed whether the particular property is for the benefit of a component part or for the whole body (*Re Hoghton Chapel* (1854), 23 L. T. (O. S.) 268).

(*t*) Trustee Appointment Act, 1850 (13 & 14 Vict. c. 28), amended by Trustee Appointment Act, 1869 (32 & 33 Vict. c. 26), and Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19; see p. 821, *post*).

(*a*) That is "the whole congregation of Christian people dispersed throughout the whole world" (Canons of 1603, 55).

(*b*) See note (*d*), p. 359, *ante*. The visible church of Christ is "a congregation of faithful men in the which the pure word of God is preached and the

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Status.The Church
as an
organised
institution.

706. The Church of England as thus defined may be considered as an aggregate of individuals (*c*), and in that sense may be regarded as including all persons who adhere and conform to the liturgy and ordinances of the Church of England as by law established (*d*), or it may be considered as an organised operative institution. For the purpose of setting forth the constitution of the Church of England as by law established, the Church is necessarily to be regarded in the latter sense, namely, as an organised institution; and the constitution to be considered consists of those ordinances, authorities, and provisions on which its operations are based which are judicially recognised by the courts of law (*e*), to the exclusion of those merely voluntary agencies by which its operations may be assisted (*f*). The ordinances and provisions thus judicially recognised include all such canons and constitutions ecclesiastical, however ancient, as have been and are allowed by general consent and custom within the realm, and the authorities thus judicially recognised include offices and ecclesiastical courts which have had a continuous existence, in many cases, from the time of the Conquest (*g*); but the changes which were introduced into the constitution of the Church by the Reformation statutes are so great and far-reaching that these statutes afford a convenient starting point for considering the framework of the constitution of the Church as it at present exists.

707. These statutes (*h*) secured the submission to the King of the clergy in England; and recognised the Church of England as a separate national Church independent of the Pope of Rome, and subject only to the King (that is, to the laws of England), as supreme governor of the realm in all spiritual and ecclesiastical as well as in temporal causes (*i*).

The Reforma-
tion.

sacraments be duly ministered according to Christ's ordinance in all those things that of necessity are requisite to the same" (Articles of Religion, XIX.).

(*c*) See note (*i*), p. 356, *ante*. The Church is not the Church of the clergy or of the laity, but of both. It consists of the lay as well as the clerical members of the community (*R. v. Dibdin* (1909), 26 T. L. R. 150, C. A.).

(*d*) As to what constitutes membership of the Church of England, see *Re Perry Almshouses*, [1898] 1 Ch. 391. A person who has been baptized, has been confirmed or is ready and desirous to be confirmed, and is an actual communicant in the Church of England, holds the status of a member of that Church, and would be ordinarily regarded and spoken of as such (*ibid.*, at p. 400), even though he does not attend church regularly (*Marshall v. Graham*, [1907] 2 K. B. 112, 124).

(*e*) See p. 355, *ante*; *Mackonochie v. Penzance* (*Lord*) (1881), 6 App. Cas. 424.

(*f*) As to such voluntary agencies, see pp. 774, 802, *post*; and in particular as to the conference of bishops in communion with the Church of England known as the Conference of Bishops of the Anglican Communion, or as the Lambeth Conference, see note (*k*), p. 485, *post*.

(*g*) As to the continuous existence of the Church of England, see note (*d*), p. 359, *ante*.

(*h*) Prohibition of Appeals to Rome Act, 1532 (24 Hen. 8, c. 12); Submission of the Clergy Act, 1533 (25 Hen. 8, c. 19); Payment of Annates Act, 1533 (25 Hen. 8, c. 20); Act of Exoneration from Exactions paid to the Roman See, 1533 (25 Hen. 8, c. 21); Act of Supremacy, 1534 (26 Hen. 8, c. 1), repealed by stat. (1554) 1 & 2 Phil. & Mar. c. 8, s. 4.

(*i*) See p. 377,

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tional
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The provisions contained in the Reformation statutes of Henry VIII., Edward VI., and Elizabeth were of great and far-reaching importance both as to Church government (*j*) and as to doctrine (*k*). Thus, the King was by statute declared to be supreme in all civil and ecclesiastical matters, and the Pope was declared to have no jurisdiction in this realm of England (*l*).

Articles of
Religion.

New Articles of Religion (known as the Thirty-nine Articles) were drawn up, differing materially from the doctrines of the Church of Rome. These were and are still enforced by statute (*m*); and no clergyman can be ordained or hold a living or curacy without declaring his assent thereto (*n*). New service books and ordinals suitable for carrying out the reformed religion were prepared, and their use was and is enforced under penalties by statutes usually called Acts of Uniformity (*o*).

The Acts of
Union.

708. The Acts for the Ministers of the Church to be of Sound Religion, and the Act of Uniformity, and all other Acts of Parliament in force at the date of the Union with Scotland for the establishment and preservation of the Church of England (*p*), and the doctrine, worship, discipline, and government thereof, are further secured by the Act of Union with Scotland (*q*), as are also the true Protestant

(*j*) Especially as to the substitution of the King for the Pope. See this subject discussed in Makower, *Constitutional History of the Church of England* (English translation), pp. 174—177.

(*k*) "The distinction between an altar and a communion table is in itself essential and deeply founded in the most important difference in matters of faith between Protestants and Romanists, namely, in the different notions of the nature of the Lord's Supper which prevailed in the Roman Catholic Church at the time of the Reformation and those which were introduced by the reformers" (*Westerton v. Liddell* (1857), 5 W. R. 470, 475, P. C.).

(*l*) Articles of Religion, 37. This article as it stood in 1553 (then No. 36) declared that the King of England was supreme head in earth next to Christ of the Church of England and Ireland: following stat. (1534) 26 Hen. 8, c. 1. But that Act was repealed by stat. (1554) 1 & 2 Phil. & Mar. c. 8, s. 4, and the repeal was confirmed by stat. (1559) 1 Eliz. c. 1, s. 4. Accordingly the article as revised in 1571 and as it now stands declares that "the Sovereign has the chief power in this realm, and that unto him the chief government of all estates of this realm whether they be ecclesiastical or civil in all causes doth appertain and is not nor ought to be subject to any foreign jurisdiction." See also title CONSTITUTIONAL LAW, Vol. VI., p. 373.

(*m*) Stat. (1571) 13 Eliz. c. 12, "An Act for the Ministers of the Church to be of Sound Religion," which was confirmed by the Union with Scotland Act, 1706 (6 Ann. c. 11), ss. 3, 5.

(*n*) See Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 1.

(*o*) 2 & 3 Edw. 6, c. 1 (1548); 3 & 4 Edw. 6, c. 1 (1549); 5 & 6 Edw. 6, c. 1 (1551); 1 Eliz. c. 2 (1558); 14 Car. 2, c. 4 (1662); Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 35).

(*p*) By stat. (1689) 1 Will. & Mar. st. 1, c. 6, the coronation oath included a promise to maintain the laws of God, the true profession of the Gospel, and the Protestant reformed religion established by law. As to the King's coronation oath and declaration against transubstantiation, see p. 381, *post*.

(*q*) Union with Scotland Act, 1706 (6 Ann. c. 11), s. 3, incorporating 6 Ann. c. 8. Stat. (1706) 6 Ann. c. 8, recites that it is reasonable and necessary that the true Protestant religion proposed and established by law in the Church of England, and the doctrine, worship, discipline, and government thereof, should be effectually and unalterably secured.

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religion and Presbyterian Church government of the Church of Scotland (*r*), the Act for securing the Church of England as by law established, and the Act of Parliament of Scotland for securing the Protestant religion and Presbyterian Church government being declared to be fundamental and essential conditions of the Union (*s*).

The Protestant character of the Church is further secured by statutes affecting the King and the oath and declaration required to be taken by him (*a*).

By the Act of Union with Ireland the Churches of England and Ireland were united into one Protestant Episcopal Church called the United Church of England and Ireland, the doctrine, worship, discipline, and government of which were to be the same as that of the Church of England; and the continuance and preservation of such united Church as the Established Church of England and Ireland were made an essential and fundamental part of the Union (*b*), the Presbyterian Church of Scotland remaining the same as established by the Act of Union with Scotland (*c*). By the Irish Church Act, 1869, the union thus created between the Churches of England and Ireland was dissolved, and the Church of Ireland was disestablished. The Church of England was otherwise unaffected by the change (*d*).

709. After the Reformation the only ecclesiastical synods authorised were the two Provincial Convocations (*e*).

Post-Reformation
developments.

The Roman canon law was in part incorporated into the statute and common law, and as to the remainder was abolished or became obsolete (*f*).

The ancient pre-Reformation territorial constitution into provinces and dioceses, together with the ecclesiastical courts and certain Church officers (archbishops, bishops etc.), continued so far as they were not modified by statute (*g*).

The archbishops of the Church of England and certain bishops sit in the House of Lords (*h*), and priests and deacons, if otherwise qualified, may vote for members of Parliament, but may not sit therein (*i*).

Various bodies have been constituted by statute as authorities

(*r*) Union with Scotland Act, 1706 (6 Ann. c. 11), ss. 2, 4, incorporating the Scotch Act.

Union with Scotland Act, 1706 (6 Ann. c. 11), ss. 3, 4, 5.

(*a*) See p. 381, *post*.

(*b*) Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), s. 1, art. 5.

Ibid.

Irish Church Act, 1869 (32 & 33 Vict. c. 42).

See p. 384, *post*.

(*f*) See p. 374, *post*. It ceased to be taught in the universities, and degrees therein were abolished.

(*g*) See pp. 383 *et seq.*, *post*.

(*h*) No minister of the Established Presbyterian Church of Scotland has a seat in the House of Lords, though the Moderator of that Church has social precedence in Scotland next after the Lord Chancellor of Great Britain and before the Dukes of England (see Royal Warrant, March 11th, 1905, Burke's Peerage, 2414). At the date of the disestablishment of the Church of Ireland, certain of its archbishops and bishops had seats in the Lords under the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67).

(*i*) See p. 556, *post*.

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for the management of the affairs of the Established Church. Thus, apart from its judicial functions, the Privy Council makes under statutory authority orders with respect to many matters ecclesiastical. Queen Anne's Bounty (*k*) and the Ecclesiastical Commission (*l*) have also been constituted by statute for the management of certain matters of Church revenue (*m*).

SECT. 2.—*The Law of the Church.*

SUB-SECT. 1.—*Common Law and Statute Law:*

Classification.

710. The laws of England may with sufficient propriety be divided into two kinds—the *lex non scripta*, the unwritten (or common) law, and the *lex scripta*, the written (or statute) law (*n*). The law ecclesiastical which forms part of the law of England is not a foreign law (*o*), and naturally falls into the same division. It consists of statute law and common law.

Origin.

711. Though ultimately founded on God's law as declared in Holy Scripture, the law ecclesiastical derives its immediate origin largely from the canon law of Papal Rome and the civil law of imperial Rome. Whatever in these codes is essential to the laws of England has long since been incorporated into either the statute or common law of the realm (*p*).

Canons thus received, allowed, and used in England were made by such allowance and usage part of the laws of England, and the interpretation, dispensation, or execution of them belongs solely to the King of England and his magistrates within his dominions (*q*).

The ecclesiastical law of England is a part of the general law of England, of the common law—in that wider sense which embraces all the ancient and approved customs of England which form law,

(*k*) See p. 779, *post*.

(*l*) See p. 719, *post*.

(*m*) Other Church authorities formerly existed, for example, the King's vicegerent and vicar-general, the High Commission for Ecclesiastical Causes, the Court of First Fruits and Tenths, the Court of Augmentation and Revenues of the King's Crown. As to these, see Makower, *Constitutional History of the Church of England*, pp. 260 *et seq.*

(*n*) 1 Bl. Com. 63; Hale, C. L. 23.

(*o*) *Mackonochie v. Penzance* (Lord) (1881), 6 App. Cas. 424, 446.

(*p*) *Caudrey's Case* (1591), 5 Co. Rep. 1:—"Albeit the Kings of England derived their ecclesiastical laws from others, yet as many as were proved, approved and allowed here by and with a general consent are aptly and rightly called the King's ecclesiastical laws of England"; and see preamble to stat. (1533) 25 Hen. 8, c. 21, s. 15 (the Act of Exoneration from Exactions paid to the Roman See). "Your Grace's realm is free from subjection to any man's laws, but only to such as have been devised, made and ordained within this Realm for the wealth of the same or to such other as by sufferance of your Grace and your progenitors the people of this your Realm have taken at their free liberty by their own consent to be used among them and have bound themselves by long use and custom to the observance of the same, not as to the observance of the laws of any foreign potentate, but as the customed and ancient laws of this Realm originally established as laws of the same, by the said sufferance consents and custom and none otherwise."

(*q*) *Le Case de Commenda* (1612), Dav. Ir. 63, 71, cited in *R. v. Millis* (1844), 10 Cl. & Fin. 534, 681, H. L.

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including not only that law as administered in the common law courts, but also that law as administered in Chancery and commonly called equity, and also that law as administered in the courts ecclesiastical, consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm—and form the King's Ecclesiastical Law (*r*). All these laws may be, and are, from time to time altered by statutes. When the question arises, What is the English ecclesiastical law? it is not ascertained by calling witnesses to prove it, as if it were a foreign law, but, taking judicial notice of what the law is, it is ascertained, by argument founded on legal principles and authorities, what the law is on the particular point (*s*).

The reception of ancient rules and usages of the canon law as common law has been recognised by statute (*a*).

712. In order to show that any old rule and usage is now binding it must be pleaded and proved that such rule has been "received, observed, and acted upon," or in other words, "has been the invariable usage in England from the earliest times down to the Reformation, and that it has been continued and uniformly recognised and acted upon in England since the Reformation" (*b*). Evidence of acceptance.

(*r*) See *Caudrey's Case* (1591), 5 Co. Rep. 1.

(*s*) *Mackonochie v. Penzance* (Lord) (1881), 6 App. Cas. 424, *per* Lord BLACKBURN, at p. 446. The above was the course pursued by the Court of King's Bench, when Lord Hardwicke was Chief Justice, in *Middleton v. Crofts* (1736), 2 Atk. 650. It was expressly approved of in the House of Lords in *R. v. Mills* (1844), 10 Cl. & Fin. 534, 681, H. L.; and *Exeter (Bishop) v. Marshall* (1868), L. R. 3 H. L. 17.

(*a*) By the Submission of the Clergy Act, stat. (1533) 25 Hen. 8, c. 19, s. 7, it was enacted that a review should be had of the canon law, and until such review should be made, all canons, constitutions, ordinances and synodals provincial, being then already made and not repugnant to the law of the land or the King's prerogative, should still be used and executed as they were before the making of the Act. Blackstone says that upon this statute now depends the authority of the canon law in England (1 Bl. Com. 83), but the statute says "as they were afore the making of the Act," and from other authorities it seems clear that this Act simply continues the authority whatever it was which the canons already possessed (*Read v. Lincoln (Bishop)* (1889), Roscoe's Report, *per* Archbishop Benson, p. 17). That is, pre-Reformation canons rest on the common law as recognised by statute. "The statutes of Henry VIII. do not set up any canon not consistent with common law rights" (*Exeter (Bishop) v. Marshall* (1866), *supra*, *per* WILLES, J., at p. 41). That the rule extends to pre-Reformation canon law received and allowed in England, not merely to provincial canons, appears from stat. (1533), 25 Hen. 8, c. 21, preamble; stat. (1543) 35 Hen. 8, c. 16; *Exeter (Bishop) v. Marshall*, *supra*; and *Burder v. Mavor* (1848), 6 Notes of Cases, 1.

(*b*) *Exeter (Bishop) v. Marshall*, *supra*, at pp. 53, 54, where the question was, whether a certain testimonial required by the ancient Roman canon law (and apparently repeated in a canon of 1603) could now be insisted on by a bishop of the Church of England, as forming part of the common law of the realm, and it was held that it could not, as there was no proof of continuous user. Lord WESTBURY said, at p. 53: "If it had been pleaded and proved that this alleged old rule and usage had been received, observed, and acted upon in the Church of England since the Reformation, it is possible that it might have been shown that this particular kind of testimonial was by law an essential criterion of the moral idoneity of the clerk. . . . Whatever may have been the canon law prior to the Reformation in this respect, there is nothing to show that it became part of the common law of this realm"; and at p. 54: "At the same time if

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It would seem that the following rule may be deduced from the foregoing, namely, that (unlike the statute law) the common law of the realm in matters ecclesiastical may become obsolete and abolished by general and long-continued non-user and custom to the contrary (c).

An ancient usage (like that of the black gown for preaching) which has ranged over 800 years, as to which no positive law exists, and against the legality of which no objection can be found, and no decision that it is illegal, may be legal (d).

Meaning of
"common
law."

713. The common law of the realm (which is nothing else but the common custom of the realm (e)) must not be confused with the common law (*jus commune*) of the Church of Rome. The term "common law" was imported into our laws from the canon law, and when used by canonists means the law common to the Church

such a rule had been pleaded by the bishop to have been the invariable usage of the Church from the earliest times down to the Reformation (which would be evidence of its being a law of the Church) and that it had been continued and uniformly recognised and acted upon by the bishops of the Anglican Church since the Reformation (which might have shown it to have been received and adopted as part of the law ecclesiastical recognised by the common law) the fitness of the rule ought not to be questioned." The older domestic canons (for example, Peckham, 1288 A.D.) "can hardly be considered as carrying with them all their first authority" (*Burgess v. Burgess* (1804), 1 Hag. Con. 384, 393, *per* Sir WILLIAM SCOTT). Apostolical canons, which nowhere now survive in use, could nowhere be acted upon (*Read v. Lincoln (Bishop)* (1889), Roscoe's Rep., *per* Archbishop Benson, 17).

(c) This is the rule applying to the canon law as it existed before "Sicut enim moribus utentium in contrarium nonnullæ leges hodie abrogatæ sunt ita moribus utentium ipsæ leges confirmantur" (*Decretum Gratiani, Distinctio 4*, canon 3, and the rule which also applies to the statute and common law of all countries whose laws are founded on the civil and canon law (for example, Scotland and France), and is consistent with the principle that stat. (1533) 25 Hen. 8, c. 19, continued the canon law as common law on the terms which existed before the passing of that Act. Other illustrations of this rule will be found in *R. v. Canterbury (Archbishop)*, [1902] 2 K. B. 503, where a practice which had been disused since about the year 1400 A.D. was held to be abrogated although the form in use still required it. There are other illustrations in the canon law rules as to the tonsure and outdoor dress of the clergy, which were undoubtedly once received and used in England; and the question of the sole right of a priest *presbyter in sacris ordinibus constitutus* to solemnise matrimony, which sole right dropped at the Reformation; see also *Kensit v. St. Paul's (Dean and Chapter)*, [1905] 2 K. B. 249, though in that case the decision turned on the question whether the offence alleged was an offence.

(d) Thus, a warrant of law for the use of the black gown is found in the constant user of it for centuries (*Re Robinson, Wright v. Tugwell*, [1897] 1 Ch. 85, C. A.). Great importance was attached to post-Reformation custom in the decisions of the Privy Council that the chasuble, alb etc. are illegal. There had been non-user of these vestments for over 300 years (*Hebbert v. Purchas* (1872), L. R. 4 P. O. 301; *Ridgdale v. Clifton* (1877), 2 P. D. 276, 331, P. C.). It is apprehended that it was in accordance with this principle (see stat. (1545) 37 Hen. 8, c. 17, repealed by Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125)) that the power of a deacon to solemnise matrimony (now undoubtedly legal) exists. The old rule of the canon law dropped, or rather was "utterly abolished" and "became frustrate and of none effect"; a new one took its place at the Reformation and has been acted upon ever since; see *R. v. Millis* (1844), 10 Cl. & Fin. 534, H. L., especially the difficulty expressed by Lord CAMPBELL, at pp. 746 *et seq.*

(e) Sir J. Davys, Preface to Reports.

of Rome generally and universally as opposed to the special customs and privileges of any provincial Church, and includes what we should call statute law (*f*).

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SUB-SECT. 2.—*Canon Law.*

714. The canon law of Europe does not and never did as a body of laws form part of the law of England (*g*). As in the case of the civil law (*h*), the parts which have been found essential to the laws of England have long since been incorporated in the statute or common law of the realm (*i*).

Not part of
law of
England.

715. The canon law, which is the ecclesiastical law of the Church of Rome (*k*), is founded principally on the civil law (*l*), and is so interwoven with it in its many branches that there is no understanding the canon law rightly without being very well versed in the civil law (*m*). It borrows from the Roman law many of its principles and rules of proceeding, though not servilely, nor without such variations as the independence of its tribunals and the different nature of its authorities might be expected to produce (*n*). The ecclesiastical courts always summoned the civil law to their aid in cases where the canon law was not complete. In all countries limits have been placed by the civil power at different times and in different places to the ecclesiastical authority (*o*). But in pre-Reformation times, no dignitary of the Church, no archbishop or bishop, could repeal or vary the Papal decrees (*p*).

Basis of
canon law.

The canon law is also founded upon Holy Scripture, Christian tradition, and various canons or rules made at different periods of

(*f*) *Rennell v. Lincoln (Bishop)* (1825), 3 Bing. 223, where BEST, C.J., at p. 271, says: "Lyndwood means the ecclesiastical law or common law of Christendom by *jus commune*." See Maitland, *Roman Canon Law in the Church of England*, p. 4; *Evers and Owen's Case* (1627), Godb. 431, 432.

(*g*) *R. v. Millis* (1844), 10 Cl. & Fin. 534, 680, H. L.

(*h*) See Hale, O. L., p. 24, and 1 Bl. Com. 14; see also p. 374, *ante*.

(*i*) See p. 374, *ante*.

(*k*) Although the Roman canon law, as such, does not form part of the scope of this work, and much of it is now obsolete or repealed by the general words of stat. (1533) 25 Hen. 8, c. 19, yet, important portions of the canon and civil law having been incorporated, it is desirable to give some account of the law and the authorities in which it may be found.

(*l*) For an account of the civil law, or, as it is usually called in England, Roman law, see p. 378, *post*.

(*m*) Wharton, *Law Lexicon*, *sub voce* Canon Law.

(*n*) Hallam, *History of Literature*, Vol. II., p. 240.

(*o*) The canon law has always been "a law under a weightier law." See also 1 Bl. Com. 79 *et seq*.

(*p*) "Tollere vel alterare non potest episcopus nec aliquis papa inferior" (Lyndwood). Much of the canon law set forth in archiepiscopal constitutions is merely a repetition of the Papal canons, and passed for the purpose of making them better known in remote localities; part is *ultra vires*, and the rest consisted of local regulations, which are only valid in so far as they do not contravene the *jus commune*. In England the legatine and provincial constitutions do not even touch upon half the recognised topics of ecclesiastical jurisprudence. The legatine constitutions are those of Otho and Othobon, in the thirteenth century. Together with the provincial constitutions (principally of Canterbury) they will be found collected in John of Athon, *Lyndwood's Provinciale*; Johnson's *Ecclesiastical Law*, Wilkins' *Concilia*, and Spelman's *Concilia*.

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of the
Church.

Post-
Reformation
canons.

the Church's history, both in the east and west. These were welded together in scientific form in a work known as the *Corpus Juris Canonici* (corresponding to the *Corpus Juris Civilis* (q)).

716. In England (as in all other countries) there had existed from very early times collections of canons of an unsystematic and incomplete character drawn up mainly to meet local and temporary

(q) The following account of this compilation is taken from Wright and Neil's Protestant Dictionary:—The *Corpus Juris Canonici* begins with what is known as the *Decretum Magistri Gratiani*. The Decretum was merely the private work of Gratian, a Benedictine monk of Bologna, who is known as "the father of canon law." It was published about the year 1150 in three books, to which Gratian himself gave the title of *Concordia discordantium canonum*. It was a very successful attempt to codify the scattered and conflicting canons of the Roman Patriarchate on the lines of the civil law, and very soon superseded all previous works. The first book is entitled *De Jure Naturæ et Constitutionis*, and treats of the sources of canon law and of ecclesiastical persons and officers. It is divided into one hundred and one sections called *distinctiones*, which in turn are subdivided into *canones*. The second book consists of thirty-six *causæ*, i.e., cases for solution. These cases are subdivided into *questiones*, i.e., the points solved in each case together with the authorities bearing on each question. The third book is entitled *De Consecratione*, and gives in five *distinctiones* the law on Church ritual and the sacraments. The original notes of Gratian (*dicta Gratiani*) are of great weight, as also are the passages headed "Papia" and supposed to be the notes of his pupil Paucapapia. Gratian's book contained the canons of the second council of Lateran, 1139, and decretals of Innocent II., which seem to have been written between 1130 and 1148 (Richter, p. x.). The next hundred years were very fruitful in legislation, so that at the end of that time the Decretum had become antiquated. During this period Innocent III. alone (Dr. Hunter says) published 4,000 laws, which went by the name of *decretales extravagantes*, that is, *extra* (*decretum Gratiani*) *vagantes*, and some of which are incorporated in the *Compilationes Antiquæ*. The *compilatio prima* has formed a pattern for all subsequent compilations, the matter being divided into five books, the subject of each being sufficiently indicated in the following hexameter:—

Judex, Judicium, Olerus, Connubia (or *Sponsalia*), *Orimen*.

Neither the Decretum nor the *Compilationes* (except *tertia* and *quinta*) ever received solemn Papal sanction: that is to say, they did not form part of the Papal statute law in the same way as the collections promulgated by the Popes themselves.

The second part of the *Corpus Juris Canonici* comprises the Decretals of Gregory IX., which took four years to complete, and were officially promulgated by the Pope in 1234. They are known as the *Libri extra* (Decretum) and comprise decided cases in five books. The Decretals of Boniface VIII., promulgated by the Pope in 1298 as a sort of supplement to Gregory's five books and hence called *Liber sextus*. The Decretals of Clement V., promulgated by him in 1313, but withdrawn and promulgated again in 1317 by John XXII. They are known as the *Clementine*. As to these Papal Decretals, Maitland remarks: "Each of them was a statute book deriving its force from the Pope who published it, and who being Pope was competent to ordain binding statutes for the Catholic Church and every part thereof." (Roman Canon Law in the Church of England, p. 3).

The *Corpus Juris Canonici* closes with the *Extravagantes* of John XXII., and with seventy-three decretals of Popes from Boniface VIII. to Sixtus V. (1298—1484), known as *extravagantes communes*. The method of citing the canon law is very complicated and varies for the different parts. It is explained at some length in the Encyclopædia Metropolitana, article "Law," and the Encyclopædia Britannica, article "Canon Law," e.g., cap. 9, X. iv. 13; chapter 9, X. de eo qui cognovit (iv. 13), means the Fourth Book of Gregory's Decretals, title 13, chapter 9 (see Ayliffe's explanation set out at p. 879, *post*).

needs (r). Except as to purely local matters, these local canons were superseded in the English ecclesiastical courts by the codification of the canon law. After the time of Gratian, when the *jus commune* arose, such canons as were made in England were made simply for the purpose of emphasising the rules of the *Corpus Juris Canonici* and of applying them to local needs, and devising new means of enforcing them (s).

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Post-Reformation canons are bye-laws for the guidance of the Church *in re ecclesiastica*, made under the direction of the Crown in the convocations and confirmed by the King (t). They have not as a whole been incorporated into the common law, nor have they been ratified by Parliament (a). They, therefore, do not form part of the laws of England, and do not of themselves, *proprio*

Not part
of law of
England.

(r) These were doubtless considered by Gratian and incorporated, where necessary, into his *Concordia discordantium canonum*.

(s) For example, Archbishop Richard's canons made at London, in 1175, consist of extracts from the decrees of some Pope or council (see Johnson's Ecclesiastical Laws, where these canons are set out in full). These were followed, in 1195, by canons made by the Archbishop of Canterbury, as Papal legate, at York, and from this date onwards to the Reformation there was a continual stream of legative and archiepiscopal canons, the most important being those of the Papal legates Otho and Othobon, who came to England *à latere* in the years 1237 and 1268 respectively. The following explanation of the method of reference to the canon law is taken from Ayliffe's *Parergon*, page xlv. A similar explanation as to the Civil Law will be found on page xliii. of the same work.

Marginal Quotations from the Books of the Canon Law explained.

- X. 1, 9, 6, 4 . . . That is to say, book the first, title the ninth, chapter the sixth and paragraph the fourth of the Decretals of Pope Gregory the Ninth. The letter X denoting the Decretals of that Pope.
- VI. 3, 4, 23 . . . Book the third, title the fourth, and chapter the twenty-third of the sixth book of the Decretals, by Pope Boniface the Eighth.
- Cl. 2, 5, 2 . . . Book the second, title the fifth, and chapter the second of the Clementines.
- Extra. 14, 3 . . . That is to say, title the fourteenth and chapter the third of the Extravagants of Pope John the Twenty-second.
- Com. 3, 2 . . . That is to say, book the third and chapter the second of the Communes.
- Dist. 76, c. 2 . . . Distinction the seventy-sixth and chapter the second of the first part of the Decrees. And if a V. consonant, or this note be added, viz. §, it denotes the verse or paragraph of that chapter, as Dist. 16, c. 2, V. 3, or § 3.
- 16, Q. 7, 3 . . . That is to say, cause the sixteenth, question the seventh and chapter the third of the second part of the Decrees.
- Com. 1, 2 . . . Distinction the first and chapter the second of the third part the Decrees.

All these books of the canon law are likewise sometimes quoted by the initial words of the law or chapter itself; and by the words of the title; as thus: *ex specialis*, *extra de judaeis*. That is to say cap. 17, tit. 6, of the fifth book of Gregory's Decretals. For the word *extra* imports these *Decretals* as well as the *Extravagants*.

The best edition of the canon law is that by Richter and Friedberg, published by Tauchnitz, Leipzig, 2nd ed., 1879.

(t) See stat. (1535) 25 Hen. 8, c. 19.

(a) The acts, conducts and habits, mentioned in canons 75 and 109 of 1604, are incorporated by the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32),

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of the
Church.

Canons
declaratory
only of the
common law.

vigore, bind the laity (*b*). But they are binding on the clergy in *re ecclesiasticâ* (*c*), and on such of the laity as have expressly or impliedly agreed to become bound by them.

Many statements in these canons are, however, reiterations or declarations of ancient usages and laws of the Church which had previously been received as common law. These obtain no additional force by being incorporated among the post-Reformation canons (*d*). They stand or fall according to the rule which renders it necessary to prove that they have been received and continuously acted upon (*e*).

Other canons.

There are other valid post-Reformation canons besides the 141 canons of 1603. In 1866 canons 36, 37, 38, and 40 of 1603, and in 1888 canons 62 and 102, were duly altered in convocation under royal authority and duly ratified by the royal letters patent for the purpose of bringing these canons into accord with certain new statute law; and for the like reason a new canon was duly made in 1892, when the Clergy Discipline Act, 1892, was passed (*f*).

Canons of
1640.

In the year 1640 seventeen canons received the assent of King Charles I.; but they were not duly made during the sitting of Parliament. They never had any binding authority in the ecclesiastical courts (*g*).

SECT. 3.—*The Royal Supremacy.*

The King
supreme
head of the
Church.

717. The Sovereign is the supreme governor of the realm in all spiritual and ecclesiastical causes as well as temporal (*h*). By Queen Elizabeth's Act of Supremacy such jurisdictions, privileges,

(*b*) *Middleton v. Crofts* (1736), 2 Atk. 660; *Lloyd v. Owen* (1753), 1 Lee, 434 (Archbishop Court); *Exeter (Bishop) v. Marshall* (1868), L. R. 3 H. L. 17.

(*c*) *Mathew v. Burdett* (1703), 2 Salk. 412. As to property, see p. 713, *post*.

(*d*) *R. v. Allen* (1872), L. R. 8 Q. B. 69, where it is decided that the usage stated in the 89th canon of 1604 is valid, "and this can only be so, because the rule of the canon law had been adopted by our law"; and see *R. v. Salisbury (Bishop)*, [1901] 2 K. B. 225, C.A.; *Harris v. Buller* (1798), cited 1 Hag. Con. 463, n. (Court of Arches); *Escott v. Mastin* (1842), 4 Moo. P. C. C. 104, 128.

(*e*) *Exeter (Bishop) v. Marshall*, *supra*; see p. 375, *ante*.

(*f*) 55 & 56 Vict. c. 32. A copy of the canons can be obtained from the Society for Promoting Christian Knowledge, also from the Clarendon Press, Oxford.

(*g*) *Cooper v. Dodd* (1850), 7 Notes of Cases, 514, 516, *per* Sir H. JENNER FUST, D. A.; and Ecclesiastical Courts Commission Report, xxxvi. Stat. (1661) 13 Car. 2, stat. 1, c. 12, which restored the ecclesiastical law, provided, by s. 5, that nothing therein contained should confirm the canons of 1640, nor any other ecclesiastical laws or canons not formerly confirmed, allowed or enacted by Parliament, or by established laws of the land as they stood in 1639; see also *li. v. Tristram*, [1902] 1 K. B. 816, 830, 836, C.A.

(*h*) The Royal Supremacy was so defined in the Oath of Supremacy imposed by stat. (1559) 1 Eliz. c. 1, s. 9 (which was repealed by the Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125)). Stat. (1534) 26 Hen. 8, c. 1, which declared that the King should be accepted and reputed the only supreme head on earth of the Church of England, was repealed by stat. (1554) 1 & 2 Phil. & Mar. c. 8, s. 4, and the repeal was confirmed by stat. (1558) 1 Eliz. c. 1, s. 4. See also 1 Bl. Com. 242; stat. (1532) 24 Hen. 8, c. 12; stat. (1533) 25 Hen. 8, c. 21; Articles of Religion, 37; Canons Ecclesiastici (1603), 2, 36; Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59). See also title CONSTITUTIONAL LAW, Vol. VI., p. 373.

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The Royal
Supremacy.**

superiorities and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority had theretofore been, or might lawfully be, exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and all manners of errors, heresies, schisms, abuses, offences, contempts, and enormities were united and annexed to the Imperial Crown of this realm (i). The Sovereign, however, is subject to God and to the law, for the law makes the King (k); and the royal supremacy is exercised in a constitutional manner according to law. The original contract between King and people (l) is contained in the coronation oath, by which the supreme authority of parliamentary statutes is clearly asserted (m).

718. The Sovereign is *persona sacra* (n), but neither this fact nor the general statutory definitions of the nature of the royal supremacy (o) confer upon the King personally the status of a minister of the Word, as plainly appears from the Articles of Religion, by which it is laid down that although we attribute to the Sovereign the chief government, we give not to our princes the ministering of God's Word or of the sacraments (p), but only that prerogative which we see to have been given always to all godly princes in Holy Scripture by God Himself; that is, that they should rule all estates and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil-doers (q).

But not a
minister of
the Word.

719. By the Act of Settlement the Sovereign must join in communion with the Church of England as by law established (r). To make it clear that the Sovereign is not personally and secretly a Roman Catholic, he or she is required to make, on accession to

Act of
Settlement.

(i) Stat. (1558) 1 Eliz. c. 1, s. 17. See title CONSTITUTIONAL LAW, Vol. VI., p. 392.

(k) Bract. lib. 3, De Actionibus, c. 9, fo. 107; 1 Bl. Com. 234. As to the position of the King generally, see title CONSTITUTIONAL LAW, Vol. VI., pp. 338 *et seq.*

(l) See 1 Bl. Com. 234.

(m) See title CONSTITUTIONAL LAW, Vol. VI., pp. 324, 338. In its present form this oath dates from 1688. It is administered to the Sovereign by an archbishop or bishop thereunto appointed by him or her and contains the following question and answer:—

Archbishop or bishop: Will you to the utmost of your power maintain the laws of God, the true profession of the gospel and the protestant reformed religion established by law? and will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them?

King or Queen: All this I promise to do.

By the Union with Scotland Act, 1706 (6 Ann. c. 11), the Sovereign also swears to maintain in Scotland the true Protestant religion and Presbyterian Church government there established (5 Ann. c. 8, s. 4).

(n) Com. Dig. tit. Ecclesiastical Persons (A).

(o) See stat. (1558) 1 Eliz. c. 1, s. 17; and p. 380, *ante*.

(p) Art. 37. "The which thing" the injunctions of Queen Elizabeth "do most plainly testify."

(q) Art. 37. "Your Grace being a layman" (stat. (1545) 37 Hen. 8, c. 17).

(r) Act of Settlement (12 & 13 Will. 3, c. 2), s. 3 (Ruffhead); Bill of Rights, (1 Will. & Mar. sess. 2, c. 2), s. 9; see title CONSTITUTIONAL LAW, Vol. VI., p. 324.

SMOT. 3.
The Royal
Supremacy.

The King
is supreme
Ordinary.

the Crown, a doctrinal declaration (founded on the Thirty-nine Articles) (a). This declaration must be in the form prescribed (b).

720. The King is the supreme Ordinary and visitor; but, as in civil matters, he does not exercise his judicial functions in person, but through his judges (c). He is also the "lawful authority" mentioned in Acts of Parliament, in the absence of any provision for an inferior judge to act in the first instance. Thus, under the Act of Uniformity of 1662 (d), Parliament has vested in "lawful authority" the power to alter the text of the Prayer Book in all those prayers which do in any way relate to the King, Queen, or royal progeny, so that the names may be altered from time to time and fitted to the present occasion. This duty is always performed by the King in Council, and orders issued accordingly (e).

The King has power to grant certain licences and dispensations under the Act for exoneration from Roman exactions (f), but has no general power to dispense from the laws ecclesiastical (g).

The King also visits the archbishops (h) and receives their resignations (i). An archbishop can resign to no one but the King (k).

The King also directs the assembling and dissolution of Convocation, and has supreme authority as to the making of canons, and the ratification thereof (l).

He has power to visit various places which are exempt from episcopal visitation, and known as royal peculiars (m), and generally to exercise various powers formerly vested in the Pope of Rome.

(a) Bill of Rights (1 Will. & Mar. sess. 2, c. 2), s. 10 (Ruffhead); Act of Settlement (12 & 13 Will. 3, c. 2), s. 2.

(b) See title CONSTITUTIONAL LAW, Vol. VI., p. 324; stat. (1678) 30 Car. 2, stat. 2. The form is as follows: "I, A. B., do solemnly and sincerely in the Presence of God profess testify and declare that I do believe that in the Sacrament of the Lord's Supper there is not any Transubstantiation of the elements of Bread and Wine into the Body and Blood of Christ at or after the Consecration thereof by any Person whatsoever. And that the Invocation or Adoration of the Virgin Mary or any other Saint and the Sacrifice of the Mass as they are now used in the Church of Rome are superstitious and idolatrous. And I do solemnly in the Presence of God profess testify and declare that I do make this declaration and every part thereof in the plain and ordinary sense of the words read unto me as they are commonly understood by English Protestants without any evasive equivocation or mental Reservation whatsoever and without any dispensation already granted me for this purpose by the Pope or any other Authority or Person whatsoever or without any hope of any such dispensation from any Person or Authority whatsoever or without thinking that I am or can be acquitted before God or man or absolved of this Declaration or any part thereof although the Pope or any other person or persons or power whatsoever should dispense with or annul the same or declare that it was null or void from the beginning."

(c) See p. 505, *post*.

(d) Stat. (1662) 14 Car. 2, c. 4.

(e) *Ibid.*, s. 21.

(f) Stat. (1533) 25 Hen. 8, c. 21.

(g) Bill of Rights (1 Will. & Mar. sess. 2, c. 2).

(h) 3 Stephens' Commentaries, 14th ed., p. 23.

(i) See p. 389, *post*.

(k) 1 Bl. Com. 382.

(l) See p. 390, *post*.

(m) See p. 411, *post*.

The law ecclesiastical as well as civil can only be altered by the King in Parliament (*n*).

SECT. 3.
The Royal
Supremacy.
—
Patronage.

721. The King is patron paramount of all the benefices in England (*o*) and has very extensive Church patronage, including the appointment of bishops and of deans, and the appointment to a certain number of cathedral preferments and benefices (*p*). He also is the guardian of the temporalities of a bishopric during a vacancy, but no longer receives the profits for his own use (*q*). The King is also entitled to present to all livings vacated by reason of the incumbent being appointed to a diocesan bishopric in England or Wales (*a*). The King has also power in certain cases to create new bishoprics in certain colonies (*b*).

722. The Judicial Committee of the King's Most Honourable Privy Council is the ultimate court of appeal in causes ecclesiastical (*c*), but, apart from this, various powers and duties of an administrative nature have been conferred on the Privy Council by statute (*d*), including a power to confirm schemes as to various matters ecclesiastical. Orders in Council made under such statutory power are published in the *London Gazette*, and when thus gazetted have the same force as if included in the statute (*e*).

The Privy
Council.

SECT. 4.—*Constitution of the Church into Provinces.*

SUB-SECT. 1.—*Provinces.*

723. A province is the circuit of an archbishop's jurisdiction. The whole of England and Wales is, for ecclesiastical purposes, divided by law into two provinces—Canterbury in the south, York in the north (*f*). The boundaries of the provinces have been adjusted by Act of Parliament (*g*). Each province is divided into dioceses (*h*).

Meaning of
"province."

(*n*) The King himself is a part of Parliament (1 Bl. Com. 153). The power and jurisdiction of Parliament is so transcendent and absolute that it cannot be confined either for causes or persons within any bounds (4 Co. Inst. 36); see titles CONSTITUTIONAL LAW, Vol. VI., p. 388; PARLIAMENT.

(*o*) Gib. Cod. 763.

(*p*) As to bishops, see p. 396, *post*; as to deans, see p. 416, *post*; as to benefices falling to the King by lapse, see p. 593, *post*; and as to benefices in the gift of the Crown, see Clergy List; Crockford's Directory.

(*q*) See p. 408, *post*.

(*a*) *R. v. Eton College* (1857), 8 E. & B. 610; and see p. 408, *post*.

(*b*) See p. 483, *post*.

(*c*) See p. 511, *post*; and see title COURTS, Vol. IX., p. 48.

(*d*) For example, the union of benefices; see p. 605, *post*.

(*e*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), ss. 12—14; and for Orders in Council, see Pulling's Index to the *London Gazette*.

(*f*) See Co. Litt. 94, a.

(*g*) The principal changes made since the Reformation are under stat. 33 Hen. 8, c. 31 (1541), by which the dioceses of Chester and Man were dis severed from the province of Canterbury and united to that of York; and under the Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), by which the county of Nottingham was transferred from York to Canterbury (diocese of Lincoln, now Southwell).

(*h*) See Co. Litt. 94 a.

SECT. 4.
Constitu-
tion of the
Church into
Provinces.
—
Canterbury.

724. The province of Canterbury now comprises twenty-seven dioceses; namely, fourteen English dioceses founded before the reign of Henry VIII. (i), which are Canterbury, London, Winchester, Bath and Wells, Chichester, Ely, Exeter, Hereford, Lichfield, Lincoln, Norwich, Rochester, Salisbury, Worcester; four English dioceses erected in the reign of Henry VIII. (k)—Gloucester (l), Bristol (l), Peterborough, and Oxford; five English dioceses recently erected—St. Albans (m), Truro (n), Southwell (o), Southwark (p), and Birmingham (p); and four Welsh dioceses, all of the old foundation—St. Davids, Llandaff, Bangor, and St. Asaph (q).

York.

725. The province of York comprises ten dioceses, four of earlier date than Henry VIII.'s reign, namely, York, Durham, Carlisle, and Sodor and Man (q); one erected in that reign, Chester (q); and five recently erected sees, Ripon (r), Manchester (r), Liverpool (s), Newcastle (s), and Wakefield (s).

SUB-SECT. 2.—*Archbishops.*

Definition of
archbishop.

726. An archbishop is that minister of the Word (t) who within that province whereof he is archbishop has, next and immediately under the King, supreme power, authority and jurisdiction in all causes and things ecclesiastical (a). There are in England two archbishops, one of the province of Canterbury and the other of York (b). Each archbishop has his own diocese wherein he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal (c).

Appointment.

727. An archbishop is appointed by the Crown. By statute no man can be archbishop unless he is fully thirty years of age (d), but subject to this there seems to be no restriction on the King's statutory power of appointment (e). An archbishop is appointed

(i) See p. 395, *post*.

(k) Co. Litt. 94 a; see stat. (1542—3) 34 & 35 Hen. 8, c. 17, s. 3.

(l) Gloucester and Bristol were united by the Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), and disunited by the Bishopric of Bristol Act, 1884 (47 & 48 Vict. c. 68), amended by the Bishopric of Bristol Amendment Acts, 1894 and 1896 (57 & 58 Vict. c. 21; 59 & 60 Vict. c. 29).

(m) Bishopric of St. Albans Act, 1875 (38 & 39 Vict. c. 34).

(n) Bishopric of Truro Act, 1876 (39 & 40 Vict. c. 54).

(o) Bishoprics Act, 1878 (41 & 42 Vict. c. 68).

(p) Bishoprics of Southwark and Birmingham Act, 1904 (4 Edw. 7, c. 30).

(q) Co. Litt. 94, a.

(r) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77).

(s) Bishoprics Act, 1878 (41 & 42 Vict. c. 68).

(t) See Articles of Religion, 23, 37.

(a) Godolphin's Repertorium Canonicum (1687), p. 12. Godolphin was an eminent civilian and king's advocate after the restoration of King Charles II (1 Cl. & Fin. 529).

(b) Godolphin's Repertorium Canonicum, p. 12; Co. Litt. 94, a.

(c) 1 Bl. Com. p. 380; and see "diocese of Canterbury" and "diocese of York" mentioned in Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77).

(d) Preface to Ordinal; stat. (1662) 14 Car. 2, c. 4.

(e) Stat. (1533) 25 Hen. 8, c. 20; *R. v. Canterbury (Archbishop)* (1848), Jebb's Report, 444; *R. v. Canterbury (Archbishop)*, [1902] 2 K. B. 503. The reasons are (1) that all archbishoprics and bishoprics of England

by royal letters missive and *congé d'élire* in the same way as a bishop who has a dean and chapter, save that the election by the dean and chapter has to be signified to the other archbishop and two bishops, or to four bishops (instead of to an archbishop only), for the purpose of confirmation, investiture and consecration (when consecration is necessary) according to the statute (*f*).

SECT. 4.
Constitu-
tion of the
Church into
Provinces.

Visitation of
bishops.

728. The powers and duties conferred by law on an English archbishop beyond those conferred on a bishop (*g*) are as follows: An archbishop has authority to visit and inspect the bishops and inferior clergy of his province and to deprive bishops for notorious cause (*h*), and he sitting alone can try a bishop (*i*). But in the case of the inferior clergy the proceedings must take the due legal form directed by the various Church Discipline and Public Worship Regulation Acts, or by the general ecclesiastical law for the time being in force (*k*).

When an archbishop visits his province it is usual for him first to visit his own cathedral and diocese, then in every diocese, to begin with the cathedral and proceed thence as he pleases to the other parts of the diocese (*l*), but the manner of a visitation is not so material as to be a ground for prohibition, as any defect in the manner of a visitation may be remedied by appeal (*m*).

All deans and chapters are subject to the visitation of the archbishop of the province *jure metropolitico*, in addition to the bishop's visitation (*n*).

By agreement the Archbishop of Canterbury does not visit the diocese of London (*o*).

729. An archbishop receives the King's writ for summoning meetings of convocation, and, in obedience thereto, issues his mandate to the bishops and clergy of his province to meet in convocation (*p*).

Convocation.

He is president of Convocation (in the absence of the King or his deputy (*p*)), has power (subject to an appeal to the Crown) to

were founded by the Kings of England (Co. Litt. 94 a, 97) and are royal donatives (1 Bl. Com. 378); (2) that the King is the head of the Church (1 Bl. Com. 280). The bishoprics in Wales were founded by the Princes of Wales, and became annexed to the Crown of England (Co. Litt. 97).

(*f*) Stat. (1533) 25 Hen. 8, c. 20, s. 5; see p. 396, *post*. An archbishop is usually translated from another see, so that, as a rule, there is no consecration (see Godolphin's Repertorium Canonicum, p. 29; and p. 399, *post*).

(*g*) See p. 400, *post*.

(*h*) 1 Bl. Com. 380; see p. 407, *post*.

(*i*) *Lucy v. St. David's (Bishop)* (1699), Carth. 484; *Ex parte Read* (1888), 13 P. D. 221, P. C.

(*k*) *Re York (Dean)* (1841), 2 Q. B. 1, where the Archbishop of York was prohibited from summarily depriving the Dean of York at a visitation without due process under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86); *Sanders v. Head* (1843), 2 Notes of Cases, 355; and see p. 410, *post*.

(*l*) Gib. Cod. 957. For forms of archiepiscopal visitation, inquiries and injunctions (Canterbury and York), see Archbishop Grindal's Remains, Parker Society, p. 121.

(*m*) *Kildare (Bishop) v. Dublin (Archbishop)* (1724), 2 Bro. Parl. Cas. 179.

(*n*) Stephens' Laws relating to the Clergy, p. 1379.

(*o*) *Gobbet's Case* (1634), Cro. Car. 340. As to peculiars, see p. 411, *post*.

(*p*) 1 Bl. Com. 279, 380; see p. 393, *post*.

- SECT. 4.** decide as to the regularity of elections to convocation, and no mandamus will lie to compel him to admit a certain candidate to convocation (*q*).
- Constitution of the Church into Provinces.** **730.** In certain cases he hears appeals from the bishops, and in some cases his decision is final (*r*). Under the Public Worship Regulation Act, 1874, the two archbishops appoint jointly, subject to the approval of the King, a judge who acts as the official principal of the two ancient provincial courts, and is usually known as the Dean of the Arches (*s*).
- Judicial duties.** **731.** The archbishop provides for the ecclesiastical administration of a diocese during a vacancy, that is, he is "guardian of the spiritualities" (as the King is of the temporalities) (*t*), but when an archbishopric is vacant the dean and chapter are the guardians, not the other archbishop (*a*).
- Guardian of the spiritualities.** He presents to livings which a bishop may allow to lapse (*b*).
- Lapse.** On the appointment of a new bishop he may name a chaplain for whom provision is to be made by such new bishop (*c*); his "option" of receiving an assignment of a benefice instead, is now abolished (*d*).
- Option.** He may retain and qualify eight chaplains (*e*). He is "enthroned," whereas a bishop is "installed" (*f*).
- Other privileges.** **732.** It is his duty, primarily, to confirm the election of bishops (when the procedure is by *congé d'élire*), and to consecrate them, failing which he is liable to a *præmunire* (*g*). He also is required to consecrate suffragan bishops (*h*).
- Duties on creation of bishops.** He is entitled to receive from every bishop holding office within his province the oath of due obedience (*i*), and this oath may still be taken during the consecration service (*k*).
- Colonial clergy.** He may consecrate persons to the office of bishop for the purpose of exercising episcopal functions elsewhere than in England, and in that case he may dispense, if he thinks fit, with the oath of due obedience to the archbishop (*l*).

R. v. York (Archbishop) (1888), 20 Q. B. D. 740.

See Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 111.

Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85).

1 Bl. Com. 380; and see p. 408, *post*.

See p. 390, *post*.

As to lapse, see p. 590, *post*.

1 Bl. Com. 381, citing Cowell.

Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 42.

(*e*) Godolphin, Repertorium Canonicum, p. 21.

(*f*) *Ibid*.

(*g*) Stat. (1533) 25 Hen. 8, c. 20, ss. 4, 6; *R. v. Canterbury (Archbishop)*, [1902] 2 K. B. 503; and see p. 396, *post*.

(*h*) Stat. (1534) 26 Hen. 8, c. 14, ss. 3—5; and see p. 404, *post*.

(*i*) The form of oath is given in the Ordinal, and is as follows: "In the name of God. Amen. I, A. B., chosen bishop of the church and see of N. do profess and promise all due reverence and obedience to the archbishop and to the metropolitical church of N. and to their successors: So help me God, through Jesus Christ."

(*k*) Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 12.

(*l*) Colonial Clergy Act, 1874 (37 & 38 Vict. c. 77), s. 12; and see stat. (1786)

His licence is necessary in order that colonial and certain other clergy may officiate in his province (*m*).

733. An archbishop is also styled metropolitan, and it has been questioned whether there is any difference between the two titles. He is said to be called archbishop as being chief of the other bishops, and metropolitan "in respect of the number of the cities or cathedral churches where the bishoprics are" (*n*).

The Church authorities have no power to confer titles, ecclesiastical or otherwise; that belongs solely to the Crown (*o*).

734. The Archbishop of Canterbury has the following special privileges:—To crown the Kings and Queens of England (*p*); to grant certain licences and dispensations throughout both provinces (*q*), as for instance, special marriage licences (*r*); and to confer degrees (*s*). He has the special style of "Primate and Metropolitan of All England" (*t*). He is a Lord of Parliament (*a*) with a seat in the House of Lords, and precedence next after the Royal Family and the King's ecclesiastical vice-gerent (*b*), and before the Lord Chancellor (*c*). He may have prelates to be his officers (*d*).

SECT. 4.
Constitution of the Church into Provinces.
Metropolitan.

Special privileges of Archbishop of Canterbury.

26 Geo. 3, c. 84, repealed by Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), s. 2.

(*m*) Colonial Clergy Act, 1874 (37 & 38 Vict. c. 77), s. 5.

(*n*) Godolphin, Repertorium Canonicum, p. 15.

(*o*) *Keet v. Smith* (1875), 1 P. D. 73, P. C., per Lord CAIRNS, L.C., at p. 75. No ecclesiastical title of honour or dignity and no pre-eminence or coercive power can be validly conferred otherwise than under the authority or by the favour of the Sovereign (Ecclesiastical Titles Act, 1871 (34 & 35 Vict. c. 53)). The archbishops are both entitled to be addressed or referred to as "His Grace," "Primate," "Most Reverend," "by Divine Providence," "By Divine Permission," "My Lord Archbishop," "by the grace of God, "Father in God" (Godolphin, Repertorium Canonicum, p. 13; Burke's Peerage). "By Divine Permission" is a style formerly often used by archbishops as well as bishops, but more rarely now.

(*p*) 1 Bl. Com. 381.

(*q*) See stat. (1533) 25 Hen. 8, c. 21, ss. 2, 3, 4, and 15.

(*r*) See p. 701, *post*.

(*s*) This power is a remnant of the Papal authority reserved to the Archbishop of Canterbury by stat. (1533) 25 Hen. 8, c. 21. As Blackstone says, The privilege is "in prejudice of the universities" (1 Bl. Com. 381). The archbishop may confer all the usual degrees, with or without examination, and on the laity as well as the clergy. These degrees (which are known as Lambeth degrees) confer no right to membership of any university. The recipient is entitled to wear the academic costume of the university of which the archbishop himself is a member. The fees payable are heavy. The Lambeth degree in medicine (unless conferred prior to the passing of the Medical Act, 1857 (21 & 22 Vict. c. 90)) gives no qualification to practise, and a person so using it is liable to penalties (*ibid.*, Sched. A (10); *R. v. Baker* (1891), 66 L. T. 416).

(*t*) Godolphin, Repertorium Canonicum, p. 14.

(*a*) Co. Litt. 97 a; Cruise on Dignities, p. 53; Ecclesiastical Commissioners Act, 1847 (10 & 11 Vict. c. 108), s. 2. Godolphin, Repertorium, p. 13, says he is the first peer of the realm, but Cruise, p. 53, says archbishops and bishops are not styled peers of the realm.

(*b*) Stat. (1539) 31 Hen. 8, c. 10, s. 3, that is, when the office of vice-gerent is filled. As to precedence, see title PEERAGE AND OTHER DIGNITIES.

(*c*) Burke's Peerage, Table of Precedence.

(*d*) Godolphin, Repertorium Canonicum, p. 14.

SECT. 4.

Constitution of the Church into Provinces.

Special privileges of Archbishop of York.

735. The Archbishop of York claims the special privilege of crowning the Queen Consort and of being her chaplain, but it would seem he is not entitled to these privileges as a matter of right, although he has sometimes exercised them (*e*). He has the special style of "Primate and Metropolitan of England" (*f*), and has precedence over all dukes (not being of the blood royal), being placed immediately after the Lord Chancellor (*f*). He is also a Lord of Parliament, and by statute has his allotted seat in the House of Lords next after the King's vice-gerent and the Archbishop of Canterbury (*g*).

Status.

736. The two archbishops, with some exceptions (*h*), are of equal and independent position and authority; both are alike subject to the King as their immediate superior. The legal decisions of one archbishop do not bind the other; appeals from both are heard and determined by the Privy Council (*i*).

An archbishop (like other bishops) is supposed by an ancient fiction to be wedded to his see (*k*). Hence by custom he still impales the arms of his see, his own arms taking the place which would ordinarily be occupied by his wife's (*l*). He also drops his own surname and signs his christian name and that of his see, using the Latin abbreviation (*m*). He is sued by his christian name with the addition of his name of office. He is a corporation sole with perpetual succession (*n*) and a seal (*o*).

The archbishops are dignitaries (*p*), members of the King's Most Honourable Privy Council, and hold other important public offices.

Bound by rubrica.

737. When a bishop (and it would seem also an archbishop) ministers in any office prescribed by the Prayer Book he is a

(*e*) A petition to be granted these privileges was presented by the then Archbishop (Dr. Maclagan) to the Court of Claims held previously to the coronation of King Edward VII. But the point was not decided, His Majesty accepting the suggestion of the Archbishop of Canterbury that the Archbishop of York should as a matter of grace be allowed to crown Queen Alexandra. The archbishop had also made a claim to act for all purposes in place of the Archbishop of Canterbury, if absent; but this was likewise withdrawn: see Wollaston, Cases in the Court of Claims, p. 148; and title CONSTITUTIONAL LAW, Vol. VI., p. 334.

(*f*) Godolphin, Repertorium Canonicum, p. 14; and for the history of the struggle for precedence between Canterbury and York, see Makower, Constitutional History of the Church of England (English translation), pp. 281 *et seq.*

(*g*) Stat. (1539) 31 Hen. 8, c. 10, s. 3; see p. 387, *ante*.

(*h*) See paragraphs 734 and 735, *ante*.

(*i*) See *Read v. Lincoln (Bishop)*, [1892] A. C. 655, P. C.

(*k*) Gib. Cod. 118.

(*l*) See arms in Burke's Peerage.

(*m*) Thus, the present Archbishop of Canterbury signs "Randall Cantuar," and the ex-Archbishop of York signed "Willelm Ebor."

(*n*) See title CORPORATIONS, Vol. VIII., p. 306.

(*o*) Godolphin, Repertorium Canonicum, p. 27. The Ecclesiastical Courts being now the King's courts, all ecclesiastical ordinaries ought to have the King's arms engraven on their seal of office, but the Archbishop of Canterbury may use his own seal (*ibid.*, p. 28).

(*p*) *Boughton v. Gousley* (1599), Cro. Eliz. 663.

minister bound to observe the directions given to the minister in the rubrics of such office (*g*).

An archbishop (like a bishop) has the right to veto certain prosecutions in his diocesan court (*r*).

The vestments of an archbishop at Prayer Book services are the same as those of a bishop (*a*). These are, by ancient and continuous post-Reformation custom, the rochet, chimere, and hood (*b*).

738. At the present time the statutory income of the Archbishop of Canterbury is £15,000 a year, and that of the Archbishop of York £10,000 a year, in lieu of their ancient revenues (*c*), with official residences.

739. A coadjutor bishop may, under the Bishops Resignation Act, 1869 (*d*), be appointed to assist an archbishop incapacitated by permanent mental infirmity. He performs episcopal functions only, the archiepiscopal jurisdiction devolving on the bishop of the province who is senior in rank (*e*). He cannot sit in the House of Lords nor sign himself by the name of the diocese. He is appointed by *congé d'élire*, and does not necessarily succeed to the archbishopric (*f*).

740. An archbishopric may become vacant by death, deprivation (*g*), translation (*h*), or resignation (*i*).

A resignation must be made to a superior (*k*); an archbishop therefore can resign to none but the King himself (*l*). The fact of the resignation and the date from which it is to take effect are declared by Order in Council. If the terms of the Bishops

SECT. 4.
Constitution of the Church into Provinces.

Vestments.

Emoluments.

Coadjutor bishop.

Resignation of archbishop.

(*g*) *Read v. Lincoln (Bishop)* (1889), 14 P. D. 148.

(*r*) See p. 407, *post*.

(*a*) See p. 402, *post*; and as to post-Reformation custom, p. 376, *ante*. No distinctive vestment or ornament was directed for an archbishop by either of the statutory Prayer Books of 1549, 1552 or 1662, or the Ordinal of 1550. By the rubric of 1552 archbishops and bishops are coupled together, and required to "have and wear a rochet." There seems to be no legal authority for the use now of the pre-Reformation archiepiscopal cross, and post-Reformation custom is against it.

(*b*) See p. 402, *post*. The use of the cope at Prayer Book services died out nearly 200 years ago. There is no legal decision as to the vestments of a bishop. As to custom, see p. 376, *ante*, and p. 402, *post*.

(*c*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77); Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124).

(*d*) 32 & 33 Vict. c. 111. The stipend is £4,000 a year for Canterbury and £3,000 a year for York.

(*e*) *Ibid.*, s. 12.

(*f*) *Ibid.*, ss. 3—13. As to coadjutors to diocesan bishops, see p. 405, *post*.

(*g*) 1 Bl. Com. 382.

(*h*) It becomes void on confirmation to the new see (*Evans v. Askwith* (1627), W. Jo. 158, 160, 162).

(*i*) It becomes void on the date fixed by His Majesty.

(*k*) Gib. Cod. 822.

(*l*) 1 Bl. Com. 382. Such resignations are very rare, but an instance has recently occurred in the case of Archbishop Maclagan of York. The Order in Council made on that occasion is set out in the London Gazette, 1908, Vol. II., p. 9741.

SECT. 4. Resignation Act, 1869, are complied with, an archbishop is entitled to a retiring pension of one-third of the revenue of his see or £2,000 a year, whichever is the greater, and may have assigned to him for his use for life any official residence occupied by
Constitution of the Church into Provinces.

Vacancy of archbishopric.

741. When an archbishopric is vacant, the dean and chapter of the metropolitan Church are the "guardian of the spiritualities," not the King or the other archbishop (*n*). Their duties continue until the new archbishop is elected and confirmed (*o*) (or appointed by letters patent); they have the power of receiving presentations of, and of admitting and instituting to, benefices; but cannot consecrate or ordain or present to vacant benefices or confirm a lease (*p*).

During the vacancy of the see of Canterbury, the dean and chapter, as guardian of the spiritualities, are empowered under their name and seal to grant all such licences and dispensations throughout both provinces as may be granted by the archbishop under the Act concerning Peter's Pence and Dispensations (*a*).

SUB-SECT. 3.—Convocation.

Definition.

742. An ecclesiastical convocation, as now known to the law, is a representative assembly of the clergy (*b*) of a province, summoned by a mandate of the archbishop issued in pursuance of the King's writ in that behalf (*c*), for the purpose of transacting such ecclesiastical business as may be committed to it by the King (*c*).

Two convocations.

There are two convocations, one for the province of Canterbury, the other for that of York (*d*).

It is to be observed that a convocation in England differs considerably in its constitution from the synods of other Christian kingdoms, these consisting wholly of bishops (*d*), whereas with us the convocations are more in the nature of a parliament—all the beneficed clergy having representatives therein, who share with the bishops and other dignitaries such rights as the convocations possess (*d*).

(*m*) Bishops Resignation Act, 1869 (32 & 33 Vict. c. 111), made perpetual by stat. (1875) 38 & 39 Vict. c. 19, which latter Act, but not the former, is repealed by Statute Law Revision Act, 1883 (46 & 47 Vict. c. 39), sched., which schedule is repealed by Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22).

(*n*) Godolphin, *Repertorium Canonicum*, p. 41; 2 Roll. Abr. p. 223.

(*o*) Oib. Cod. 114.

(*p*) Godolphin, *Repertorium Canonicum*, pp. 21, 40. As to guardian of the temporalities, see p. 408, *post*.

(*a*) Stat. (1533) 25 Hen. 8, c. 21, s. 15.

(*b*) 1 Bl. Com. 279. Only beneficed clergy and members of chapters have votes. Certain dignitaries are members *ex officio*.

(*c*) Stat. (1533) 25 Hen. 8, c. 19; see p. 391, *post*. See also Address of House of Commons in which the Lords concurred, 1689.

(*d*) 1 Bl. Com. 279. For the early history of convocation, see *ibid.*; Lathbury, *History of Convocation*, 77—117; and *R. v. York (Archbishop)* (1888), 20 Q. B. D. 740. Early in the reign of Edward III. the clergy began to assemble pursuant to the King's writ in two provincial convocations for the purpose of taxing themselves and transacting the King's business. These parliamentary convocations must not be confused (in pre-Reformation times) with the ecclesiastical provincial synods which were summoned by papal legates or archbishops alone, without the King's writ (see Bishop Kennett *Ecclesiastical Synods*).

The legal position of the convocations now depends upon the Act of Submission of the clergy (e), by which it was provided that the clergy cannot assemble in convocation without the assent of the King, nor make canons without the King's licence, nor execute any canon without his assent, and not even then if such canon offends against the royal prerogative, or the common or statute law, or any custom of the realm (f).

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Act of Submission.

743. Each convocation is summoned pursuant to the King's writ, which is addressed to the archbishop, commanding him to call together with convenient speed, in lawful manner, the bishops, deans of cathedral churches, archdeacons, chapters and colleges, and the whole clergy of the province, to appear before him at a convenient place (g). These writs are issued at the same time as the writs for Parliament.

Summoned by royal writ.

The archbishops then issue their mandates. The Archbishop of Canterbury addresses his mandate to the Bishop of London, reciting the royal writ, and requiring him to cite the other bishops of the province, and by them the rest of the clergy. The Archbishop of

Archbishops' mandates.

pp. 14, 149, 150), and in which the affairs of the Church were discussed and managed. These were generally held out of Parliament time (*ibid.*, p. 14), and were indifferently called synods, convocations, congregations and councils, and the legate or archbishop retained the power to summon them at his pleasure down to the date of the Act of Submission (Lathbury, *History of Convocation*, p. 111). It is sometimes stated that "in convocation (meaning thereby the State convocation) the clergy not only passed canons with the King's consent, but taxed themselves" (*R. v. York (Archbishop)*, *supra*). But it is very doubtful whether the pre-Reformation clergy ever considered themselves as sitting in a State convocation, when they passed canons, and pre-Reformation canons certainly did not require the royal assent (see Kennett, *Ecclesiastical Synods*, p. 149), though their reception and use, if repugnant to the laws of the realm, might be prohibited by the State (*Case of Convocations* (1610), 12 Co. Rep. 72; see p. 377, *ante*). It appears from the records, however, that Church and State business was very much mixed up in the 15th century meetings of the convocation of Canterbury; but there seems to be no authority to prove that canons were passed in the State convocation called by the royal writ. The assembly might well have been a State convocation under the King's writ for taxation purposes one day, and an ecclesiastical synod summoned by the archbishop or papal legate for canonical purposes the following or even the same day. This state of affairs came to an end with the Act of Submission, whereby the royal supremacy was acknowledged (Lewis, *Reformation Settlement*, p. 169, s. 39). Thus, all ecclesiastical business became the King's business. Canons were to be made in the State convocation only, and the independent provincial synods ceased to meet (Kennett, *Ecclesiastical Synods*, p. 201); indeed, according to some authorities, they became and are still "illegal assemblies" (see Lathbury, *History of Convocation*, p. 116).

Of recent years voluntary assemblies "cognate" to the convocations called "Houses of Laymen" and "The Representative Church Council" have been formed, but, as these are unknown to the law, they do not come within the scope of this work.

(e) Stat. (1533) 25 Hen. 8, c. 19.

(f) *Case of Convocations*, *supra*. It is thought that the Act of Submission and this decision do not prevent the convocations, when legally assembled, from discussing matters of general ecclesiastical interest or from passing resolutions, and this both convocations frequently do. Such resolutions, however, not binding on either clergy or laity. Presumably it is not considered business."

(g) The form of writ issued by Queen Victoria to the Archbishop of York is set out in the report of *R. v. York (Archbishop)* (1888), 20 Q. B. D. 740, 741.

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Provinces.

Bishop's
citation.

York sends his mandate to each bishop of his province direct, requiring him to cite the clergy (*h*). During a vacancy in an archbishopric the guardian of the spiritualities can issue the mandate (*i*).

Next, in the province of Canterbury, the Bishop of London issues a citation as provincial dean to the other bishops of the province, reciting the archbishop's mandate, and citing and admonishing them to appear at the place appointed, and that they each of them in their turn shall cite their clergy (*k*).

The bishops of both provinces then issue citations to the dean to appear personally and the chapter by one proctor; they also issue a citation to the archdeacons commanding them to attend personally, and to secure the attendance of the clergy by the proper number of proctors.

Election of
proctors.

744. The deans and archdeacons hold elections for proctors. The president of the convocation of the province has the right of deciding whether a person who has been elected is disqualified, and no mandamus will lie to compel him to admit the candidate to convocation (*l*). Non-residentiary prebendaries are entitled to vote at the election of a proctor for the chapter (*m*).

The beneficed clergy (which term is taken to include perpetual curates, but not stipendiary curates) (*n*) are by ancient custom entitled to vote for proctors.

Upper and
Lower
Houses.

745. In each convocation there is an upper and a lower house (*o*). The upper house consists of the archbishop and the diocesan bishops of the province (*o*). The upper house of Canterbury has now twenty-seven members, and that of York ten members (*p*). The lower house consists of deans of cathedrals, archdeacons, the proctors for the chapters, and the proctors for the parochial clergy (*q*). In Canterbury the Deans of Westminster and Windsor are added (*r*). In York, on account of the small number of dioceses, the beneficed clergy in each archdeaconry elect two

(*h*) The form of mandate addressed by the Archbishop of York to the Bishop of Durham is also set out in the report of *R. v. York (Archbishop)* (1888), 20 Q. B. D. 740, 742.

(*i*) Wilkins, *Concilia* III., 871. This was done in the year 1544 (*ibid.*).

(*j*) For all these forms, see Pearce, *Law of Convocation*.

(*k*) *R. v. York (Archbishop)*, *supra*.

(*m*) *Randolph v. Milman* (1868), L. R. 4 C. P. 107, Ex. Ch.; Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 51.

(*n*) The royal writ directs the archbishop to summon the whole clergy, in lawful manner. Stipendiary curates have come into being since the form of writ was settled. They have never been admitted to vote (*Journal of Convocation*, 1857, p. 350). Before self-taxation by the clergy was abolished, at any rate before stat. (1533) 25 Hen. 8, c. 19, they would seem not to have been wanted, as only clerical freeholders, that is, persons taxable, were suitable to the assembly.

(*o*) 1 Bl. Com. 279. Suffragan bishops do not sit in the upper house, but if elected may sit in the lower; see *Journals and Chronicles of Convocation*.

(*p*) See p. 384, *ante*.

(*q*) 1 Bl. Com. 279; 2 Stephen, *Commentaries*, 14th ed., p. 597.

(*r*) For further details, and a complete list of chapters and archdeaconries represented, see *Clergy List*.

proctors (s). The lower house of Canterbury now has about 175 members and that of York about 85 members (a).

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Constitution of the Church into Provinces.

President.

746. The persons who have, since the Act of Submission, presided over the whole convocation of a province—in the absence of the King—are the King's vice-gerent (b), the vice-gerent's representative (c), the archbishop of the province (who is the usual president), and a bishop of the province (d).

Prolocutor.

The president of the upper and also of the lower house is called prolocutor (speaker). The prolocutor of the lower house is chosen by that house, and presented to the upper house. Like the Speaker of the House of Commons, he is the intermediary between the upper and lower houses (e).

747. A convocation, when assembled, is bound by the Act of Submission, and is also regulated by a number of ancient and modern rules as to its own procedure (f). Prayer Book services may be read in either convocation in Latin (g).

Internal regulations.

748. When the Crown desires the advice of the convocations on matters ecclesiastical, "Royal Letters of Business" are issued, by which His Majesty states the matter or matters to be considered, and authorises the convocation to "debate, consider, consult and agree" thereon, and after mature debate etc. to present to the Crown a report in writing (h). Taxation of the clergy, which was originally the only business of convocation when general ecclesiastical matters were dealt with by provincial and other synods, now forms no part of it (i); it being

"Letters of Business."

(s) 2 Stephen, Commentaries, 14th ed., p. 597.

(a) For further details, and a complete list of chapters and archdeaconries represented, see Clergy List.

(b) See Collier's Ecclesiastical History, Vol. II., 117—119.

(c) See Wilkins, Concilia III., 803, 809; Lathbury, History of Convocation, 128. Lord Cromwell was Henry VIII.'s vice-gerent and vicar-general, but no successor to him was appointed; see p. 387, ante.

(d) The Bishop of London presided in the Convocation of Canterbury in 1604. He was appointed by a second royal writ; see Ratification of the Canons of 1604 by James I. (Homilies etc., 1816 ed., p. 619).

(e) See 4 Co. Inst., 322.

(f) It also has a terminology in some cases peculiar to itself, but apparently chiefly founded on that of Parliament. Thus the speaker is *prolocutor*, an adjournment a *continuation*. Kennett says the terms (used for "resolutions") *gravamina cleri* and *articula reformationis* are terms of the State convocation, not of the synod (Ecclesiastical Synods, p. 168). Convocation also has a special prayer which is never to be omitted and which contains the following passage: "we who according to the Order of our Holy Reformation have deliberately and with good reason renounced the errors, corruptions, and superstitions, as well as the Papal tyranny which once prevailed"; see *Forma Precum* British Museum "3406, c. 31."

(g) Stat. (1662) 14 Car. 2, c. 4, s. 18.

(h) For forms, see Cardwell, History of Conferences, p. 443; Chronicle of Convocation, Lower House, Canterbury, 1872, p. 240; and Joyce, History of Convocations, p. 142.

(i) Self-taxation by the clergy was discontinued about the year 1665 by a verbal and wholly informal agreement between Archbishop Sheldon and Lord London (*R. v. York (Archbishop)* (1886), 20 Q. B. D. 740, 746; stat. (1663) 15 c. 10); and thus the original *raison d'être* of the convocations disappeared.

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now (k) judged more advantageous to include the clergy in the money bills passed by the Commons, and to allow them, on the other hand, to vote for members of Parliament—a privilege that did not formerly belong to them. Hence the convocations have long ceased to exercise any legislative power (l).

The upper house of convocation is not entitled to act as a court of appeal (m).

Canons do
not bind
laity.

749. Canons duly made by the Crown and the convocations, since the Act of Submission, bind *in re ecclesiasticâ* all the clergy, including, it would seem, curates who have no votes (n), but they do not *proprio vigore* bind the laity (o).

Privilege of
members.

750. The present convocations being the successors of the pre-Reformation convocations, their members are possibly entitled to the benefit of privilege from arrest or molestation in "coming, tarrying or returning," in the same way as members of Parliament (p), although the reason for the grant of the privilege no longer exists (q).

From 1665 to 1688 the meetings were merely formal. In 1688 activity revived, letters of business being issued in 1689, and continued till 1717, after which, owing to the turbulent behaviour of the lower house of Canterbury, no business was placed before the convocations for about 150 years. After 1717 they were regularly summoned and assembled, and passed complimentary addresses to the Crown, but were at once prorogued. There were, however, occasional discussions as in 1741, 1742, and 1847. In 1861, for the first time after the interval, the Crown again conferred on the Convocation of Canterbury a licence to make canons, but these, although drafted, were never confirmed, and shortly after, the same licence was given to the Convocation of York. In 1872 royal letters of business were granted by Queen Victoria for the discussion of the Ritual Commissioners' Final Report. Since then much business of a deliberative character has been done by the convocations, and canons have been passed and confirmed by the Crown; but these latter have up to the present been only for the purpose of bringing the canons of 1603 into harmony with the statute law (see *Journals of Convocation*). Bishop Burnet says, "no business can be undertaken in convocation unless it has been specially proposed to them by royal licence" (*History of his Own Time*, Vol. V., pp. 202, 254).

(k) Since 1665; see p. 393, *ante*.

(l) 2 Stephen, *Commentaries*, 14th ed., p. 522. All legislative power is now vested in Parliament; see p. 383, *ante*.

(m) *Re Gorham v. Exeter (Bishop)* (1850), 5 Exch. 630, where stat. (1532) 24 Hen. 8, c. 12, s. 9, was held to be repealed by stat. (1533) 25 Hen. 8, c. 19. Appeals in all cases, whether they touch the King or not, now lie to the King in Council (*ibid.*, at p. 677).

(n) *Middleton v. Crofts* (1736), 2 Atk. 650, 669, on the principle of parliamentary elections, as to which Lord HARDWICKE says it is impossible for all to join and, therefore, our constitution has fixed it in the more worthy, who have a right to bind the rest; but Sir E. COKE says the clergy are all bound "for this that they all either by representation or in person are present" (*Case of Convocations* (1610), 12 Co. Rep. 72, 73), which was no doubt true in his day; see p. 392, *ante*.

(o) *Middleton v. Crofts*, *supra*; and see p. 379, *ante*.

(p) Stat. (1429) 8 Hen. 6, c. 1. See title PARLIAMENT.

(q) The privilege is said to have been granted after the clergy in the State Convocation had shown their readiness to grant subsidies to the King (Lathbury, *History of Convocation*, 93). They were thus performing duties in a quasi-parliament—duties which Parliament itself now transacts. Bishop Kennett says the statutory protection extended only to Parliamentary convocations (*Ecclesiastical Synods*, v. 160).

751. A convocation is prorogued or dissolved by Royal writ addressed to the archbishop, who in obedience thereto issues his mandate to the like effect (a).

A convocation has also been considered to be dissolved by the demise of the Crown (b), and also by the dissolution of Parliament (c).

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Constitution of the Church into Provinces.
Dissolution.

SECT. 5.—*Constitution of the Church into Dioceses.*

SUB-SECT. 1.—*The Diocese.*

752. A diocese is a legal division of a province and the circuit of a bishop's jurisdiction: it is divided into archdeaconries, each archdeaconry into rural deaneries, and each rural deanery into parishes (d).

Definition of diocese.

The boundaries of the dioceses have undergone many alterations, both in ancient and modern times, necessitated by the creation of new dioceses, the suppression or union of old ones, and the transfer of districts from one diocese to another. The most important changes since the Reformation have been made in the reigns of Henry VIII. (e) and Queen Victoria (f), and new sees continue to be founded from time to time, a separate Act of Parliament being passed on each occasion. When portions of a diocese are transferred, jurisdiction over them goes to the bishop and ecclesiastical courts of the diocese to which they are transferred (g).

Boundaries.

Certain portions of dioceses, called peculiars, are, except for certain purposes, exempt from the bishop's jurisdiction (h).

Peculiars.

(a) For forms, see Pearce, *Law of Convocation*, p. 109; *Chronicle of Convocation*, 1874, cited in Joyce, *History of Convocations*, p. 178. The writ of dissolution recites that "by the advice of Our Council We have thought fit that the present Convocation be this day dissolved," and commanding the archbishop to dissolve or cause it to be dissolved, and to signify on His Majesty's part to all the clergy that they be intent and obedient to this command.

(b) Lathbury, *History of Convocation*, p. 373. This was formerly the rule as to Parliament, and, as in other matters, the convocations followed Parliament. Since 1707 the rule as to Parliament has been changed and Parliament continues to sit after the demise of the Crown (Succession to the Crown Act, 1707 (6 Ann. c. 41), s. 4; Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 51). Although no corresponding Acts seem to have been passed in the case of the convocations, convocation continued to sit after the demise of Queen Victoria.

(c) This seems to be in accordance with the ancient custom of convocation, and if so the rule cannot be changed without an Act of Parliament. An opinion to the contrary was expressed in 1640 (in very troublous times), and convocation sat after the dissolution of Parliament, and passed seventeen canons, which have, in consequence, ever since been held to be of no binding force, and were declared to be so by stat. (1661) 13 Car. 2, st. 1, c. 12; see p. 380, *ante*; and *R. v. York (Archbishop)* (1888), 20 Q. B. D. 747.

(d) Co. Litt. 94 a; Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77). For the names of the dioceses as they exist at present, see p. 384, *ante*.

(e) See p. 383, *ante*.

(f) See p. 384, *ante*.

(g) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 10; Ecclesiastical Jurisdiction Act, 1847 (10 & 11 Vict. c. 98), continued by the Expiring Laws Continuance Act.

(h) As to peculiars, see p. 411, *post*.

SECT. 5.

Constitution of the Church into Dioceses.

Definition of bishop.

Ordinary and prelate.

Qualifications.

SUB-SECT. 2.—*Bishops.*(i.) *Definition and Qualifications.*

753. A bishop is a legally ordained minister of the Word appointed by the Crown, who, under the supremacy of the Crown and the supervision of the archbishop, is "chief in superintendency" (i) in matters ecclesiastical within a diocese.

A bishop is also called "Ordinary" in some Acts of Parliament, "as having ordinary jurisdiction in causes ecclesiastical" (k), "immediate to the King" (l). He is also called "Prelate" (m).

754. No man can be a bishop unless he is fully thirty years of age (n), and duly appointed and consecrated according to the statutory rules (o). He must be a godly and well-learned man, and has to be vouched for as such by two bishops (p). He must be able to say that he is truly called to this ministration according to the will of our Lord Jesus Christ and the order of this realm. Also that he is persuaded that the Holy Scriptures contain sufficiently all doctrine required of necessity for eternal salvation through faith in Jesus Christ, and that he is ready to drive away all erroneous and strange doctrine contrary to God's word (a).

(ii.) *Appointment.*

By Crown.

755. The Kings of England were anciently the founders of all the bishoprics in England; so also the bishoprics in Wales, which were founded by the Princes of Wales, became annexed to the Crown of England (b). Hence all bishops in England and Wales are, in all cases, appointed by the Crown; in other words, bishoprics are royal donatives (c). The King appoints bishops in two ways: (1) by royal letters patent, (2) by royal letters missive and *congé d'élire* (d).

Procedure.

756. After the King's assent to the election has been signified to the archbishop of the province, the latter subscribes his *fiat confirmatio*, giving commission, under archiepiscopal seal, to his vicar-general to perform all the acts requisite for perfecting the

(i) Godolphin, *Repertorium Canonicum*, p. 23.

(k) *Ibid.*, p. 23. In the civil law, from which the word is taken, *ordinarius* signifies any judge authorised to take cognisance of causes *proprio suo jure*, and not by way of deputation or delegation.

(l) *Ibid.*, p. 32.

(m) See stat. (1523—4) 17 Edw. 2, st. 2, c. 14.

(n) Preface to Ordinal (stat. (1550) 3 & 4 Edw. 6, c. 12; stat. (1552) 5 & 6 Edw. 6, c. 1; stat. (1662) 14 Car. 2, c. 4). By the Roman canon law this rule applied to all presbyters (except in emergencies), thirty being the age at which our Lord was baptized and began to preach (Dist. 78, c. 3).

(o) See following paragraphs.

(p) Ordinal, which is statutory under stat. (1662) 14 Car. 2, c. 4, "Most Reverend Father in God, we" (that is, two bishops) "present unto you this godly and well-learned man to be ordained and consecrated bishop."

(b) Co. Litt. 94 a, 97; stat. (1350—1) 25 Edw. 3, st. 4; stat. (1390) 13 Ric. 2, st. 2, c. 2; stat. (1532) 24 Hen. 8, c. 12; stat. (1533) 25 Hen. 8, c. 20.

(c) Godolphin, *Repertorium Canonicum*, p. 24; 1 Bl. Com. 378.

(d) For the methods of appointment, see title CONSTITUTIONAL LAW, Vol. VI., pp. 395-8.

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confirmation (e). The vicar-general, in the archbishop's name, issues a citation, summoning all opposers of the election to make their appearance at a certain time and place, then and there to offer their objections, if they have any (f). At the time and place appointed the proctor for the dean and chapter exhibits the royal assent and the commission of the archbishop to the vicar-general, who accepts the same; then the proctor exhibits the proxy from the dean and chapter, presents the elected bishop, returns the citation, and desires that the opposers may be thrice publicly called (g); which done (h), and their contumacy accused, he desires that, in *pœnam contumaciæ*, the business may proceed, which is ordered in writing by the vicar-general. Then the proctor presents a summary petition, which states the whole process of election and assent, and desires that a time may be assigned him to prove it, which the vicar-general admits and decrees (i). After this, the proctor again exhibits the royal assent, with the elected bishop's assent, and the certificate to the archbishop, desiring a time to be presently assigned for final sentence, which the vicar-general decrees. Then the proctor desires that all opposers may again be thrice publicly called; which done, and none appearing or opposing, they are pronounced contumacious, and a decree is made to proceed to sentence by a schedule read and subscribed by the vicar-general. Upon this the bishop takes the oaths of allegiance (formerly of supremacy), against simony, and of obedience to the archbishop. After this the vicar-general reads and subscribes the sentence (k).

Next after the confirmation follows the consecration of the elected bishop in obedience to the King's mandate, which is solemnly done by the archbishop with the assistance of two other bishops (l). The consecration must be in the statutory form, otherwise it is apprehended that it is invalid (m).

Consecration

(e) Godolphin, *Repertorium Canonicum*, p. 25.

(f) As to what objections can be sustained, see p. 398, *post*. The apparitor-general calls the opposers by a process called "triple preconisation." This usually takes place in the province of Canterbury, at the Church House, Westminster.

(g) As to what objections can be taken, see *R. v. Canterbury (Archbishop)*, [1902] 2 K. B. 503; and p. 398, *post*.

(h) See note (f), *supra*.

(i) Godolphin, *Repertorium Canonicum*, p. 25.

(k) *R. v. Canterbury (Archbishop)*, *Hampden's (Dr.) Case* (1848), Jebb's Report, 79. Godolphin, *Repertorium Canonicum*, pp. 25, 26, says the Dean of the Arches subscribes the sentence.

(l) Godolphin, *Repertorium Canonicum*, p. 26.

(m) Thus, at the beginning of Queen Elizabeth's reign there was a doubt whether the statute had been duly complied with in the case of certain bishops of the Reformed Church, so a confirming Act was passed which enacted that all persons consecrated or ordained according to the confirmed forms should be in very deed, and also by authority of the Act declared and enacted to be, and should be, archbishops, bishops, priests, ministers, and deacons, and rightly made, ordered, and consecrated, any statute, law, canon or other thing to the contrary notwithstanding (stat. (1566) 8 Eliz. c. 1; statutory article 36); and see stat. (1536) 28 Hen. 8, c. 16, s. 3. This does not affect the question as to whether persons ordained by non-episcopal forms were valid ministers and could hold livings, only whether persons ordained under the statutory ordinals were validly ordained.

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tion of the
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Fitness of
bishop-elect.

The ceremony must always be performed on some Sunday or holy day (n).

757. There is no mention in the statute (a) of any examination or inquiry by the archbishop, who is directed to confirm the election within a period of twenty days (b), nor does the statute on the face of it in terms contemplate or directly or indirectly suggest that the archbishop can in any way question the fitness of the person nominated by the Crown, unless such power is involved in the use of the word "confirm" (c), hence the archbishop is merely a ministerial agent, and has no general right of questioning the fitness of the King's nominee (d). Further, the archbishop is not compellable by mandamus to consider objections in order to inform his mind as to the fitness of the bishop-elect (e).

Objections to
confirmation.

758. No objection can be taken to a bishop-elect, in answer to the triple preconisation in the confirmation ceremony, on the ground of heresy or unsoundness of doctrine, and no mandamus will lie to compel the archbishop to hear and determine objections of that nature (f). Objections are only allowed on two points, namely, that the election had been defective in some matter of form, or that the person presented for confirmation is not the person on whom the choice of the Crown had fallen. Such objections, if well founded, entitle the archbishop to rectify any informality in the form of the election, under the peculiar power which he has to supply the defects, whatever they may be, in the election (g). If any person has any other objection to make, or thinks the choice of the Crown erroneous, it is his duty to apply at an earlier stage than confirmation. He should petition His Majesty not to issue his mandate for the confirmation (h). The archbishop has jurisdiction to issue a citation requiring objections to be delivered before the confirmation, and he may consider such objections at a meeting in chambers prior to the confirmation (i), but it is doubtful whether the strict form and order of the proceedings, which have been in use since 1534, can be departed from (k).

(n) Ordinal.

(a) Stat. (1533) 25 Hen. 8, c. 20.

(b) The penalty for failure or refusal to confirm is a *præmunire* (*ibid.*, s. 6).

(c) *R. v. Canterbury (Archbishop)*, [1902] 2 K. B. 503, per Lord ALVERSTONE, C.J., at p. 540.

(d) *Ibid.*

(e) *Ibid.*, at p. 539.

(f) *Ibid.*, per WRIGHT, J., at p. 562; *R. v. Canterbury (Archbishop)* (1848), Jebb's Report; *Temple's (Dr.) Case* (1869), *Times*, December 9, 1869; *Mountague's (Dr.) Case* (1629), 6 State Tr. (N. S.) 427, n. (b).

(g) *R. v. Canterbury (Archbishop)*, *supra*, per CRIPPS, K.C., Vicar-General, at p. 510.

(h) *Temple's (Dr.) Case*, *supra*, per Sir TRAVERS TWISS, Vicar-General.

(i) *R. v. Canterbury (Archbishop)*, *supra*.

(k) See *Mountague's (Dr.) Case*, *supra*, per Sir HENRY MARTIN, Dean of the Arches, who thought not (at p. 428): "Since 25 Hen. 8 we proceed in a strict form of which he (the Vicar-General) hath a copy and from which he doth not swerve and this doth differ from the canon law etc.";

SECT. 5.
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Installation.

759. If the King appoints by letters patent (*l*), then his nomination and presentment is made to the same archbishop or bishop as in the case of the signification of an election by the dean and chapter (*m*), and in like manner he directs the consecration of his nominee under the penalty of a *præmunire* (*n*).

760. The archbishop issues his mandate to the archdeacon of his province to instal the bishop elected, confirmed, and consecrated. The bishop (or his proxy, which is usual) is introduced by the archdeacon, in the presence of a public notary, into the cathedral church, on any day between the hours of nine and eleven. He first declares his allegiance to the King (*o*), and then the archdeacon, with the canons, accompanies the bishop to the choir, and places him in the episcopal seat, pronouncing the customary formula (*p*). After the divine service proper for the occasion, the bishop is conducted into the chapter-house, where the archdeacon and the canons acknowledge canonical obedience to him; and the public notary, by the archdeacon's command, records the whole matter in an instrument, to remain as authentic to posterity (*q*).

761. The bishop is introduced into the King's presence, to do his homage for his temporalities or barony, by kneeling down and putting his hands between the hands of the King, sitting in his chair of state, and by taking a solemn oath to be true and faithful to His Majesty, and that he holds his temporalities of him (*r*). Homage.

762. Translation is the transfer of a bishop from one see to another. When the appointment is by *congé d'élire*, the former see is not void by the election to the new one, until the election is Translation.

contra, *Temple's (Dr.) Case* (1869), *Times*, December 9, 1869, *per* Sir TRAVERS TWISS, Vicar-General: "There has been no statutory sanction given to these forms. They are not obligatory upon the archbishop. He has been pleased to adopt them, and the practice for three centuries has been to use them": compare *R. v. Canterbury (Archbishop)*, [1902] 2 K. B. 503, *per* CRIPPS, K.C., Vicar-General, at p. 509. But the ancient decrees, ordinances and constitutions of the canon law were, as stated in stat. (1545) 37 Hen. 8, c. 17, utterly abolished, and became frustrate and of none effect by stat. (1533) 25 Hen. 8, c. 19, s. 6, and the contrary thereunto, that is, new forms of confirmation were drawn up at the Reformation and used and put in practice by the archbishop, and have been continuously used ever since. On the question of ancient post-Reformation custom becoming part of the common law of the realm, see p. 376, *ante*, and the illustrations there given. It would seem that Sir Henry Martin is right.

(*l*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 395, 397.

(*m*) Stat. (1533) 25 Hen. 8, c. 20, s. 3.

(*n*) *Ibid.*, s. 6.

(*o*) *Ibid.*, s. 5.

(*p*) See Godolphin, *Repertorium Canonicum*, p. 26. A bishop is said to be installed, whereas an archbishop is enthroned; see stat. (1533) 25 Hen. 8, c. 20, s. 5.

(*q*) Godolphin, *Repertorium Canonicum*, pp. 26, 27.

(*r*) *Ibid.*, p. 26. Statute of Westminster II., 1285 (13 Edw. 1, c. 42). Certain fees are payable on doing homage. As to fees generally in connection with the appointment of a bishop, see title CONSTITUTIONAL LAW, Vol. VI., p. 398.

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First fruits
and tenths.

Powers and
duties.

confirmed by the archbishop (*s*). On a translation there is no consecration (*t*).

763. Bishops pay first fruits and tenths (*u*), but their ancient *ad valorem* payments have been commuted into an annual payment (*a*), which is to be made at such times and in such manner as tenths used formerly to be paid (*b*).

(iii.) *Powers, Duties, and Privileges.*

764. The chief powers and duties of a bishop are: Performing the duties of a minister of the Word (*c*), ordination of priests and deacons (*d*), confirmation of baptized persons (*e*), confirmation, consecration, and investment of bishops (*f*), consecration of churches (*g*), visitation and correction of the clergy (*h*), institution or licensing to benefices (*i*), licensing of curates and settling their stipends subject to the statutory rules (*k*), appointing chancellors (*l*), honorary canons (*m*), and other officers, collating to livings in his gift and otherwise exercising the episcopal patronage, acting in certain cases as an ecclesiastical judge (*n*), granting marriage licences (*o*) and certain dispensations.

A bishop has a right of presenting to a benefice which a patron has allowed to lapse (*p*); he can retain and qualify six chaplains (*q*), may keep a secretary, whose fees are in some cases regulated by law (*r*),

(*s*) *Evans v. Askwith* (1627), W. Jo. 158.

(*t*) Godolphin, *Repertorium Canonicum*, p. 29. Certain fees are payable on translation. The fees paid by the late Archbishop Magee on his translation to York amounted to £573 6s. The fees and charges payable by a newly-made bishop of one of the ancient sees in respect of his appointment amount to from £400 to £600 (Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.). On a grant of letters patent under the Great Seal of a *cogné d'élire*, or of the royal assent to or presentation of any person to be archbishop or bishop, or of or for the restitution of the temporalities of any archbishop or bishop, £30 is payable. There are also certain stamp duties payable.

(*u*) For description of these, see p. 779, *post*.

(*a*) This payment is £1 17s. 6d. per cent. on the present annual income of the see (£1 for first fruits and 17s. 6d. for tenths); for example, the Archbishop of Canterbury pays £281 5s. in respect of his income of £15,000 a year, and the others less in proportion (Order in Council of November 27th, 1852; London Gazette, 1852, p. 3667).

(*b*) *Ibid.*

(*c*) See p. 401, *post*, and *Read v. Lincoln (Bishop)* (1689), 14 P. D. 148.

(*d*) See pp. 401, 549, *post*.

(*e*) See p. 688, *post*.

(*f*) See pp. 396 *et seq.*, *ante*.

(*g*) See p. 728, *post*.

(*h*) See p. 409, *post*.

(*i*) See p. 601, *post*.

(*k*) See p. 638, *post*.

(*l*) See p. 412, *post*.

(*m*) See p. 433, *post*.

(*n*) See p. 499, *post*.

(*o*) See p. 701, *post*.

(*p*) See p. 590, *post*.

(*q*) Godolphin, *Repertorium Canonicum*, p. 32.

(*r*) Orders in Council dated December 10th, 1895, and June 2nd, 1908 (London Gazette of those dates), under Ecclesiastical Fees Act, 1867 (30 & 31 Vict. c. 135), s. 1; Statutory Rules and Orders, 1895, p. 158; Pluralities Act, 1838

and is entitled to receive from the clergy the oath of canonical obedience (a).

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765. A bishop must be a shepherd to the flock of Christ (b). It is his duty to instruct the people committed to his charge out of the Holy Scriptures, and to study them himself and to be prepared to oppose all erroneous and strange doctrine (b). He must also lead a sober, righteous, and godly life, and punish all that are disobedient or criminous within his diocese (c).

Duties as
minister of
the Word.

766. Only a bishop can ordain priests or deacons (d). In ordaining the bishop has an absolute discretion (except as to certain statutory qualifications of the candidate (e)). He need not hold an ordination at all unless the supply of clergy is running short (f). If he ordains a person either deacon or priest when there is no proper vacancy, that is, "no certain place where he may use his function," the bishop is liable under the canons of 1604 for the maintenance of the ordinee (g).

Ordination.

767. The ancient rule is that bishops should reside within their dioceses (h); and they are liable to penalties for non-residence by the general ecclesiastical law (i). It was, however, considered that, while inhabiting their London houses, they were residing in their dioceses, and capable of there transacting diocesan business (k). It has been doubted whether this privilege still exists (l), but in any case it is personal, not local, and does not attach if the property passes out of the bishop's hands (m).

Residence.

(1 & 2 Vict. c. 106), ss. 47, 131; also Public Notaries Act, 1801 (41 Geo. 3, c. 79), s. 14.

(a) As to the meaning of this oath, see p. 406, *post*; see also Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 12. As to the bishop's oath of canonical obedience to the archbishop, see p. 386, *ante*.

(b) Ordinal; stat. (1662) 14 Car. 2, c. 4.

(c) *Ibid.* As to the bishop's power to punish offences, see p. 534, *post*.

(d) Stat. (1662) 14 Car. 2, c. 4, ss. 10, 11.

(e) As to age etc., for which see p. 549, *post*; for the bishop's powers as to ordaining clergy for service elsewhere than in England and for the admission of clergy ordained out of the realm, see p. 553, *post*.

(f) As to ordination, see further, p. 549, *post*.

(g) Canon 33, which is declaratory of the common law continued at the Reformation, being founded on a decree of the Lateran Council, 1179, which was promulgated by Archbishop Hubert Walter's canons at Westminster (canon 6) in the year 1200 (Johnson, Ecclesiastical Law). A stipendiary curacy from which the holder is liable, in certain events, to summary dismissal, can hardly be regarded as a *certain* title from which he may derive the necessities of life. As, however, it is believed that no proceedings have been taken under this ancient rule for a very long time, the *onus probandi* will lie on the plaintiff and it will rest with him to show that this common law usage is not now obsolete; see p. 375, *ante*; *R. v. Canterbury (Archbishop)* (1848), Jebb's Report, *per* Lord DENMAN, at p. 488.

(h) *Barton v. Wells* (1789), 1 Hag. Con. 21, *per* Lord STOWELL, at p. 28.

(i) *Ibid.*, at p. 27; Watson, Clergyman's Law, p. 687.

(k) Stat. (1772) 12 Geo. 3, c. 43, directing that payment of rents belonging to the see of Ely may be made in the new episcopal residence, Ely House, Dover Street; stat. (1541) 33 Hen. 8, c. 31 (Ochester Bishopric Act).

(l) Stephens, Laws relating to the Clergy, p. 160; *Barton v. Wells*, *supra*.

(m) As to canon law on residence of bishops, see Stephens, Laws relating to the Clergy, p. 159; Lynd. 130, 67.

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Ornaments.

768. The vestments of an archbishop or bishop required to be used in church are the rochet (*n*), chimere (*o*), and (if a graduate) university hood (*p*). The distinctive vestment of an archbishop or bishop is the rochet (*q*), sometimes called the "episcopal surplice" (*a*). It has large sleeves of fine linen, usually termed "lawn sleeves" (*n*). The mitre, episcopal ring, and gloves were not retained in 1549, and, upon the principles of the Privy Council decisions, are illegal (*b*).

(*n*) "Tunicam ex lino byssino manicatam laxamque quae paululum infra genua dimittitur, sumunt" (Dean Durel, *Vindiciae* (1669), p. 125). Dean Durel (who flourished 1625—1683) says: "The dress of the bishops is different from that which the Roman bishops use . . . for having laid aside the gown (*toga*) which is their usual outer dress, they put on a loose fitting tunic, with sleeves of fine linen (*lino byssino*), which falls a little below the knees, and over it they put on another garment entirely made of black silk (*holosericam*), which is without sleeves and open in front so that the lawn sleeves and the lawn tunic itself may be seen in front." The pre-Reformation rochet appears to have been a sleeveless surplice; see Lynd. 252.

(*o*) The chimere is a kind of sleeveless coat of black silk, worn over the rochet and open in front (*anterius aperta*) (Dean Durel, *Vindiciae*, p. 125, see note (*n*), *supra*). For illustrations of the early post-Reformation use of the chimere, see Tomlinson on the Prayer Book, p. 121, and compare pp. 149, 164. The bishop's rochet and chimere are colloquially called "magpie" (*ibid.*).

(*p*) The inferior clergy are definitely directed to do so by Canons 25 and 58 of 1603. By Canon 74 the archbishops and bishops shall not intermit to use the accustomed apparel of their degrees (apparently out of church). As to the use of the black gown for preaching, see *Re Robinson, Wright v. Tugwell*, [1897] 1 Ch. 85, C. A. The use of the cope by bishops and other clergy in cathedral and collegiate churches when administering the communion on certain occasions (see Advertisements of 1566 and Canon 24), which was never generally adopted, died out altogether about 200 years ago. The question of cope wearing was not before the court in *Hebbert v. Purchas* (1871), L. R. 3 P. C. 605, or *Ridsdale v. Clifton* (1877), 2 P. D. 276, P. C., and it is doubtful whether the *dictum* in the latter case that the cope was legal up to 1662 (on the occasions above referred to) would be construed to mean that it is now legal, in the face of the general custom to the contrary. Copes have by ancient and continuous custom been worn by bishops and other clergy on State occasions, for example, at coronations.

(*q*) By the present ordinal (which forms part of the Prayer Book annexed to stat. (1662) 14 Car. 2, c. 4) the rubric (which is statutory (*ibid.*)) directs the elected bishop to be "vested with his rochet" and subsequently to put on "the rest of the episcopal habit." The latter rubrical direction, by ancient and continuous post-Reformation custom, has for over 300 years been taken to mean the chimere. As to the effect of ancient and continuous custom, see *Ridsdale v. Clifton* (1877), 2 P. D. 276, 331, P. C.

(*a*) For example, in Parker's Register; see Tomlinson on Prayer Book, p. 163.

(*b*) These ornaments are not mentioned in the Rubrics of the First Prayer Book of Edward VI. (1549) (2 & 3 Edw. 6, c. 1), nor in the ordinal of 1550 (3 & 4 Edw. 6, c. 12), nor in any subsequent rubric. Not being mentioned in the First Prayer Book, they are not included among lawful church ornaments under the "Ornaments Rubric"; see *Liddell v. Westerton* (1857), 5 W. R. 470; *Martin v. Mackonochie* (1868), L. R. 2 P. C. 365; *Hebbert v. Purchas*, *supra*; *Ridsdale v. Clifton*, *supra*. Section 13 of stat. (1558) 1 Eliz. c. 2, which Act forms part of the present Prayer Book of 1662 (1 Eliz. c. 2, and 14 Car. 2, c. 4), has given rise to a great deal of controversy (see p. 520, *post*). In the last-named case when considering the question of the vestments to be worn by the parochial clergy the Privy Council stated that they did not express any opinion as to the vestures proper to be worn by bishops, as to which separate considerations might arise (see *Ridsdale v. Clifton*, *supra*, at p. 307). For further information as to the vestments worn by bishops, see the evidence given before the Royal Commission on Ecclesiastical Discipline, 1906, and the reports of Committees of the Upper Houses of Canterbury and York Convocations

The presentation to the newly-made bishop of a pastoral staff was abolished in 1552, and was not restored in 1662 (c).

769. The question whether a bishop's charge to his clergy is absolutely privileged in the same way as the charge of a judge to a jury, or a speech in Parliament (d), has not been decided (e); but there is no absolute privilege if the bishop sends a report of his charge to the Press (f).

770. The bishops of London, Durham and Winchester, have seats in the House of Lords, together with twenty-one other bishops summoned in order of seniority (g). No bishop elected by *congé d'élire* can be summoned as a lord of Parliament until his election has been confirmed (h).

A bishop is not a peer (i), and cannot be tried by the peers in Parliament (k). All diocesan bishops are considered entitled to

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—
Bishop's charge, how far privileged.

Right to sit in House of Lords.

presented in 1908. For arguments that in the above-mentioned s. 25 of stat. (1558) 1 Eliz. c. 2, the words "in use" mean "in trust" and that the rubric of 1552 requiring a bishop to wear simply a rochet is still the law, see Tomlinson on the Prayer Book.

(c) Compare rubrics in the statutory ordinals of 1550, 1552 and 1662. Gibson, Bishop of London, writing in 1713, and speaking of the pastoral staff, mitre, episcopal ring, and gloves says: "All which, and many other superstitions of like nature (as savouring more of the ceremonies of the Jewish than of the simplicity of the Christian religion), our Reformed Church hath prudently and piously laid aside in the consecration of her archbishops and bishops, retaining only such outward tokens as are most ancient and most grave" (Gib. Cod. 118); but as to the legal position of the pastoral staff, see the reports of Committees of the Upper Houses of Canterbury and York presented February 5th, 1908, where the recent revival of its use is justified by reference to the rubric for form of consecrating an archbishop or bishop in the Ordinal of 1550, which expressly prescribed its use in that ceremony.

(d) See title LIBEL AND SLANDER.

(e) In *Laughton v. Sodor and Man (Bishop)* (1872), L. R. 4 P. O. 495, the Privy Council declined to decide the question.

(f) *Ibid.*, at p. 502. In this case a charge of the Bishop of Sodor and Man made to his clergy in the Manx Convocation was held to be a privileged communication in the ordinary sense of the term, on the well-known principle that a communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which without that privilege would be defamatory and actionable (*ibid.*, at p. 504). But it does not necessarily follow that the publication of his charge by a bishop in a local newspaper is equally privileged (*ibid.*). In the special circumstances of the case it was held that the bishop was justified in making such publication, as he acted *bonâ fide* for the purpose of vindicating himself, or of informing the public upon matters which they were concerned to know and not of defaming or injuring his opponent (*ibid.*, at p. 505); and although the expressions used by the bishop undoubtedly went beyond what was necessary for self-defence, they afforded no evidence of malice (*ibid.*, at p. 508).

(g) Ecclesiastical Commissioners Act, 1847 (10 & 11 Vict. c. 108), s. 2. Formerly all the diocesan bishops of England and Wales, except Sodor and Man, had seats in the House of Lords.

(h) *Evans v. Ascough* (1627), Lat. 233.

(i) Stephens, *Laws relating to the Clergy*, p. 163, citing the First Report on the Dignity of a Peer, p. 70; Cruise on Dignities, p. 53; and see p. 387, *ante*.

(k) See titles COURTS, Vol. IX., p. 19; CRIMINAL LAW AND PROCEDURE, *ibid.*, p. 270.

SECT. 5. be addressed or referred to as "My Lord," "Right Reverend,"
Constitu- "Father in God," and "by Divine Permission" (*l*), or in the case
tion of the of the Bishop of Durham "by Divine Providence." A diocesan
Church into bishop is a dignitary (*m*).
Dioceses.

Precedence. Diocesan bishops in the House of Lords have precedence next after viscounts, and in social rank next after the younger sons of marquises (*n*).

In the House of Lords, the archbishops and bishops sit together on the right side of the chamber, the Bishop of London sits next after the Archbishop of York, then the Bishop of Durham, then the Bishop of Winchester, and then the other twenty-one bishops "after their ancients" (*o*).

Bishops not The lords spiritual are not essential to the House of Lords. The
essential to King can hold a Parliament without any spiritual lords (*p*), and
House of Queen Elizabeth's Act of Uniformity was passed in spite of the
Lords. dissent of all the bishops (*q*).

In criminal cases the lords spiritual withdraw and make their proxies (*r*).

Corporation. **771.** A bishop is a corporation sole, with perpetual succession and a seal (*s*). A bishop may use a seal other than that of his office, for letters of institution, as the seal is not material (*t*).

Suffragan **772.** Strictly speaking, all the bishops of a province are suffragans
bishops. or helpers to the chief or archbishop, but the term "suffragan" is now usually applied to an inferior order of bishops who assist the diocesan bishops (*u*).

When a diocesan bishop desires to have a suffragan he petitions His Majesty to appoint one of two spiritual persons named by him; and, upon such presentation, His Majesty has power to give such person the title of bishop suffragan of such see as he may think convenient, so that it be within the same province (*a*). After the title is given, the King sends his letters patent to the archbishop of the province requiring him to consecrate the said person within three months, unless he is already a bishop (*b*). Two bishops or suffragans must assist at the consecration (*c*).

The suffragans take only such profits, jurisdiction, and authority as are licensed and limited to them by their diocesans by commission

(*l*) Burke's Peerage, Introduction, pp. 4, 5; and see p. 387, *ante*.

(*m*) See note (*g*), p. 403, *ante*.

(*n*) See Burke's Peerage, ed. 1909, Order of Precedence, p. 2410. Bishops' wives have no special rank corresponding to their husbands' dignities (*ibid.*, Order of Precedence among Women, p. 2411).

(*o*) Stat. (1539) 31 Hen. 8, c. 10, s. 3; Ecclesiastical Commissioners Act, 1847 (10 & 11 Vict. c. 108), s. 2.

(*p*) Stephens, Laws relating to the Clergy, p. 164; and see title PARLIAMENT.

(*q*) These bishops were Queen Mary's Popish prelates.

(*r*) 3 Co. Inst. 31.

(*s*) As to the seal, see p. 388, *ante*; see generally, title CORPORATIONS, Vol. VIII., pp. 306, 309.

(*t*) *Cort v. St. David's (Bishop)* (1634), Cro. Car. 341.

(*u*) Their election and consecration is regulated by stat. (1534) 26 Hen. 8, c. 14, as amended by the Suffragans Nomination Act, 1888 (51 & 52 Vict. c. 56).

(*a*) Stat. (1534) 26 Hen. 8, c. 14, s. 1.

(*b*) *Ibid.*, ss. 1—3; Suffragan Bishops Act, 1898 (61 & 62 Vict. c. 11), s. 1.

(*c*) Stat. (1534) 26 Hen. 8, c. 14, s. 5; see p. 397, *ante*.

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under their seals, and no suffragan may use any jurisdiction or episcopal power or authority otherwise for longer time than shall be limited by such commission, on pain of a *præmunire* (*d*).

Any town within the province which the King in Council may direct may be taken for the see of a bishop suffragan (*e*).

A bishop suffragan, as a rule, continues to hold his living after consecration; and he is permitted to hold two benefices with cure (*f*). He is not entitled to sit in the House of Lords nor in the upper house of either convocation. His style and title is "bishop suffragan of the same see whereunto he shall be named" (*g*). Residence anywhere in the diocese where he has commission is sufficient (*h*).

773. A coadjutor is an assistant bishop who may be appointed in the event of mental incapacity of a bishop (*i*). The procedure is similar to that on the resignation of a bishop (*k*). The coadjutor is elected by *congé d'élire* or letters patent as if the bishopric were vacant. He cannot sit in the House of Lords nor sign himself by the name of the diocese; the incapacitated bishop retaining his rank, style and privilege; but the spiritualities and patronage of the see vest in him. On the death of the incapacitated bishop the coadjutor bishop normally succeeds to the bishopric, but in the case of the bishoprics of London, Durham, or Winchester, the bishop of some other diocese, not being that of Sodor and Man, may be translated to the bishopric, and in that case the coadjutor bishop succeeds to the bishopric left vacant by the translation (*l*).

Coadjutor
bishop.

774. The King has power to create a bishopric in any part of his dominions, except where, as in Scotland, such an exercise of the prerogative is forbidden (*m*), or where, as in a colony, there is a responsible government (*n*).

Creation of
bishoprics.

775. When a clergyman is made bishop of a diocese in England or Wales, all his other preferments are vacated, and the right of presentation to them devolves on the King, but this rule does not apply to a promotion to an Irish, Scotch, or colonial bishopric, or to a suffragan bishopric in England (*o*).

Cession.

(*d*) Stat. (1534) 26 Hen. 8, c. 14, s. 4.

(*e*) Suffragans Nomination Act, 1888 (51 & 52 Vict. c. 56). Before this Act, only certain towns mentioned in stat. (1534) Hen. 8, c. 14, s. 1, could be taken as sees for suffragans.

(*f*) Stat. (1534) 26 Hen. 8, c. 14, s. 7.

(*g*) *Ibid.*, s. 1.

(*h*) *Ibid.*, s. 6.

(*i*) Under the provisions of the Bishops Resignation Act, 1869 (32 & 33 Vict. c. 111); made perpetual by stat. (1874) 38 & 39 Vict. c. 19.

(*k*) See p. 407, *post*.

(*l*) Bishops Resignation Act, 1869 (32 & 33 Vict. c. 111), ss. 3—5, 11. His income is £2,000 a year (except in the case of Sodor and Man, where it is £1,000) payable half-yearly. As to an archbishop, see p. 389, *ante*.

(*m*) *R. v. Eton College* (1857), 8 E. & B. 610, *per* Lord CAMPBELL, at p. 635; and now, it is apprehended, since the disestablishment, in Ireland.

(*n*) See *Long v. Cape Town (Bishop)* (1863), 1 Moo. P. O. C. (N. S.) 411. As to the creation of new bishoprics in England and Wales, see p. 395, *ante*.

(*o*) *R. v. Eton College*, *supra*. By the canon law this rule as to avoidance

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776. Bishops have what are practically fixed annual incomes (*p*) secured to them by the Ecclesiastical Commissioners in lieu of their ancient temporalities which are vested in the commissioners (*q*). Bishops of new dioceses are partly paid out of the income of funds voluntarily subscribed for the purpose (*r*).

Patronage.

777. Bishops have very considerable patronage. They have in their gift a large number of benefices (*a*). They appoint to chancellorships (*b*), archdeaconries (*c*), rural deaneries (*d*), honorary canonries (*e*), and most of the canonries (*f*).

Public worship.

778. A clergyman is bound by the oath of canonical obedience to obey all such commands as the bishop by law is authorised to impose (*g*), but the bishop has no power personally to compel the incumbent to adopt one of two alternatives both equally legal (*h*), and, public worship being regulated by Act of Parliament, neither the bishop nor anyone else, unless authorised by statute, has power to dispense with strict adherence to the statutory forms prescribed by the Acts of Uniformity (*i*).

The bishop has, however, certain powers as to public worship conferred by statute (*k*), including power to direct the performance of a third or additional service, being either the morning or evening service, with sermon on Sundays or great festivals in certain circumstances where the existing accommodation is not

applied to promotion to any bishopric of the Roman Church, and (prior to disestablishment) was continued as to Ireland (*Evans v. Ascough* (1627), Lat. 233; *Colt v. Coventry and Lichfield (Bishop)* (1617), Hob. 140, 157).

(*p*) Ecclesiastical Commissioners Acts, 1836 (6 & 7 Will. 4, c. 77); 1850 (13 & 14 Vict. c. 94), s. 17; 1860 (23 & 24 Vict. c. 124), s. 1. The incomes appointed in 1836 were, London £10,000, Durham £8,000, Winchester £7,000, and the others about £5,000 each. Variations have been made in some of these incomes by statutory Orders in Council. For these Orders, see Pulling's Index to the London Gazette, under the names of the various dioceses, also the annual "Statutory Rules and Orders."

(*q*) See Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), s. 2; and p. 800, *post*; and as to temporalities, p. 408, *post*.

(*r*) See, for instance, Bishoprics Act, 1878 (41 & 42 Vict. c. 68), s. 2.

(*a*) For the details, see Crockford's Clerical Directory, or the Clergy List.

(*b*) See p. 412, *post*.

(*c*) See p. 437, *post*.

(*d*) See p. 440, *post*.

(*e*) See p. 433, *post*.

(*f*) See p. 427, *post*.

(*g*) *Long v. Capetown (Bishop)* (1863), 1 Moo. P. C. C. (N. S.) 411, *per* Lord KINGSDOWN, at p. 445. A bishop may, of course, give advice either with or without being requested so to do under the clause in the Preface to the Prayer Book concerning the service of the Church.

(*h*) The discretion, if there be any such, is exercised by the court. See *Re York (Dean)* (1841), 2 Q. B. 1; Report of the Ecclesiastical Commissioners, 1832, followed by the Church Discipline Act, 1840 (3 & 4 Vict. c. 86); *Hutchins v. Denziloe* (1792), 1 Hag. Con. 170, *per* Lord STOWELL.

(*i*) Stat. (1548) 2 & 3 Edw. 6, c. 1, s. 2; stat. (1549) 3 & 4 Edw. 6, c. 10, s. 1; stat. (1558) 1 Eliz. c. 2, ss. 1, 2; stat. (1662) 14 Car. 2, c. 4, s. 13; and see Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 35). As to small deviations, see *Newberry v. Godwin* (1811), 1 Phillim. 282.

(*k*) Apart from statute he has no *jus liturgicum* (*Kemp v. Wickes* (1809), 3 Phillim. 264, 268). See as to divine worship, p. 657, *post*.

sufficient (*l*), and power to approve special forms of service to be used on special occasions in any cathedral or church (*m*), and power to approve an additional form of service in any cathedral or church in which the Morning and Evening Prayer, the Litany and ante-Communion Service are duly read (*n*).

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779. The bishop has an absolute discretion under the Church Discipline Act, 1840 (*o*), as to whether he will issue a commission of inquiry into offences under that Act (*p*), and under the Public Worship Regulation Act, 1874 (*q*), as to whether he will, after considering the whole circumstances of the case, stop proceedings taken under that Act (*r*).

Bishop's veto.

(iv.) *Vacation of Bishopric.*

780. A bishopric may become vacant by death, deprivation (*s*), translation (*t*), or resignation (*u*). Vacancy.

A bishop can be deprived by his metropolitan sitting alone or with assessors (*x*), subject to an appeal to the King in Council (*a*). Deprivation.

All resignations must be made to some superior, and should be made to the immediate superior (*b*). Thus, though an archbishop can resign to none but the Sovereign himself, a bishop may and should resign to his metropolitan (*c*). Resignation

When a bishop becomes incapacitated by age or some mental or permanent physical infirmity, His Majesty may, if satisfied of such incapacity and that the bishop has canonically resigned, declare the see vacant (*d*).

(*l*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 65; Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 80.

(*m*) Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 35), ss. 3, 4.

(*n*) *Ibid.*, s. 4; and p. 660, *post*.

(*o*) 3 & 4 Vict. c. 86.

(*p*) *Julius v. Oxford (Bishop)* (1880), 5 App. Cas. 214, 234.

(*q*) 37 & 38 Vict. c. 85.

(*r*) *Allcroft v. London (Bishop)*, *Lighton v. London (Bishop)*, [1891] A. C. 666.

(*s*) 1 Bl. Com. 382.

(*t*) *Evans v. Askwith* (1627), W. Jo. 158, 160; see p. 400, *ante*.

(*u*) See *infra*.

(*x*) *St. David's (Bishop) v. Lucy* (1699), Carth. 484; *Clogher's (Bishop) Case* (1822), Annual Register for 1822, Vol. LXIV., pp. 425, 432; and see *Ex parte Read* (1888), 13 P. D. 221, P. O. The archbishop in person is (it would seem) for this purpose an ecclesiastical court.

(*a*) Ayl. Par. 124; *Read v. Lincoln (Bishop)*, [1892] A. C. 660.

(*b*) 1 Bl. Com. 382; Gib. Cod. 822.

(*c*) Godolphin, Repertorium Canonicum, p. 191. A resignation should be made to the immediate ordinary and not to the mediate, for which reason a prebend (*i.e.*, canon) may not resign to the King, for that although he is Supreme Ordinary yet he is not the Immediate Ordinary (*ibid.*, p. 191).

(*d*) Bishops Resignation Act, 1869 (32 & 33 Vict. c. 111), made perpetual by stat. (1875) 38 & 39 Vict. c. 19. The retiring bishop is to receive out of the revenue of the see one-third of the income or £2,000 a year, whichever is the greater, and may have assigned to him for his use for life any episcopal residence occupied by him. The new bishop is not required to pay the usual fees and charges on accession till the death of the retiring bishop, except the necessary expense of his election and consecration (*ibid.*, s. 2). As to an archbishop's resignation, see p. 389, *ante*.

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Temporalities.

781. During the vacancy of a bishopric the King is the guardian and custodian of the temporalities, by his prerogative as the founder of all archbishoprics and bishoprics, to whom during the vacancy they revert (*e*). The temporalities are all such things as the bishops have by livery from the King, as castles, manors, lands, tenements, parsonages, tithes, and all other certainties for which the King is responsible during the vacancy (*f*). The temporalities include rights of presentation to livings of which the bishop in right of his see is patron, and though the Crown restore the temporalities to the new bishop without filling up the incumbency, the right to fill it up remains with the Crown (*g*).

Waste.

The King may not commit waste in the temporalities, nor may the custody of them be sold (*h*). The temporalities may not be seized and kept "by a long season" (*i*).

Restitution.

The temporalities remain in the King's hands until the new bishop sues for them out of his hands by a writ *de restitutione temporalium* which he cannot do *de jure* till after consecration (*k*), or, if already a bishop, confirmation. But the King *ex gratiâ* by his letters patent may grant them to him after confirmation and before consecration (*l*); and the new bishop, as soon as he is consecrated and confirmed, usually receives the restitution of his temporalities quite entire and untouched from the King. Thereupon, he has a fee simple in his bishopric, and may maintain an action for the profits (*m*).

Spiritualities.

782. A bishop's spiritualities include all manner of jurisdictions of the courts ecclesiastical, such as granting licences to marry (*n*), which though really of a temporal nature are not included in the temporalities (*o*). The archbishop of the province is guardian of the spiritualities during the vacancy of a bishopric, having all the jurisdiction of the courts, and the right of granting admissions and institutions, but it is said that he cannot, as such, consecrate or ordain (*p*), nor can he, of course, interfere with the temporalities (*q*).

(*e*) 1 Bl. Com. 380; stat. (*temp. incert.*) of King's Prerogative, c. 16; *Covett's Case* (1600), Cro. Eliz. 754.

(*f*) *Case de Temporalities* (1583), Sav. 52; Watson, Clergyman's Law, p. 760.

(*g*) *Rennell v. Lincoln (Bishop)* (1827), 7 B. & C. 113, 186; *Ex parte Tarrant* (1783), Rom. 119.

(*h*) *Magna Charta* (1224), 9 Hen. 3, c. 5; see also Statute of Westminster I. (1275), 3 Edw. 1, c. 21.

(*i*) Stat. (1327) 1 Edw. 3, st. 2, c. 2. Fleta saith "*vendi non debent nec legari*, yet the King may commit the temporalities of them during the vacation as by statute appeareth"; stat. (1340) 14 Edw. 3, st. 4, cc. 4, 5; 2 Co. Inst. 15, where a history of the question will be found.

(*k*) Watson, Clergyman's Law, p. 764.

(*l*) *Ibid.*, 764.

(*m*) 1 Bl. Com. 283; Co. Litt. 67 a, 341 b. As to the transfer of temporalities to the Ecclesiastical Commissioners in some cases, and the reception by the bishops of fixed stipends, see p. 406, *ante*, and p. 800, *post*.

(*n*) *Case de Temporalities*, *supra*; formerly also (before 1856) probate of wills and matrimonial causes, see stat. (1344) 18 Edw. 3, st. 3, c. 1; Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85); and p. 701, *post*.

See stat. (1532) 24 Hen. 8, c. 12, s. 1.

Godolphin, Repertorium Canonicum, pp. 21, 40.

2) See *supra*.

After election and confirmation, or appointment by letters patent, the new bishop becomes entitled to exercise all the spiritual jurisdiction exercised during the vacancy by the guardian, and consequently the power of the latter then ceases (*r*).

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[(*v*.) *Episcopal Visitation*.]

783. Visitation, in the common acceptation of the term, denotes the act of the bishop or of some other ordinary going his circuit throughout his diocese or district with a full power of inquiring into such matters as relate to the government and discipline of the Church. Visitation implies some coercive authority (*a*), and is one of the principal duties of a bishop; and to this purpose he has several courts under him, and may visit at pleasure every part of his diocese (*b*). Definition of visitation.

The principal object of visitation is that the bishop, archdeacon or other person assigned to visit, may get some good knowledge of the state, sufficiency, and ability of the clergy and other persons whom they are to visit; and therefore every clergyman must exhibit his letters of orders, institution, induction, and all his dispensations, licences or faculties whatsoever, at the next visitation after his admission to a living or curacy (*c*). Object of.

784. The Roman canon law concerning visitors has not, as a whole, been incorporated into the common law, and consequently is not binding on the subject, except in so far as it has been incorporated by custom or statute (*d*). Where it appears there is a visitor, the common law courts cannot intermeddle (*e*). There are, however, certain rules made by statute as to visitations. Thus, the right of visitation itself is acknowledged. Any bishop or archdeacon can hold visitations of the clergy within the limits of his diocese or archdeaconry, and at such visitations may admit churchwardens, receive presentments, and do all other matters by custom appertaining to the visitation of bishops and archdeacons in the places assigned to his jurisdiction and authority (*f*). Visitors may, on default being made by chapters, propose alterations in their statutes (*g*), and the consent of visitors may be required in certain cases as to the disposal of property (*h*). Canon and common law.

Statutory rules.

785. In a diocesan visitation it is usual for the bishop first to visit his cathedral church, afterwards the diocese (*i*); but the Procedure.

(*r*) Gib. Cod. 114.

(*a*) Ayl. Par. 514.

(*b*) 1 Bl. Com. 382, including hospitals if spiritual (*Philips v. Bury* (1694), judgment of HOLT, C.J., reported 2 Term Rep. 346, 353).

(*c*) Canon 137. As to archidiaconal visitation, see also p. 439, *post*.

(*d*) *Philips v. Bury* (1694), 1 Ld. Raym. 5, 7; 1 Bl. Com. 79, 80. As to visitation generally, see title CHARITIES, Vol. IV., pp. 287 *et seq*.

(*e*) *R. v. Chester (Bishop)* (1747), 1 Wils. 206.

(*f*) Pluralities Act, 1838 (1 & 2 Vict. c. 106); Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 28.

(*g*) By the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 47.

(*h*) See Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 68; Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 18.

(*i*) See Gib. Cod. 957.

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Who is
visitable.

Authority of
bishop over
parson.

manner of the visitation is not so material as to be a ground for prohibition, because any error or defect in the manner of the visitation may be remedied by appeal (*k*).

Every spiritual person is visitable by the ordinary. This includes a dean *de mero jure* (*l*), a dean and chapter (*m*), and the inferior clergy and the ordinary may also visit spiritual hospitals (*l*). Laymen (except churchwardens and sidesmen) are not visitable (*n*).

Though the ordinary once had power of correction of a parson (*l*), meaning summary power of correction, his power over the clergy of his diocese and of correcting them is now established and exercised by proceedings in the ecclesiastical courts. Private admonition may in some cases be sufficient, but where it is necessary to take proceedings, they must be by articles against a clergyman when acting contrary to his duty as a minister of the Church of England and as a beneficed clergyman (*o*). The Church Discipline Act, 1840 (*p*), preserved any authority over the clergy which the archbishops and bishops might at that date according to law exercise personally and without process in court, but at the same time provided that no criminal suit or proceeding against a clerk in holy orders for any offence against the laws ecclesiastical should be instituted in any ecclesiastical court otherwise than is by the Act provided (*a*). An archbishop or bishop exercising his general authority as visitor of an ecclesiastical body, and not visiting under the statutes of a particular foundation, acts not personally, but as judge in a court (*b*), and must follow established

(*k*) *Kildare (Bishop) v. Dublin (Archbishop)* (1724), 2 Bro. Parl. Cas. 179, discussed in *Re York (Dean)* (1841), 2 Q. B. 1, per Lord DENMAN, C.J., at p. 37.

(*l*) Godolphin, *Repertorium Canonicum*, p. 34; *Philips v. Bury* (1694), reported 2 Term Rep. 346, 353; *Walrond v. Pollard* (1568), 3 Dyer, 273 a.

(*m*) Stephens, *Laws relating to the Clergy*, p. 1379; *Harrison v. Dublin (Archbishop)* (1713), 2 Bro. Parl. Cas. 199; *Kildare (Bishop) v. Dublin (Archbishop)* (1724), 2 Bro. Parl. Cas. 179.

(*n*) *Anon.* (1607), Noy, 123.

(*o*) *Sanders v. Head* (1843), 2 Notes of Cases, 355, per Sir H. JENNER FUST, D.A., at p. 376, or by the legal procedure for the time being in force; see p. 520, *post*.

(*p*) 3 & 4 Vict. c. 86, s. 25.

(*a*) *Ibid.*, s. 23.

(*b*) *Re York (Dean)*, *supra*. Some of the books speak of a Court of Visitation, and the phrase is not incorrect. It is an authority acting with certain forms of procedure and inquiry, suspending its proceedings from time to time by adjournment, making certain orders and decrees; whether or not these acts are of necessity judicial, those done in the course of establishing a charge against a party accused are undoubtedly so (*ibid.*, p. 39). There is no example of a power of deprivation being exercised by bishops over their clergy at a visitation, even in their regular and solemn visitations. They are indeed exempted from the forms required by the common law, and are to proceed, as Comyns says, "*Summarie simpliciter et de plano sine strepitu aut figura judicii*," that is, according to mere law and right (*ibid.*, p. 34, per Lord DENMAN, C.J., citing Com. Dig. tit. Visitor (C)). But some forms, as involving the opportunity of knowing and answering the charges, are absolutely necessary for securing this object (*ibid.*, p. 34). The jurisdiction of visitors has been described in most comprehensive terms by common lawyers of high authority. Lord HOLZ himself is cited as allowing them an arbitrary power in his often-reported judgment on the case of *Philips v. Bury* (1694), Skin. 447, but Lord DENMAN says that

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forms of process and inquiry, at least in hearing accusations with a view to punishment, and therefore, as soon as the visitor proceeds to examine the proofs of an ecclesiastical offence committed by a clerk, for the purpose of deprivation, more especially where the accuser avails himself of the aid of a professional advocate, a criminal proceeding is undoubtedly instituted and in full progress. Such a proceeding is not within the reservation of authority which may be exercised personally and without process in court, and therefore cannot be legally instituted otherwise than as the Act directs (c).

786. The fees payable at an episcopal or archidiaconal visitation amount to 18s. for each parish (d), in addition to procurations and synodals. Bishops' procurations are no longer collected (e). Fees.

787. Episcopal visitations are to be held every third year (f), and if in that year, by reason of some infirmity, the bishop cannot visit, he must not omit the same the next year after as he may conveniently (f). The commissary, at his court of visitation, cannot cite lay parishioners unless only churchwardens and sidesmen, and to these he may give his articles and inquire by them (g). Periods for visitation.

788. During an episcopal visitation, inferior officers stand inhibited (h). The inhibition follows upon the bishop's personal presence, but it suspends all the powers and authorities of the officer affected by it. The bishop brings with him not only the means of visiting the churches and directing ecclesiastical affairs, but the power of acting judicially by his highest officers, of whom the official principal holds the highest place (i). Inhibition.

789. Some places, called "peculiars" are exempt from the visitation of the customary ordinary, and in the case of royal peculiars are visitable only by the Crown as head of the Church (k). Most of the peculiars which once existed (l) were abolished by Exemption of "peculiars."

that case arose out of the visitation of a charitable foundation. Lord Holt, C.J.'s, strong language is all applied to that case (*Re York (Dean)* (1841) 2 Q. B. 1, at p. 36). See, further, for the general powers and duties of a visitor, title CHARITIES, Vol. IV., pp. 287 *et seq.*; *R. v. Rochester (Dean and Chapter)* (1851), 17 Q. B. 1; *Chichester (Bishop) v. Harward* (1787), 1 Term Rep. 650; *Kirkby Ravensworth Hospital Case* (1807), 8 East, 221; *R. v. Ely (Bishop)* (1788), 2 Term Rep. 290; *R. v. Chester (Dean and Chapter)* (1850), 15 Q. B. 513; *Lee's (Dr.) Case* (1858), E. B. & E. 863.

(c) *Ibid.*

(d) See Table of Ecclesiastical Fees, London Gazette, 1908, p. 4064; and note (a), p. 419, *post*.

(e) As to bishops' procurations, see 3 Salk. 379; and as to archidiaconal procurations, see p. 440, *post*.

(f) Canon 60.

(g) *Anon.* (1607), Noy, 123.

(h) *R. v. Sowter*, [1901] 1 K. B. 396, C. A.

(i) *R. v. Thorogood* (1840), 3 Per. & Dav. 629, *per* Lord DENMAN, at p. 640, where an officer who was both commissary and official principal was inhibited as commissary, but his authority was revived as official principal.

(k) See stat. (1533) 25 Hen. 8, c. 21; stat. (1558) 1 Eliz. c. 1.

(l) There were, as appears from the Report of the Ecclesiastical Commissioners in 1832, p. 21, upwards of 300 of such special ecclesiastical jurisdictions in England, including royal peculiars, of which there were eleven (*Combe v. De la Bere* (1882), 22 Ch. D. 316, C. A., *per* CHITTY, J., at p. 328).

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statute (*m*), but royal residences and certain other places still remain as peculiars (*n*).

For the purposes of the Pluralities Act, 1838 (*o*), and the Church Discipline Act, 1840 (*p*), the archbishops and bishops have by statute (*o*) all necessary powers over peculiars.

(vi.) *Diocesan Chancellors.*

Definition.

790. Chancellors, vicars-general, official principals and commissaries, are officials appointed by the bishops with authority to execute for them the offices of ecclesiastical judge and administrator (*q*). By the Clergy Discipline Act, 1892 (*r*), a chancellor is defined as the judge of the consistory court by whatever name known. Although the nomination of the chancellor is in the bishop, yet his authority is derived from the law (*s*). He is a King's judge, in one of the King's courts, namely, the consistory court of a diocese (*t*). Hence the law understands him as an ordinary as well as the bishop (*a*). Like the archdeacon, he is *oculus episcopi* (*b*).

Appointment.

791. Chancellors, commissaries, officials, scribes or registrars, are appointed by the King, or by archbishops, bishops, or archdeacons or other persons having authority under the King, by letters patent under seal (*c*). The appointment, when made by a bishop, is usually for the life of the grantee, the dean and chapter confirm, and thereupon the chancellor has a freehold for life (*d*) on the terms of the patent, subject to due qualification (*d*).

If the bishop will not choose a chancellor the metropolitan may and ought to do it, for the reason that the bishop himself, according to the common law, cannot be a judge in his own consistory court except in some particular cases (*e*). In cases under the Clergy Discipline Act, 1892 (*f*), the chancellor must preside in the consistory court, and he alone is to determine any question of law. A

(*m*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 10; Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 24 (*Combe v. De la Bere* (1882), 22 Ch. D. 316, O. A.).

(*n*) For example, Westminster Abbey, St. George's, Windsor, and the Chapels Royal. The site of the old Palace of Westminster is not now a peculiar, being no longer a royal residence (*Combe v. De la Bere, supra*).

(*o*) 1 & 2 Vict. c. 106, s. 108.

(*p*) 3 & 4 Vict. c. 86, s. 22.

(*q*) *Ex parte Medwin* (1853), 1 E. & B. 609, 616.

(*r*) 55 & 56 Vict. c. 32, s. 12.

(*s*) Godolphin, Repertorium Canonicum, p. 81.

(*t*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 12; as to Ecclesiastical Courts, see p. 499, *post*.

(*a*) Godolphin, Repertorium Canonicum, p. 81.

(*b*) *Ibid.*, 85.

(*c*) See the repealed s. 4 of stat. (1545) 37 Hen. 8, c. 17.

(*d*) Godolphin, Repertorium Canonicum, p. 83; *Sutton's (Dr.) Case* (1627), Litt. 22; *Jones v. Llandaff (Bishop)* (1693), 4 Mod. Rep. 27; 12 Mod. Rep. 47.

(*e*) Ayl. Par. 161; *Sutton's (Dr.) Case, supra*. "The bishop must appoint a chancellor or official principal, and he may be compelled to do so by the archbishop" (*Ex parte Medwin* (1853), 1 E. & B. 609, 616).

(*f*) 55 & 56 Vict. c. 32, s. 2 (*o*).

chancellor therefore is a necessity in a diocese (*g*) in spite of the bishop's reservations in certain patents hereinafter referred to (*h*).

792. In certain dioceses, by a special provision, at the prayer of the party the bishop's judgment may be invoked. But where this prayer is not made the chancellor seems to be an independent judge (like the King's other judges), nor is he the less so because some cases are excepted from his jurisdiction, nor because that jurisdiction ceases or is suspended when the bishop is present. If absent, the bishop cannot interfere; the parties are never supposed by the citation or other proceedings to be before him, nor is there any appeal from the chancellor to him (*i*).

Hence a bishop may be interested in a cause in the consistory court, may guarantee the costs thereof, and may obtain costs (*j*).

As a general rule the chancellor has, immediately under the bishop, jurisdiction of all matters ecclesiastical within the diocese (*k*), but this depends on the form of the patent (*l*).

793. The form and contents of the chancellor's patent vary in different dioceses (*m*).

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patent.

(*g*) See note (*e*), p. 412, *ante*.

(*h*) See *infra*.

(*i*) *Ex parte Medwin* (1853), 1 E. & B. 609, *per* Lord CAMPBELL, at p. 615; *R. v. Tristram*, [1902] 1 K. B. 816, C. A.

(*j*) *Ex parte Medwin*, *supra*, at p. 613.

(*k*) *Ibid.*; Godolphin, Repertorium Canonicum, p. 85; Ayl. Par. 160.

(*l*) *R. v. Tristram*, *supra*.

(*m*) Forms of patents of chancellors, vicars-general, and official principals (and of confirmations by the deans and chapters) will be found in the Ecclesiastical Courts Commission's Report, 1883, at pp. 659 *et seq.* Those used in the diocese of Sodor and Man are the shortest. In 1877 separate patents were granted by the Lieutenant-Governor of the Isle of Man and by the bishop. The latter by his patent appoints — to be his vicar-general, chancellor and official principal of his diocese during “our goodwill and pleasure,” and during “his diligent discharge of the duties of the said offices,” and gives him power “to grant faculties and licences of marriage,” “to decide all spiritual causes and to administer according to the laws of the Church, to correct all offenders and to do all other things which belong, or are deemed to belong, to the said offices.” The chancellor's appointment is usually to the offices of vicar-general and official principal (*ibid.*, see the patents). “The chancellor is the bishop's vicar-general” (*Sutton's (Dr.) Case* (1627), Litt. 22). The following is an abstract of Dr. Tristram's patent to the chancellorship of London:—The bishop deposes and authorises the said Dr. Tristram to do and execute the power and authority of us and our successors in all matters and things which belong to the offices of vicar-general and official principal, also to hold the said offices together with the emoluments to the said Dr. Tristram during his natural life in as full and ample a manner as his nine predecessors (mentioned by name). And further to the intent and purpose that the said Dr. Tristram may the better understand how to act “as by law and custom he is bound to do,” the following details are given: He is to take cognizance of and proceed in all causes appertaining to his ecclesiastical court, including crimes, excesses, and offences committed within the diocese, to punish clergy and laity by ecclesiastical censures, to institute clerks (in the diocese or its peculiars) and cause them to be inducted (the bishop reserving to himself and his successors the acceptance of resignations), and to appoint apparitors except the apparitor-general, to grant marriage licences and all other canonical dispensations whatsoever for the bishop and his successors. And, lastly, to do all other necessary matters in or concerning the premises “which to the said offices by right and custom are

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In about one-half of the dioceses the bishop has in the patent reserved to himself the right to exercise his ordinary jurisdiction by himself, or in conjunction with his chancellor, in as ample a manner as if the grant had not been made (*n*). Such reservations are of course illegal if in conflict with the statute law (*o*). In the diocese of Chichester the reservation takes the form of a reservation to the bishop in the event of a request being made, by any of the parties to a suit, for a personal hearing by the bishop. In the event of such a request being made, the consent of the bishop to the chancellor's trying the action is absolutely necessary (*p*).

Jurisdiction.

794. Under the Clergy Discipline Act, 1892 (*q*), the chancellor is not authorised to depose from holy orders, this being left to the bishop, who also must pronounce a sentence of deprivation or of declaration of incapacity to hold preferment (*r*), but the chancellor may pronounce certain judgments (*s*). It is also said that a chancellor cannot license a lecturer (*t*).

Layman may
be chancellor.

795. In pre-Reformation times the chancellor was always in orders (*u*), but since the Reformation a layman has been qualified to hold, and usually has held, the office (*a*).

The statute of Henry VIII. (*b*) (under which most chancellors are now qualified) only enables doctors of the civil law made in any university, married or unmarried, to lawfully hold the office of chancellor etc., and to execute and exercise all manner of ecclesiastical jurisdiction, but this does not operate to prevent other laymen, married or unmarried, from holding such offices and exercising such jurisdiction. The statute declares that the foreign and domestic canon law was by the Act of Submission (*c*) "utterly abolished, frustrate, and of no effect" (including the regulations as to the appointment of ecclesiastical judges), and the Act was only

known to belong although by their own nature they may require a more special mandate."

(*n*) *R. v. Tristram*, [1902] 1 K. B. 816, O. A. "Saving and excepting to ourself . . . the power of sitting in our consistorial court and of exercising all and all manner of jurisdiction and authority to us and our successors in right of our bishopric belonging together with all matters and things hereinbefore saved excepted and reserved" (Form in Diocese of Oxford; Ecclesiastical Courts Commission Report, p. 688). See also canon 11 of the abortive Canons of 1640, but it has no legal force; see p. 377, *ante*.

(*o*) For example, see Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 2 (*e*).

(*p*) *R. v. Tristram*, *supra*.

(*q*) 55 & 56 Vict. c. 32, s. 8.

(*r*) Clergy Discipline Rules, 1892, r. 31 (2); and Clergy Discipline Rules, 1898 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 68 *et seq.*); canon 122; Canon Ecclesiasticus (1892).

(*s*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), ss. 2, 3, 7, and as to Ecclesiastical Courts, see p. 499, *post*.

(*t*) *Smith v. Lovegrove* (1755), 2 Lee, 162, 169.

(*u*) See the preamble to stat. (1545) 37 Hen. 8, c. 17.

(*a*) *Ibid.*, s. 2.

(*b*) Stat. (1545) 37 Hen. 8, c. 17, repealed Statute Law Revision Act, 1863.

(*c*) Stat. (1532) 25 Hen. 8, c. 19, s. 2.

passed because the archbishops, bishops and archdeacons did not in this particular "use" or "put in practice the contrary" to the aforesaid abolished canon law (*d*).

By the Canons of 1604 (not *proprio vigore* binding on the laity) no man can be admitted a chancellor to exercise any ecclesiastical jurisdiction, unless of the full age of twenty-six years, learned in the civil and ecclesiastical laws (*e*), and at the least a master of arts or bachelor of law, and "reasonably well practised in the course thereof as likewise well affected and zealously bent to religion touching whose life and manners no evil example is had" (*f*). He must take the oath of allegiance (*g*), assent to the Articles of Religion (*h*), and also swear that he will deal uprightly and justly in his office, the said oaths to be recorded by a registrar (*i*).

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Qualifications.

796. If a bishop or chancellor exceeds his jurisdiction or appoints an unqualified person to be chancellor, he may be prohibited (*k*); a common law action also will lie against him, and damages may be recovered (*l*). Where the judge of any spiritual court excommunicates a man for cause of which he has not the legal cognisance, he is liable to be indicted at the suit of the King (*m*).

Prohibition.

797. A chancellor, according to the canon, may employ as a substitute or surrogate to "keep any court" for him only either a grave minister and a graduate or a licensed public preacher and a beneficed man near the place where the courts are kept, or a master of arts or bachelor of law at least who has some skill in the civil and ecclesiastical law and is a favourer of true religion and a man of modest and honest conversation, under penalties (*n*).

Surrogate.

The bishop may appoint a deputy chancellor, who must be a barrister of not less than seven years' standing or the holder of a judicial appointment (*o*), which latter expression includes

Deputy chancellor.

(*d*) Stat. (1545) 37 Hen. 8, c. 17, s. 2, repealed Statute Law Revision Act, 1863. This affords another illustration of the rule in *Exeter (Bishop) v. Marshall* (1868), L. R. 3 H. L. 17, that the ancient canon law of Rome, whether continental or domestic, unless continued after the Reformation, and continuously acted on down to the present time, is utterly obsolete and of no effect; see p. 376, *ante*.

(*e*) Canon 127, as to learning; see *Sutton's (Dr.) Case* (1627), Litt. 2, 22; and also *Jones v. Llandaff (Bishop)* (1691), 4 Mod. Rep. 27; (1693) 12 Mod. Rep. 47, in which *Sutton's Case* is denied to be law.

(*f*) Canon 127.

(*g*) *Ibid.*, formerly the oath of supremacy; see Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 8.

(*h*) *Ibid.*, and Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 1.

(*i*) *Ibid.* Certain canons as to chancellors were made in 1640, but they are of no authority whatever; see p. 380, *ante*.

(*k*) See 7 Com. Dig. 144, tit. Prohibition (F. 4); *Jones v. Llandaff (Bishop)*, *supra*; see title CROWN PRACTICE, Vol. X., p. 141.

(*l*) *Beaurain v. Scott (Bt. Hon. Sir William)* (1812), 3 Camp. 388, which was an action on the case for unlawful excommunication; *Ackerley v. Parkinson* (1815), 3 M. & S. 411; and as to ecclesiastical courts, see p. 499, *post*.

(*m*) 2 Co. Inst. 623; 1 Bl. Com. 101.

(*n*) Canon 128.

(*o*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 10 (*s*).

SECT. 5.
Constitu-
tion of the
Church into
Dioceses.

Emoluments.
Office not
saleable.

Kinds of
deans.

Definition.

chairmanship of quarter sessions and a police or stipendiary magistrateship (*p*).

798. Chancellors are paid by fees, which are in some cases authorised by statute (*q*).

799. A chancellorship is not saleable (*r*).

SUB-SECT. 3.—*Deans and Chapters.*

(i.) *Deans generally.*

800. There are several kinds of ecclesiastical deans: (1) Deans of chapters, often called cathedral deans; (2) deans of peculiars (without chapters), who have sometimes both jurisdiction and cure of souls, as the Dean of Battle in Sussex, and sometimes jurisdiction only, as the Dean of the Arches (*s*) in London, and the Dean of Bocking in Essex; (3) rural deans (*a*); (4) honorary deans, as the deans and sub-deans of the Chapels Royal (*b*); and (5) provincial deans, for example, the Bishop of London is dean of the province of Canterbury, but there does not appear to be a dean of the province of York (*c*). In addition to these there are other deans of a quasi-ecclesiastical character, as deans of colleges and of faculties in universities, who need not be in orders (*d*).

(ii.) *Deans of Chapters.*

801. A dean of a chapter, or, as he is sometimes called, a cathedral dean, is the head of a chapter of a cathedral or collegiate church (*e*).

(*p*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 12.

(*q*) See Table of Ecclesiastical Fees under the Ecclesiastical Fees Act, 1867 (30 & 31 Vict. c. 135); Order in Council of June 2, 1908, London Gazette of that date; see note (*a*), p. 419, *post*.

(*r*) Sale of Offices Act, 1551 (5 & 6 Edw. 6, c. 16); *Trevor's (Dr.) Case* (1511), 12 Co. Rep. 78. It is considered that corruption in connection with an ecclesiastical judgeship is worse than in the case of a civil judgeship. "For the temporal judge commits the party convict to the gaoler, but the spiritual judge commits the person excommunicate to the devil" (*ibid.*).

(*s*) The original Dean of the Arches had jurisdiction only over thirteen peculiars (now abolished) of the Archbishop of Canterbury in London (see *Dale's Case*, *Enraght's Case* (1881), 6 Q. B. D. 376, *per* MANISTY, J., at p. 413). As to the judge who now bears the name, see p. 509, *post*.

(*a*) See p. 440, *post*.

(*b*) See Co. Litt. 95 a, note 102.

(*c*) *Ibid.*

(*d*) Co. Litt. 95 a, note 102, in which six kinds of deans are enumerated. Godolphin says the civil and canon laws do chiefly take notice but of three sorts of deans, namely, (1) the dean set over ten soldiers; (2) deans rural; (3) cathedral deans (*Repertorium Canonicum*, p. 53).

(*e*) See Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77), s. 4. Bishop Kennett says (*Parochial Antiquities*, p. 633): "When, in episcopal sees, the bishops dispersed the body of their clergy by affixing them to parochial cures, they reserved a college of priests or secular canons for their counsel and assistance, and for the constant celebrations of divine offices in the mother or cathedral church, where the tenth person had an inspecting and presiding power, till the senior or principal dean swallowed up the office of all the inferior, and, in subordination to the bishop, was head or governor of the whole society" (and see *Norwich (Dean and Chapter) Case* (1598), 3 Co. Rep. 73 a, 75 b). "His office was to have authority over all the canons, presbyters, and vicars, and to give possession to them when instituted by the bishop, to inspect their

No person is capable of receiving the appointment of a cathedral dean until he has been six complete years in priests orders (*f*). He must therefore be fully thirty years of age, as the minimum statutory age for ordination as priest is twenty-four (*g*).

All heads of chapters are now called deans (*h*). As a rule there is a dean of every cathedral and collegiate church. The exceptions are Sodor and Man, and some of the recently created dioceses. Thus, at Truro and Newcastle there are four canons residentiary; but no dean has, as yet, been appointed, though power to appoint one, under certain conditions, has been reserved to His Majesty under the respective Chapter Acts (*i*).

Sometimes the bishop of the diocese is empowered to act as dean of the cathedral. Thus, by the Truro Bishopric and Chapter Acts Amendment Act, 1887, the bishop, in addition and without prejudice to his functions, power, jurisdiction, and authority (and until the appointment of a dean), is to have, perform, and exercise all the functions, power, jurisdiction, and authority of a dean, provided that the bishop is not as dean to be liable to be summoned to convocation, and that no obligation in regard to residence is to be imposed upon him (*k*).

SECT. 5.
Constitution of the Church into Dioceses.

Sees without deans.

Bishop acting as dean.

802. Deans of cathedrals and collegiate churches are now appointed by royal letters patent. Those of the old foundation

Appointment.

discharge of the cure of souls, to convene chapters and preside in them, there to hear and determine proper causes, and to visit all churches once in three years, within the limits of their jurisdiction. The men of this dignity were called archpresbyters, because they had a superintendence or primacy over all their colleges of canonical priests; and were likewise called *decani christianitatis*, because their chapters were courts of christianity or ecclesiastical judicatures, wherein they censured their offending brethren, and maintained the discipline of the church within their own precincts."

(*f*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 27. Formerly the rule was different; from 1662 to 1840 any person in priests orders was eligible. Prior to 1662 a deacon could regularly hold the office, and there have been instances of laymen doing so. The rule of the canon law was "*nullus in archipresbyterum nullus in decanum, nisi presbyter ordinetur*," but the gloss qualifies this, saying, "*sufficit si talis sit quod in brevi possit promoveri ad istum ordinem*" (Dist. 60, c. 1, 2, 3; Stephens' Laws relating to the Clergy, p. 404). The legatine canons made at London in 1126, No. 7, say "that none be promoted to a deanery but a priest" (Johnson, Ecclesiastical Laws, pp. 1126—7). The holding of a canonry residentiary, prebend, or office is not now necessary to the holding of the deanery of any cathedral church in England, or to the entitling of any dean to his full share of the divisible corporate revenues of such church, although such share may not heretofore have been received by any preceding dean otherwise than as a canon residentiary (Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 5).

(*g*) Preface to Ordinal, confirmed by Clergy Ordination Act, 1804 (44 Geo. 3, c. 43).

(*h*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 1; Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77). Formerly the heads of chapters (under the bishop) at St. David's and Manchester and Llandaff were the "precentor," "warden," and "archdeacon" respectively (Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 1). The non-residentiary deaneries of Wolverhampton, Middleham, Heytesbury, and Brecon were to be suppressed as they respectively fell vacant (*ibid.*, s. 21).

(*i*) See p. 418, *post*.

(*k*) Truro Bishopric and Chapter Acts Amendment Act, 1887 (50 & 51 Vict. c. 12), s. 9.

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are appointed under the Ecclesiastical Commissioners Act, 1840 (*l*), and the Welsh Cathedrals Act, 1843 (*m*), those of the new foundation under the usual practice since the time of Henry VIII. (*n*), and those of sees recently founded under the respective Acts of Parliament (*o*).

Income.

803. The Ecclesiastical Commissioners are empowered to take over the temporalities of deans and chapters by scheme confirmed by Order in Council (*p*), and to make provision for the average annual income of deans (*q*).

(*l*) 3 & 4 Vict. c. 113, s. 24.

(*m*) 6 & 7 Vict. c. 77, s. 1.

(*n*) Deans of the old foundation were, before 1840, elected by the King's *congé d'élire* like bishops. Gibson says "Deans of the old foundation come in by election of the chapter upon the King's *congé d'élire*, with the royal assent, and the confirmation of the bishop, much in the same way as the bishops themselves do: but, generally, the deans of the new foundation, which were always purely donative, come in by the King's letters patent; upon which they are instituted by their respective bishops; and then installed upon a mandate, pursuant to such institution, and directed to the chapters" (Gib. Cod. 173). This distinction between the old and new foundations arose after the dissolution of monasteries, when Henry VIII., having ejected the monks out of the cathedrals, replaced them by secular canons; and those whom he thus regulated are called the deans and chapters of the new foundation; such are Canterbury, Winchester, Worcester, Ely, Carlisle, Durham, Rochester, and Norwich. Now by the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), and the Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77), the deanery of every cathedral and collegiate church upon the old foundation has been placed in the direct patronage of the Sovereign, who appoints by letters patent. Before this the right of election to the deanery of Exeter was the subject of a lawsuit (*R. v. Exeter (Chapter)* (1840), 4 Per. & Dav. 252).

(*o*) Thus, by the Truro Chapter Act, 1878 (41 & 42 Vict. c. 44), it was enacted that whenever the Ecclesiastical Commissioners should certify to the Sovereign under their common seal that the net income of the Truro Chapter Endowment Fund (Bishopric of Truro Act, 1876 (39 & 40 Vict. c. 54) would provide a minimum annual income of £1,000 for a dean and of £300 each for not less than four residentiary canons, exclusive in all cases of the value of any residence, the Sovereign by Order in Council might found a dean and chapter of Truro and constitute them a body corporate with all the rights and powers of other cathedral chapters in England or with such of them as to Her Majesty might seem fit, and might subject them to the jurisdiction of the Bishop of Truro as visitor (*ibid.*, s. 3); and such dean and chapter is to be deemed for all purposes subject to the same laws as the dean and chapter of any other bishopric in England, and the deanery is to be in the direct patronage of the Sovereign, and every canonry in the patronage of the Bishop of Truro for the time being (*ibid.*). The Sovereign may make, alter, and revoke statutes for the order, rule, and governance of the dean and chapter of Truro and the members, officers, and endowment thereof (*ibid.*, s. 4). By s. 6 of the same Act, canonries may be established at the minimum income aforesaid before the foundation of the dean and chapter. This has been the course followed, and apparently no dean of Truro has yet (1910) been established. The bishop acts as dean. For Orders in Council under these Acts, see Pulling's Index to Orders in Council, *sub voce* Truro, and the Annual Statutory Rules and Orders.

The Newcastle Chapter Act, 1884 (47 & 48 Vict. c. 33), contains provisions identical (*mutatis mutandis*) with the above for dealing with the Newcastle Chapter Endowment Fund, and the establishment of a dean and chapter. Canonries have been founded, but as yet there is no dean. See Orders in Council, *supra*.

See p. 500, *post*.

Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 66; Statute

804. If a canon accepts a deanery his canonry is void by cession, and the King is entitled to present to the vacant canonry (*r*).

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805. When appointed, a dean is entitled to installation (*a*).

The profits of a deanery, during vacation of the office, go to the successor (*b*).

806. Every dean is to be resident in his cathedral or collegiate church eight months at the least (*c*) in every year, and is to continue therein, preaching the word of God, and keeping good hospitality (*d*). Such residence is counted as if he were residing in any other benefice he may hold (*e*). A decanal house of residence is usually provided (*f*). Residence.

807. Deans in cathedral and collegiate churches (and also the canons) must not only preach there so often as they are bound by law, statute, ordinance, or custom, but are likewise to preach in other churches of the same diocese, where they are resident, and especially in those places whence they or their church receive any yearly rents or profits, and in case they themselves be sick, or lawfully absent, they are to provide substitutes approved by the bishop (*g*). The dean ought to visit his chapter (*h*). Preaching.

808. No spiritual person holding more benefices than one can take a deanery or any cathedral preferment to hold therewith (*i*). Pluralities.

No dean can hold any benefice except in the city or town of the cathedral or collegiate church in which he shall hold such deanery,

Law Revision Act, 1874 (No. 2) (37 & 38 Vict. c. 96); Ecclesiastical Commission Act, 1868 (31 & 32 Vict. c. 114). The following is the scale: Durham, £3,000; St. Paul's and Westminster, £2,000 each; and every other cathedral and collegiate church in England not less than £1,000. The Welsh deans have respectively £700 per annum (Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77), s. 6).

(*r*) Burn, Ecclesiastical Law, Vol. II., p. 90. As to pluralities of canons, see also p. 429, *post*.

(*a*) See Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 24. The fees payable on installation amount to £10 4s., that is, £1 1s. to the commissary of the dean and chapter, £8 8s. to the registrar of the dean and chapter or other officer by usage performing the duty, 10s. to the apparitor, and 5s. to the sealer (Tables of Ecclesiastical Fees, June 2, 1908, superseding those of December 10, 1895, London Gazette, 1908, p. 4064, and Statutory Rules and Orders, 1908, p. 316).

(*b*) Stat. (1536) 23 Hen. 8, c. 11, s. 2.

(*c*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 3.

(*d*) Canon 42.

(*e*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 38.

(*f*) See Ecclesiastical Houses of Residence Act, 1842 (5 & 6 Vict. c. 26), and Deanery of Manchester Act, 1906 (6 Edw. 7, c. 19); and as to dilapidations, the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), ss. 25—28; Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 18; Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77), s. 7; and as to property, see p. 713, *post*.

(*g*) Canon 43.

(*h*) Godolphin, Repertorium Canonicum, p. 55; and as to visitation generally, see p. 409, *ante*.

(*i*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 2, 124.

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and unless the annual income of the benefice is under £500 (*k*). A benefice held in contravention of this rule, unless sooner avoided, becomes void on the expiration of six calendar months from the time of his admission to such deanery (*l*).

No dean of any cathedral church can hold any of the following offices: Head ruler of any college or hall in the Universities of Oxford and Cambridge, provost of Eton College, warden of Winchester College, master of the Charterhouse; but the Dean of Christ Church, Oxford, may be head ruler of the college there maintained (*m*).

Cure of souls.

It has been doubted whether a dean, archdeacon, or canon has a cure of souls (*n*), but it seems probable that a dean has still the cure of souls of his chapter (*o*).

Vestments.

809. The dean and prebendaries (now canons) are to wear a surplice with a silk hood in the choir, and a hood when they preach in the cathedral or collegiate church (*p*).

By the Canons of 1603 they are to wear surplices both for prayer and preaching, and with their surplices such hoods as are agreeable to their degrees (*q*). The settled practice has been in accordance with the above rules (*r*).

(*k*) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 19. As to the rectory of Tatenhill annexed to the deanery of Lichfield, see Ecclesiastical Commissioners Act, 1873 (36 & 37 Vict. c. 64).

(*l*) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 19.

(*m*) Pluralities Act, 1850 (13 & 14 Vict. c. 98), s. 5.

(*n*) Coke says they have (3 Co. Inst. 155), but Watson says it is held by some, notwithstanding what is said by Coke, that a deanery, archdeaconry, prebend etc. are not benefices with cure of souls (Watson, Clergyman's Law, p. 11); see also *Ecclesiastical Commissioners v. Kildare (Dean and Chapter)* (1858), 8 I. Ch. R. 93, C. A., *per* NAPIER, L.C., at p. 96.

(*o*) See Godolphin, *Repertorium Canonicum*, p. 55, and canon 42; Johnson, *Ecclesiastical Laws*, 1237. By the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 5, every person about to be instituted or collated to any benefice or preachship must, before institution or collation, make and subscribe the Declaration of Assent to the Thirty-nine Articles and the Prayer Book, the declaration against simony, and take the oath of allegiance in the presence of the bishop by whom he is instituted or collated, or his commissary; but only such persons as are instituted or collated to a benefice with cure of souls are required to read and assent to the Thirty-nine Articles of Religion in the presence of the congregation after institution or collation (*ibid.*, s. 7). It is therefore considered doubtful whether this second assent to the Articles (commonly called "reading in") need be gone through by deans, archdeacons, and canons. The question turns upon whether they have a cure of souls. For the old law as to subscriptions, see the stat. (1662) 14 Car. 2, c. 4, ss. 6, 8, 9, by which deans and canons were required to assent and subscribe to the Prayer Book, and stat. (1571) 13 Eliz. c. 12, by which assent to the Thirty-nine Articles was required. Watson thought deans, archdeacons, and canons did not come within the latter Act (Clergyman's Law, p. 302); see also canon 36.

(*p*) Advertisements of 1566.

(*q*) Canon 25. The Advertisements, and also canon 24, contain regulations that "decent" copes are to be worn in cathedrals and collegiate churches at the communion service, upon principal feast days, by the principal minister, whether bishop, dean, or one of the canons. This practice, never generally observed, died out about 200 years ago. As to whether it could now be legally revived, see p. 402, *ante*.

(*r*) As to wearing a black gown instead of a surplice for preaching, see *Re Robinson, Wright v. Tugwell*, [1897] 1 Ch. 85, O. A.

810. The dean of a cathedral is sometimes called the arch-presbyter of the diocese (*s*), and is said to be next in dignity to the bishop, though this position has also been ascribed to the chancellor of the diocese (*t*) and to the archdeacon (*a*). He is styled the "Very Reverend," and is entitled to a seat in the Lower House of Convocation.

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Rank and style.
Sub-dean.

811. A sub-dean is a non-residentiary officer of a cathedral or collegiate church. The office does not give a right to any endowment, unless duties are actually performed in respect of it (*b*).

A sub-deanery held independently of the dean, and not subject to the cathedral authorities, is an anomaly unknown to the law (*c*).

812. A dean of a cathedral or collegiate church in England or Wales (*d*) or a canon (*e*) may make a representation to his bishop that he is desirous of resigning his deanery or canonry by reason that he is incapacitated by age or some mental or permanent physical infirmity from the due performance of his duties. The bishop must, if satisfied of the incapacity, certify such incapacity in writing under his hand to His Majesty, the archbishop, bishop, body corporate, or person in whom the patronage of the deanery or canonry held by such dean or canon is vested; and from and after the date of such certificate such deanery or canonry is to be vacant, and such vacancy may be filled up in the same manner, and with the same incidents in all respects, as if such dean or canon were dead, except that there is to be paid, by the year, to the retiring dean or canon, by the treasurer or other proper officer of the chapter to which the dean or canon belongs, out of the income of the deanery or canonry, and as a first charge thereon in the hands of the successor, one third part of the income, calculated on an average of the three preceding years, received by the retiring dean or canon before his retirement on account of his deanery or canonry, such yearly sum to accrue due from day to day, but to be payable half-yearly: provided that if the retiring dean or canon holds no other ecclesiastical preferment, such one-third must, in the case of a dean in England, if less than £400 a year, be made up to £400 a year; and in the case of a dean in Wales, if less than £300 a year, be made up to £300 a year (*f*).

Resignation of deans and canons.

Retiring

813. When a representation has been made to a bishop by a dean or canon of his desire to resign, the bishop may, if he, in his

Inquiry as to incapacity.

(*s*) See Godolphin, *Repertorium Canonicum*, p. 56.

(*t*) *Ibid.*, Appendix, p. 5; Ayl. Par. 95.

(*a*) See the authorities cited at p. 439, *post*.

(*b*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 22.

(*c*) *Braithwaite v. Hook* (1862), 8 Jur. (N. S.) 1186, where the relations of the dean and sub-dean of Chichester are dealt with; and see Godolphin, *Repertorium Canonicum*, p. 55. At Truro the sub-dean has a stall in the choir, and in the absence of the dean or of the bishop (until a dean has been appointed) presides in the residentiary chapter and in the general chapter, and has the same voice in such chapters respectively as a residentiary canon (Truro Bishopric and Chapter Acts Amendment Act, 1887 (50 & 51 Vict. c. 12), s. 7).

(*d*) Deans and Canons Resignation Act, 1872 (35 Vict. c. 8).

(*e*) As to canons, see p. 433, *post*.

(*f*) Deans and Canons Resignation Act, 1872 (35 Vict. c. 8), s. 3. For the pension in the case of a canon, see p. 433, *post*.

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Church into
Dioceses.

Procedure
at inquiry.

discretion, thinks it expedient so to do, for the purpose of satisfying himself of the incapacity of such dean or canon, direct an inquiry to be held into the existence of such incapacity by any number of persons, not exceeding three, being beneficed clergymen or holding a rank in the Church higher than that of beneficed clergymen, and he may give or withhold his certificate according to the result of such inquiry.

The persons directed by the bishop to make an inquiry into the incapacity of a dean or canon are to give notice to such dean or canon of a time and place at which the inquiry will be made, and any person authorised by or on behalf of such dean or canon may attend the inquiry, and produce evidence, and cross-examine the witnesses, and generally conduct the case on behalf of the dean or canon. The persons conducting the inquiry, or any of them, may administer an oath, and may examine witnesses on oath or not, in writing or orally, as they think expedient; and any person who wilfully makes a false statement when examined, whether on oath or not, is guilty of a misdemeanour. Any person refusing to give evidence when required, after a tender of his reasonable expenses, may be certified by any person or persons conducting such inquiry to have so refused to any judge of the High Court, who may deal with such person in the same way as if he had refused to give evidence in a proceeding instituted in the court of which he is judge (*g*).

Lunacy of
deans and
canons.

814. If any dean or canon has been found by due process of law to be a lunatic or of unsound mind, the bishop of the diocese may, if he thinks fit, grant a certificate of the incapacity of such dean or canon without any representation being made by him of such incapacity, and such certificate for the purposes of the Act has the same effect as if it had been granted in pursuance of a representation of incapacity made by the dean or canon: provided that no such certificate is to be granted where the deanery or canonry held by the person so found to be a lunatic or of unsound mind is annexed to the headship of a college or professorship of any university, so long as provision shall be made to the satisfaction of the bishop for performing the duties of the said deanery or canonry (*h*).

Expenses.

815. The reasonable expenses of any inquiry into the incapacity of a dean or canon are to be certified under the hands of any person or persons authorised to conduct the inquiry, and when so certified and approved by the bishop are to be defrayed out of the income of the retiring dean or canon (*i*).

Professorships
etc. annexed.

816. Where any professorship, archdeaconry, headship, or other preferment, ecclesiastical or civil, is annexed to any deanery or canonry, or any deanery or canonry is annexed to any professorship, archdeaconry, headship, or other preferment, ecclesiastical or civil, the dean or canon retiring from his deanery or canonry in

(*g*) Deans and Canons Resignation Act, 1872 (35 Vict. c. 8), s. 4.

(*h*) *Ibid.*, s. 5.

(*i*) *Ibid.*, s. 6.

pursuance of this Act is to be deemed to have vacated also such professorship, archdeaconry, headship, or other preferment, and is to be entitled to be paid out of the income of such preferment, and as a first charge thereon in the hands of the successor, by the treasurer or other officer whose duty it is to pay such income, one-third part of the income calculated on an average of the three preceding years received therefrom by the retiring dean or canon before his retirement on account of such preferment, such yearly sum to accrue due from day to day, but to be payable half-yearly: provided, that where any such dean or canon would, if the Act had not passed, and he had vacated or become incapable of performing the duties of any such professorship, archdeaconry, headship, or other preferment, have been entitled to any other payment in respect of such preferment than that to which he is entitled under this section, such payment is to be substituted for the one-third awarded to him hereby (*k*).

All powers and duties by the Act vested in or imposed on the bishop of the diocese, in the case of the dean and canons of the King's free chapel of Saint George within his castle of Windsor, the dean and canons of Christ Church, Oxford, and the dean and canons of the collegiate church of Saint Peter, Westminster, vest in and are imposed on the Archbishop of Canterbury acting on behalf of His Majesty (*l*).

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Powers vested in Archbishop of Canterbury.

(iii.) *Chapters.*

817. A chapter is a congregation of canons of a cathedral or collegiate church (*m*), usually (but not necessarily) including a dean (*n*), who is chief and head of the chapter (*o*).

Definition of chapter.

A dean and chapter are a corporation aggregate (*p*).

Corporation.

By the Ecclesiastical Commissioners Act, 1841 (*q*), the majority of the existing members of a chapter (including or not including the dean, according as his presence may or may not by law be required) are at all times a sufficient number of canons for constituting a chapter, and in other sections of the Ecclesiastical

Quorum.

(*k*) Deans and Canons Resignation Act, 1872 (35 Vict. c. 8), s. 7.

(*l*) *Ibid.*, s. 8.

(*m*) See Co. Litt. 95 a.

(*n*) See Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77), s. 4.

(*o*) Godolphin, Repertorium Canonicum, p. 51; see Truro Bishopric and Chapter Acts Amendment Act, 1887 (50 & 51 Vict. c. 12), ss. 2, 10. A chapter of a cathedral church formerly consisted of persons ecclesiastical, canons and prebendaries, whereof the dean was chief, all subordinate to the bishop, to whom they were as assistants in matters relating to the Church, for the better ordering and disposing the things thereof, and for confirmation of such leases of the temporalities and offices relating to the bishopric as the bishop from time to time might happen to make (Godolphin, Repertorium Canonicum, p. 58). They were termed by the canonists *capitulum*, being, anciently, a kind of head, instituted not only to assist the bishop, but also to rule and govern the diocese in the time of vacation (*ibid.*, p. 56). This right now exists only in archdioceses (see p. 390, *ante*), the archbishop being the guardian of the spiritualities in ordinary dioceses; see p. 408, *ante*.

(*p*) 1 Bl. Com. 477; *Lyn v. Wyn* (1662), O. Bridg. 122, 148; *Eyre's Case* (1663), Moore (K. B.), 51; Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77), s. 4; see title CORPORATIONS, Vol. VIII., p. 344.

(*q*) 4 & 5 Vict. c. 39, s. 16.

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Commissioners Act, 1840 (*r*), the dean is assumed to be a member of the chapter. But there may be no dean, and where there is no dean at all (as formerly at Southwell) grants by or to the chapter are as effectual as other grants by or to dean and chapter (*s*).

Though the dean is the head of the chapter, he has no power to negative their decisions formally arrived at (*t*), nor has he even a casting vote (*a*).

College.

818. The chapter in a collegiate church is more properly called a college (*b*).

Chapters—
general and
close.

819. Of chapters, some are ancient, some new (*c*). Chapters are of two kinds, the "general chapter" and the chapter proper or "close chapter"; the latter comprising the dean and residentiary canons only. The close chapter has the exclusive management of the capitular property, though at Hereford the general chapter is convened for the receipt of the royal *congé d'élire*, the election of bishop and proctors in convocation, and the installation of a dean and any other dignitary (*d*).

Truro.

The term "the dean and chapter" in the diocese of Truro means the bishop, acting as a dean, the sub-dean, the canons residentiary, and any person who by the Act is entitled to a voice in the chapter. The term "the general chapter" means the dean and chapter and the honorary canons of the cathedral (*e*).

(*r*) 3 & 4 Vict. c. 113. "Patronage . . . possessed by deans and other individual members of chapters" (*ibid.*, s. 41); "all members of chapters except the dean . . . are etc." (*ibid.*, s. 1).

(*s*) Watson, Clergyman's Law, p. 692; but see *Southwell (Chapter) v. Lincoln (Bishop)* (1675), 1 Mod. Rep. 204; *Vaughan v. Ascue* (1623), 2 Roll. Rep. 450, 453. Compare the mayor, aldermen, and burgesses of a borough (see title LOCAL GOVERNMENT). So likewise in the cathedral churches of St. David's and Llandaff there was formerly no dean, but the bishop in either was head of the chapter; and at the former the chanter (or precentor), at the latter the archdeacon, presided, in the absence of the bishop or vacancy of the see (Stephens, *Laws Relating to the Clergy*, p. 409). At present in the ancient bishopric of Sodor and Man, and also in some of the new bishoprics, there is no dean, the bishop (in the case of Truro) acting as such (see p. 418, *ante*); but as a general rule the chapter consists of dean and canons.

(*t*) Watson, Clergyman's Law, p. 855.

(*a*) *Chichester (Bishop) v. Harward* (1787), 1 Term Rep. 650, 652; see stat. (1541) 33 Hen. 8, c. 27; stat. (1707) 6 Ann. c. 75; and compare title CORPORATIONS, Vol. VIII., p. 349.

(*b*) Co. Litt. 95 a, notes 102, 103.

(*c*) The new, according to Sir E. COKE, are those which were founded or translated by Henry VIII. (see stat. (1542) 34 & 35 Hen. 8, c. 21; stat. (1576) 18 Eliz. c. 2; stat. (1593) 35 Eliz. c. 3), in the places of abbots and convents, or priors and convents, which were chapters while they stood, and these are new chapters to old bishoprics; or they are those which are annexed unto the new bishoprics founded by Henry VIII., and are therefore new chapters to new bishoprics (Co. Litt. 95 a). In addition to these there are some chapters of quite recent foundation, as Truro and Newcastle (see Truro Chapter Act, 1878 (41 & 42 Vict. c. 44), and Truro Bishopric and Chapter Acts Amendment Act, 1887 (50 & 51 Vict. c. 12), and Newcastle Chapter Act, 1884 (47 & 48 Vict. c. 33)).

(*d*) *B. v. Hereford (Dean)* (1870), L. R. 5 Q. B. 196, where s. 25 of the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), was construed; *Randolph v. Milman* (1868), L. R. 4 C. P. 107, Ex. Ch. where the right of non-residentiaries to vote for proctors in convocation was decided.

(*e*) Truro Bishopric and Chapter Acts Amendment Act, 1887 (50 & 51 Vict.

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820. The chapter for certain purposes is a "court" exercising judicial functions, though not, strictly speaking, a court of law or an ecclesiastical court. Thus, it has been held to be a court for the purpose of inquiring into the due performance by a vicar choral of the cathedral services (*f*).

Chapters visitable.

821. All chapters are subject to the visitation of the bishop *jure ordinario* (*g*), and of the archbishop, *jure metropolitico* (*h*), except in the case of peculiars, when they are visited by their own peculiar ordinary, but every see or cathedral as such is exempt from archidiaconal jurisdiction (*i*).

At a visitation the bishop may order the removal of illegal ornaments erected therein by the dean and chapter (*k*), in spite of their opposition, but he cannot, at his discretion, order any alteration in the fabric of the cathedral (*l*).

Control of cathedral.

822. The chapter has the general control of the cathedral, in accordance with the cathedral statutes (*m*). Thus, a chapter may, if they have power to appoint by their statutes, remove a chorister (*n*) or schoolmaster (*o*) appointed by themselves, subject to an appeal to the visitor.

Appoints commissioners.

A chapter also has power to appoint a commissioner under the Pluralities Acts Amendment Act, 1885 (*p*), to inquire into the adequate performance of ecclesiastical duties under that Act.

Prejudicial

If the bishop, with the assent of the chapter, make a statute for the chapter prejudicial to their successors, it requires to be construed strictly and according to its very letter (*q*).

Property.

823. The possessions of a dean and chapter are for the most part divided, the dean having one part alone, in right of his deanery, and each particular canon a certain part in right of his canonry;

c. 12), s. 2. The "general chapter" also consents to the exercise of the patronage of the dean and chapter (Truro Bishopric and Chapter Acts Amendment Act, 1887 (50 & 51 Vict. c. 12), s. 14).

(*f*) *Boughton v. York (Dean and Chapter)*, Rothery's Appeal Cases, 134; *R. v. Hereford (Dean and Chapter)* (1897), 13 T. L. R. 374, O. A., per Lord ESHER, M. R., at p. 375; but see *Re York (Dean)* (1841), 2 Q. B. 1. As to ecclesiastical courts, see p. 499, *post*.

(*g*) See p. 410, *ante*. "The ordinary is visitor, so constituted by the canon law and from thence derived to us" (1 Bl. Com. 480).

(*h*) See p. 385, *ante*.

(*i*) Gib. Cod. 171.

(*k*) *Phillpotts v. Boyd* (1875), L. R. 6 P. C. 435.

(*l*) *Ibid*.

(*m*) As to the interpretation of these and the powers of visitors, see p. 409, *ante*. As to the chapter being for certain purposes a court, see *supra*.

(*n*) *R. v. Chester (Dean and Chapter)* (1850), 15 Q. B. 513.

(*o*) *R. v. Rochester (Dean and Chapter)* (1851), 17 Q. B. 1.

(*p*) 48 & 49 Vict. c. 54, s. 4.

(*q*) *Garnett v. Gordon* (1813), 1 M. & S. 205, 214. As to episcopal visitations, see p. 409, *ante*. The questions in the cases usually turn on the construction of the cathedral statutes; as to those of Chichester, see *Chichester (Bishop) v. Harward* (1787), 1 Term Rep. 650; as to Hereford, *R. v. Hereford (Dean)* (1870), L. R. 5 Q. B. 196, and cases cited at p. 410, *ante*. In some cases there have been compositions as to visitatorial rights; see Burn, Ecclesiastical Law, Vol. II., tit. Dean and Chapter.

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the residue the dean and chapter have alike, and each of them is to this purpose incorporate by himself (*r*).

The dean and chapter being a corporation aggregate, although their possessions may be parted with, yet, for necessity, the corporation remains, as well to assist the bishop in his office as to give their assent to certain of his actions (*s*). Where there is no dean and chapter, the acts of the bishop are valid without confirmation (*a*).

Patronage.

824. The patronage of all benefices with cure of souls has been taken away from individual members of the chapter (*b*), but that of the chapter itself is preserved subject to the following restrictions. The chapter, on a vacancy, must present a member of such chapter or one of the archdeacons of the diocese, or a non-residentiary prebendary, or honorary canon; or a person who has served for five years at least the office of minor canon or lecturer of the same church, or a master of any school connected with such church, or as incumbent or curate in the diocese, or as public tutor in either of the Universities of Oxford or Cambridge, or as to Durham has served for the like term in the office of professor, reader, lecturer, or tutor in the University of Durham, or has been educated thereat, or is a licentiate or graduate in theology therein, or has served as incumbent or curate within the same diocese for a like period (*c*). In the event of no presentation being made in accordance with the foregoing provisions within six months, there is a lapse to the bishop to collate an incumbent or curate of the diocese of five years' standing, who has "actually served," and if no such collation is made within another six months, there is a lapse without condition to the archbishop of the province (*d*).

Consolidation
of sees.

825. Where sees have been consolidated and united, in some cases the two deans and chapters have retained their separate powers (*e*), and in others one of them has been made the sole chapter (*f*).

(iv.) *Canons.*

Definition of
canon.

826. A canon is a residentiary member of the chapter of a cathedral or collegiate church (*g*); and has a stall in the choir and

(*r*) Godolphin, *Repertorium Canonicum*, p. 52. As to incomes of deans and canons, see p. 418, *ante*, and p. 431, *post*; and as to property, see p. 432, *post*.

(*s*) *Norwich (Dean and Chapter) Case* (1698), 3 Co. Rep. 73 a, 75 b.

(*a*) See Bishopric of Truro Act, 1876 (39 & 40 Vict. c. 54), s. 7.

(*b*) See p. 432, *post*.

(*c*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 44.

(*d*) *Ibid.*, and though not mentioned there would be a lapse to the King at the end of a further six months, if the archbishop fails to present.

(*e*) For example, Gloucester and Bristol before their disunion in 1897; see Bishopric of Bristol Act, 1884 (47 & 48 Vict. c. 66).

(*f*) See the cases of dissolved chapters of monasteries, stat. (1541) 33 Hen. 8, c. 30 (Coventry and Lichfield), stat. (1543) 34 & 35 Hen. 8, c. 16 (Bath and Wells). The chapters of Lichfield and Wells only respectively in each case being retained.

(*g*) Under the Ecclesiastical Commissioners Acts all members of a chapter except the dean are now styled canons (Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 1; as to Wales, Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77)). Officers called prebendaries, however, still exist among the non-residentiaries (Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 22).

a voice in the chapter. A canonry is the office (with the emoluments) of a canon (*h*).

A canon is, by himself, a corporation sole. He is a corporation in two respects, first as a member of the corporation aggregate, namely, the corporation of the dean and chapter; next as a corporation sole (*i*).

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A corporation.

Qualification.

827. No one is eligible for a canonry unless he has been six years in priests orders, except in the case of a canonry annexed to a professorship, headship, or other office in some university (*k*). He must therefore be thirty years of age at least (*l*).

The holding of a prebend is not necessary to the holding of either of the residentiary canonries at St. Paul's, which are in the direct patronage of the Sovereign (*m*).

828. The right of appointing canons is vested by statute either in the King (*n*) or the bishop of the diocese (*o*), except in the case of a canonry which is attached to some ecclesiastical or spiritual

Appointment.

The term "canon" in the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), means only "every residentiary member of chapter, except the dean, heretofore styled either prebendary, canon, canon residentiary or residentiary" (*ibid.*, s. 93).

(*h*) A prebend (now called a canonry) was formerly described as an endowment in land, or pension in money given to a cathedral or conventual church in *præbendam*, that is, for the maintenance of a secular priest or regular canon who was a prebendary, as supported by the prebend (Stephens, *Laws Relating to the Clergy*, p. 409), and see *Walronde v. Pollard* (1570), 3 Dyer, 293 b. As to the present income, which consists of a money payment, see p. 431, *post*. Sir E. COKE says a prebendary was so called a *præbendo*, from the assistance he afforded to the bishop (*Norwich (Dean and Chapter) Case* (1598), 3 Co. Rep. 73 a, 75 b); but GIBSON says he had his name, on the contrary, from the assistance which the Church afforded him in meat, drink, and other necessities. A canonry was also formerly a name of office, and a canon was the officer in like manner as a prebendary; and a prebend was the maintenance or stipend both of the one and of the other (Gib. Cod. 172; *Norwich (Dean and Chapter) Case*, *supra*; *Magdalen College Case* (1615), 11 Co. Rep. 66 b, 75 a; *Chichester (Bishop) v. Harward* (1787), 1 Term Rep. 650). The number of canons in the several following cathedral or collegiate churches throughout England and Wales was by the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 2, and sched., and the Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77), s. 1, fixed as follows:—Canterbury, Durham, Ely, and Westminster six each; Winchester and Exeter five; and the remaining dioceses in England and Wales four each.

(*i*) *Ecclesiastical Commissioners v. Kildare (Dean and Chapter)* (1858), 8 I. Ch. R. 93, O. A., *per* NAPIER, L.C., at p. 96.

(*k*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 27.

(*l*) See p. 417, *ante*. Before the stat. (1662) 14 Car. 2, c. 4, a layman might have been presented to a prebend, for a prebendary *non habet curam animarum* (*Bland v. Maddox* (1587), Oro. Eliz. 79). The law was the same as in the case of a dean; see p. 417, *ante*.

(*m*) Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 5.

(*n*) See Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 24, whereby the three then existing canonries of St. Paul's, London, were placed in the clerical patronage of the Sovereign; and as to the patronage of additional or revived canonries, see p. 429, *post*.

(*o*) As to the patronage of the bishop of the diocese, see the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), ss. 25, 26, 33; and as to revived or additional canonries, see p. 429, *post*. By the Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77), s. 1, the provisions of the Ecclesiastical Commissioners Acts, 1840 and 1841, are to extend to St. Asaph and Bangor (and see s. 2 as to patronage).

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Rearrange-
ment of
canonries.

office (*p*). When a canon is invested in his canonry he is said to be installed (*q*). If nominated by the King, he is appointed by royal letters patent, and is thereupon entitled to installation (*r*); if by the bishop, he is collated and thereupon in like manner he is entitled to installation (*s*).

829. By the Ecclesiastical Commissioners Act, 1840, a number of canonries were suspended for the purposes of rearrangement (*a*); some of these canonries were annexed to archdeaconries (*b*), others to certain parishes or professorships, and some were suppressed (*c*); as to the latter, however, it was provided that a plan might from time to time be laid before the Ecclesiastical Commissioners by any of the chapters, with the consent of the visitors respectively, for removing the suspension and re-establishing such suspended canonries, by assigning towards the re-endowment of any such canonry a portion of the divisible corporate revenues remaining to such chapters respectively, after paying to the Ecclesiastical Commissioners the profits and emoluments accruing to them from the suspended canonry, so that the profits and emoluments of such suspended canonry be not diminished by the removal of such suspension, and also by accepting and assigning for the same purpose any further endowment in money, or in lands, tithes, or other hereditaments, not exceeding in yearly value the sum of £200 for each canonry from which the suspension shall have been so removed, and also by annexing to any such canonry from which the suspension shall have been so removed any suitable benefice or other preferment in the patronage of such chapters respectively, or of any other patron, with the consent of such patron, and where any bishop is patron, with the consent of the archbishop; and any such plan may be carried into effect and such alterations may be made in the existing statutes and rules of such chapters respectively as

(*p*) By the Truro Chapter Act, 1878 (41 & 42 Vict. c. 44), the appointment of canons of Truro is vested in the bishop.

(*q*) See, for example, the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), ss. 24, 25.

(*r*) *Ibid.*, s. 24.

(*s*) *Ibid.*, s. 25. The fees payable on collation and installation to a canonry amount to £13 15s. 6d., namely, on installation £1 1s. to the commissary of dean and chapter, £4 4s. to the registrar of dean and chapter or other officer by usage performing the duty, 10s. to the apparitor, and 5s. to the sealer. On collation to the vicar-general or chancellor, 16s. 8d.; to the registrar or other officer by usage performing the duty, £2 2s. 4d.; to the secretary of archbishop or bishop, £4 4s.; apparitor, 3s. 6d.; sealer, 4s. 6d.; record-keeper, 4s. 6d. (See Statutory Order in Council of June 2, 1908 (London Gazette, 1908, p. 4064; Statutory Rules and Orders, 1908, pp. 316, 317, 319, especially as to fees payable to the apparitor, sealer, and record-keeper).

(*a*) Namely, at Canterbury, Durham, Worcester, Westminster, Windsor, Winchester, Exeter, Bristol, Chester, Ely, Gloucester, Lichfield, Norwich, Peterborough, Ripon, Rochester, Salisbury, Wells and Ely (Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), ss. 4—18). As to suspending a canonry at Westminster in order to provide for the repair of the fabric of the Abbey, see Westminster Abbey Act, 1888 (51 & 52 Vict. c. 11).

(*b*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 16.

(*c*) The Ecclesiastical Commissioners have no greater rights in these canonries than had the former canons, and are subject to the same trusts (*A.-G. v. Windsor (Dean and Canons)* (1858), 24 Beav. 679).

the case may require, under the authority in the Act provided for making alterations in existing statutes (*d*); such plan need not propose to assign towards such re-endowment any portion of the divisible corporate revenues remaining to the chapter (*e*).

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Additional canonries

830. Plans may also be laid before the Ecclesiastical Commissioners for the establishment of additional canonries (*f*), and such plans may contain proposals for assigning to the holders of any such canonries, spiritual, ecclesiastical, eleemosynary, or educational duties for the benefit of the Church of England and in connection with the diocese, and for fixing the residence of such canons and their participation in the conduct of divine service and in preaching in the cathedral or collegiate church, and for limiting the tenure to a term of years, dependent upon the performance of duties, and for determining the patronage. The patronage of such canonries is to vest in the Sovereign or the bishop of the diocese, except in the case of a canonry which is attached to some already existing ecclesiastical or spiritual office. Patronage not determined in the plan is to vest in the bishop (*g*).

831. As to canonries in Wales, various provisions have been made by statute (*h*). Two canonries in each cathedral were to be annexed to archdeaconries. The income was settled (*i*), and all the provisions of the Ecclesiastical Commissioners Acts of 1840 and 1841 were extended to St. Asaph and Bangor (*k*), provision as to Llandaff and St. David's having in most respects been made by those Acts (*l*).

Welsh cathedrals.

832. It is doubtful whether a canon has any cure of souls (*m*). Canons (*n*) must make and subscribe the declaration of assent to the Thirty-nine Articles and Prayer Book before collation, and also the declaration against simony, and take the oath of allegiance (*o*).

Cure of souls.

833. No spiritual person (except an archdeacon), holding more than one benefice with cure of souls (*p*), may accept and take,

Pluralities.

(*d*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 20.

(*e*) Cathedral Acts Amendment Act, 1873 (36 & 37 Vict. c. 39), s. 1. For further details as to property, see p. 432, *post*.

(*g*) Cathedral Acts Amendment Act, 1873 (36 & 37 Vict. c. 39), s. 3; and see Ecclesiastical Commissioners Act, 1873 (36 & 37 Vict. c. 64), s. 3, amending the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 51.

(*h*) Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77). The number of canonries in each cathedral is four; see p. 427, *ante*.

(*i*) See p. 431, *post*.

(*k*) *Ibid*.

(*l*) *Ibid*.

(*m*) See p. 420, *ante*.

(*n*) *Ecclesiastical Commissioners v. Kildare (Dean and Chapter)* (1858), 8 I. Ch. R. 93, O. A., *per* NAPIER, L.C., at p. 96; and see p. 420, *ante*.

(*o*) Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 5. For the old law, see stat. (1662) 14 Car. 2, c. 4, ss. 6, 8, 9. As to "reading in," see note (*o*) on p. 420, *ante*.

(*p*) For the definition of benefice, see Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 124; Pluralities Act, 1860 (13 & 14 Vict. c. 98), s. 3; and note (*h*) on p. 560, *post*.

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to hold therewith, any cathedral preferment (g) having any prebend or endowment belonging thereto, and no spiritual person holding any preferment in any collegiate or cathedral church may accept or take, to hold therewith, any preferment in any other cathedral or collegiate church, any law, canon, custom or usage to the contrary notwithstanding (r). But this does not prevent any spiritual person holding any cathedral preferment either with or without a benefice from holding therewith any office in the same cathedral or collegiate church the duties of which are statutable or customarily performed by the spiritual persons holding such preferment (s).

Heads of
colleges.

No spiritual person being head ruler of a college or hall in the Universities of Oxford or Cambridge, or warden of the University of Durham, and also holding any benefice, can take and hold therewith any cathedral preferment or any other benefice; no such spiritual person also holding any cathedral preferment can take and hold therewith any benefice; but this does not prevent any such spiritual person from holding any benefice or cathedral preferment permanently attached to or forming part of the endowment of his office (a); and if any spiritual person accepts a cathedral preferment or benefice, and is admitted, instituted, or licensed thereto contrary to the provisions of the said Pluralities Acts, 1838 and 1850, every cathedral preferment and benefice which he previously held becomes *ipso facto* void as if he had died or resigned the same (b).

Unendowed
offices.

By the Ecclesiastical Commissioners Act, 1841, more benefices than one might be held with any prebend, dignity or office not then in any manner endowed (including an honorary canonry), or whereof the endowments had not been vested in the Ecclesiastical Commissioners, or which might thereafter be endowed to an amount not exceeding £20 a year (c), and this provision was extended by the Pluralities Act Amendment Act, 1850, so as to authorise the holding of one benefice and one (endowed) cathedral preferment in the same church with such honorary canonry, prebend, dignity or office (d).

Residence of
canons.

834. A canon is bound to reside at his cathedral or collegiate church at least three months in every year (e). Most canons, however, hold another benefice, on which the ordinary term of compulsory residence under the Pluralities Act, 1838, is nine months in the year (f). Hence it is provided by the same Act that a canon may

(g) For the definition of cathedral preferment which includes a canonry, see Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 124.

(r) *Ibid.*, s. 2; and see p. 419, *ante*.

(s) *Ibid.*

(a) Pluralities Act, 1850 (13 & 14 Vict. c. 98), s. 6.

(b) *Ibid.*, s. 7; Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 11.

(c) Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39).

(d) Pluralities Act, 1850 (13 & 14 Vict. c. 98), s. 11.

(e) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 3. For a decision on the repealed stat. (1803) 43 Geo. 3, c. 84 see *Cathcart v. Hardy* (1814), 2 M. & S. 534. See also canon 44.

(f) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 32, 120.

count the residence at the cathedral or collegiate church as if he had resided on some benefice (*g*); provided always that a canon may not be absent from any benefice, on account of such residence and performance of duty, for more than five months altogether in any one year, including the time of such residence on his prebend, canonry etc., and every such spiritual person holding any such office in any cathedral or collegiate church, in which the year for the purposes of residence is accounted to commence at any other period than the 1st of January, and who may keep the periods of residence required for two successive years at such cathedral or collegiate church, in whole or in part, between the 1st of January and the 31st of December in any one year, may account such residence, although exceeding five months in the year, as reckoned from the 1st of January to the 31st of December, as if he had resided on some other benefice (*h*).

Hence it would seem that an incumbent who is also a canon has two months' leave of absence from clerical duty instead of three. If, however, the canon is the holder of a revived or additional canonry under the Cathedral Acts Amendment Act, 1873, he is not bound to any other or further residence than is prescribed in the plan under that Act (*i*).

835. The income of a canon varies from about 350*l.* to 1,000*l.* a year. All the interests of the holder of any canonry in real estate or endowments are to be absolutely vested in the Ecclesiastical Commissioners (*j*) and money payments made instead; thus the Commissioners have to make such arrangements as will (if possible) leave to the canons of Durham, Manchester, St. Paul's, and Westminster respectively an annual average income of 1,000*l.* a year each, to the canons of St. David's, Llandaff (*k*), St. Asaph, and Bangor (*l*) 350*l.* a year each, and to the rest 500*l.* a year each. But this scale of payment may from time to time be varied or revised, but so as to preserve as nearly as possible the intended average annual incomes, so as not to affect any canon in possession at the time of making such variation (*m*).

Income of
canons.

The profits of a canonry during vacation, subject to the expenses of performing the duties of the office, go to the successor (*n*).

(*g*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 39, 120.

(*h*) *Ibid.*, s. 39.

(*i*) Cathedral Acts Amendment Act, 1873 (36 & 37 Vict. c. 39), s. 3; see p. 429, *ante*.

(*j*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 50; Welsh Cathedrals Act, 1840 (6 & 7 Vict. c. 77).

(*k*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 66.

(*l*) Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77), s. 6.

(*m*) Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 20. Certain deans and chapters elected to take estates in lieu of money payments, and are now suffering from the agricultural depression. For the present incomes of canons, see Whitaker's Almanack, 1910. Since 1842 many new dioceses have been formed, but in some of them there are no deans and chapters and no funds to endow them.

(*n*) Stat. (1536) 28 Hen. 8, c. 11, ss. 2, 8. As to deans, see p. 419, *ante*.

- SECT. 5.** **836.** In the older cathedrals houses of residence are attached (o), but an individual canon does not seem to have ever had more than the right to use one of the houses. Whenever a house becomes vacant by a vacancy in a canonry the other canons may make choice of it according to seniority, the new canon taking the house which is left. Where the houses are the property of the dean and chapter, and the particular canons merely have the use of them for the discharge of their duties, a canon cannot validly mortgage (*inter alia*) his house of residence, so as to give the mortgagee the right to eject him therefrom (p), nor can he vote in respect of it (q). Where, however, a canon occupies a house as a corporation sole, and not as a member of the chapter, having a right to it for life with which the chapter cannot interfere, he is entitled to a vote (r).
- Houses of residence.** Every canon and petty canon is rated separately for his first-fruits, not jointly (s).
- Rating.**
- Patronage of canons.** **837.** Subject to certain special provisions, all the patronage of benefices with cure of souls formerly possessed by individual deans and canons in right of their separate estates, or by non-residentiaries in right of their offices, has been transferred to and vested in the bishops of the respective dioceses, subject to all such provisions as to apportionment or exchange of ecclesiastical patronage as are contained in the Ecclesiastical Commissioners Act, 1836 (t).
- It is not lawful for any spiritual person to sell or assign any patronage or presentation belonging to him by virtue of any dignity or spiritual office held by him, and every such sale or assignment is null and void to all intents and purposes (a).
- Property.** **838.** Numerous provisions have been made by the Ecclesiastical Commissioners Acts as to the property of canons (b).
- Visitation.** **839.** Canons, like other clergy, are individually subject to episcopal and metropolitical visitation, but cannot now be deprived summarily by the visitor (c).
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- (o) See Ecclesiastical Houses of Residence Act, 1842 (5 & 6 Vict. c. 26); Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77), s. 7; Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 18. As to property, see p. 713, *post*.
- (p) *Doe d. Butcher v. Musgrave* (1840), 1 Man. & G. 625; *Grenfell v. Windsor (Dean and Canons)* (1840), 2 Beav. 544. As to mortgages or assignments of ecclesiastical incomes or property, see p. 735, *post*. As to dilapidations, see Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), ss. 25—28; and p. 767, *post*.
- (q) *Heath v. Haynes* (1857), 3 O. B. (N. S.) 389; *Harris v. Phillips*, [1891] 1 Q. B. 267; and see *Durant v. Kennett* (1869), L. R. 5 O. P. 262, and title ELECTIONS.
- (r) *Ford v. Harington* (1869), L. R. 5 O. P. 282.
- (s) Stat. (1534) 26 Hen. 8, c. 3, s. 22.
- (t) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 41; Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77); for the old law, see *Rennell v. Lincoln (Bishop)* (1825), 3 Bing. 223, reversed in K. B. (1827), 7 B. & C. 113, and judgment of K. B. affirmed *sub nom. Mirehouse v. Rennell* (1833), 1 Cl. & Fin. 527, H. L.
- (a) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 42.
- (b) See p. 794, *post*.
- (c) *Re York (Dean)* (1841), 2 Q. B. 1. As to visitation of chapters, see p. 409, and for the old law, *R. v. Chester (Bishop)* (1747), 1 Wils. 206.

840. A canon (which means a canon or minor canon (*d*) of a cathedral or collegiate church in England or Wales but does not include an honorary canon) may, if incapacitated, resign on similar terms and by the same procedure as a dean (*e*). A representation has to be made to the bishop, and a certificate of incapacity sent by the bishop to the Sovereign or other the body or person who holds the patronage of the canonry (*f*).

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tion of the
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Resignation.

841. Non-residentiary prebends and offices—for example, sub-dean (*g*), chancellor of the church (*h*), vice-chancellor, treasurer, provost, precentor, or succentor, non-residentiary prebendary—do not give any right to any endowment whatsoever, unless duties are actually performed in respect of such office (*i*). Such officers are not members of the close chapter (*k*).

Non-
residentiaries.

The estates of certain offices and non-residentiary prebends have been vested in the Ecclesiastical Commissioners, but this does not apply to any dignity, office, or prebend permanently annexed to any archdeaconry, professorship, or lectureship, or to any school or the mastership thereof, or to certain prebends of Chichester (*l*).

(v.) *Honorary Canons.*

842. A new kind of canonry, called an honorary canonry, which was intended to be conferred as a distinction of honour upon deserving clergymen, has been created in every cathedral church in England in which in 1840 there were not already founded any non-residentiary prebends, dignities, or offices (*m*). The honorary canons are entitled to stalls (*n*) and to take rank in the cathedral church next after the canons, and are subject to such regulations as may be made by authority with the consent of the chapters. The number of honorary canonries to be founded was twenty-four in each cathedral. The bishop is to appoint. No emolument

Definition.

Privileges.

(*d*) As to minor canons, see p. 434, *post*.

(*e*) Deans and Canons Resignation Act, 1872 (35 Vict. c. 8); see also p. 421, *ante*. For the special procedure in cases of unsoundness of mind, see p. 422, *ante*.

(*f*) *Ibid.*, ss. 2, 3. A canon in England receives one-third of his income, calculated on an average of the three preceding years, or £250 a year (whichever is the larger), by way of pension; a canon in Wales one-third of income, or £175 a year (whichever is the larger); a minor canon one-third of income, calculated as aforesaid.*

(*g*) As to sub-dean, see p. 421, *ante*.

(*h*) This does not mean diocesan chancellor, as to whom, see p. 412, *ante*.

(*i*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 22.

(*k*) See p. 424, *ante*.

(*l*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 51, as amended by Ecclesiastical Commissioners Act, 1873 (36 & 37 Vict. c. 64), s. 3.

(*m*) The cathedrals in which honorary canonries were founded in 1841 were Canterbury, Bristol, Carlisle, Chester, Durham, Ely, Gloucester, Norwich, Oxford, Peterborough, Ripon, Rochester, Winchester, Worcester and Manchester (Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 2), to which must be added the new cathedrals since founded, in which chapters and honorary canonries may be, and in some cases have been, erected; see p. 384, *ante*.

(*n*) But in the Table of Ecclesiastical Fees (see note (*p*) on p. 434, *post*), "induction," not "installation," is mentioned.

SECT. 5.
Constitution of the Church into Dioceses.

Pluralities.

Members of general chapter.

Vicars choral or minor canons.

Appointment.

whatever, nor any place in the chapter, is taken or held by any honorary canon in virtue of his appointment (*o*).

Certain fees are payable on collation and induction to an honorary canonry (*p*).

843. An honorary canonry, or any prebend, dignity, or office not now endowed with more than £20 a year, does not prevent the holding therewith of more benefices than one (*q*), and is not subject to lapse in the hands of the bishop (*r*). Also an honorary canon or such prebendaries as aforesaid are allowed to hold in addition one benefice and one cathedral preferment (*s*).

844. Honorary canons have certain rights as members of the general chapter (*t*), as for example under the Pluralities Acts Amendment Act, 1885 (*a*), whereby they are given a right to vote at the election of a commissioner to represent the chapter under that Act.

(vi.) *Minor Canons.*

845. Vicars choral or (as they are actually termed) minor canons are the clerical (*b*) assistants or deputies of the canons of a cathedral or collegiate church. Their office is very ancient, and is generally endowed. The terms petty canon, vicar choral, priest vicar, and senior vicar are also used to designate the same or similar officials (*c*). The office of minor canon, priest vicar, or vicar choral, if endowed, is a "cathedral preferment" within the meaning of the Pluralities Act, 1838 (*d*). A vicar choral is a corporation sole (*e*).

846. The appointment of minor canons has been vested in the respective chapters or in the dean in all cases, and cannot be exercised by any other person or body whatsoever (*f*). The dean

(*o*) Ecclesiastical Commissioners Acts, 1840 and 1841 (3 & 4 Vict. c. 113, s. 23; 4 & 5 Vict. c. 39, ss. 2, 3).

(*p*) The fees amount to £5 15s. 8d., namely, 16s. 8d. to the Vicar-General or Chancellor, £1 1s. to the registrar or other officer by usage performing the duty, £2 2s. to the secretary of archbishop or bishop, 3s. 6d. to the apparitor, 4s. 6d. to the sealer, 4s. 6d. to the record keeper and for induction, £1 1s. to the registrar of dean and chapter or other officer by usage performing the duty, and 2s. 6d. to the sealer (Statutory Order in Council of June, 1908, London Gazette, 1908, p. 4064; Statutory Rules and Orders, 1908, pp. 316, 317, 319; especially as to apparitor, sealer, and record keeper).

(*q*) Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 3.

(*r*) *Ibid.*, s. 3.

(*s*) Pluralities Act, 1850 (13 & 14 Vict. c. 98), s. 11.

(*t*) See Truro Bishopric and Chapter Acts Amendment Act, 1887 (50 & 51 Vict. c. 12), ss. 2, 14; and p. 424, *ante*.

(*a*) 48 & 49 Vict. c. 54, s. 4.

(*b*) See Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 15.

(*c*) See Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 93, by which the term "minor canon" includes every vicar, vicar choral, priest vicar, and senior vicar being a member of the choir in any cathedral or collegiate church; and see canon 42.

(*d*) 1 & 2 Vict. c. 106, s. 124.

(*e*) *Gleaves v. Parfitt* (1860), 7 O. B. (N. S.) 838, *per* ERLE, C.J., at p. 844.

(*f*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), ss. 44, 45. The fees payable on collation to a minor canonry amount to £2 14s. 6d., namely, 10s. 6d. to the commissary of dean and chapter, £2 2s. to the registrar of dean and chapter or other officer by usage performing the duty, and 2s. 6d. to

appoints in cases only where the right was in him before the passing of the Ecclesiastical Commissioners Act, 1841 (*g*), by which it was enacted that regulations should be made for fixing the number of minor canons and their emoluments. In any case there must not be more than six nor less than two in each cathedral or collegiate church. The stipend is not to be less than £150 per annum (*h*). No minor canon may hold any other benefice beyond the limit of six miles from his cathedral or collegiate church (*i*).

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847. Some of the assistants in the choirs of cathedrals are laymen, and are generally known as lay vicars. They do not come within the scope of the Acts of 1840 and 1841, in which the term "minor canon" is not to be construed to extend to or include any other than a spiritual person (*k*). Lay vicars.

848. In 1864 a further Act was passed enabling the Ecclesiastical Commissioners to substitute fixed money payments for the fluctuating incomes of certain vicars choral, priest vicars, senior vicars, custos and vicars warden, and vicars or minor canons who may constitute a corporation aggregate in any cathedral church in England, by means of a transfer by the latter (with the consent of their visitor) to the Commissioners of all their lands and hereditaments (*l*). By another Act (*m*) the Commissioners may assign certain stipends to be payable out of the estates of the cathedral and collegiate churches to minor canons, schoolmasters, organists vicars choral, lay clerks, officers, choristers, bedesmen, servants and other members of the cathedral or collegiate church (*n*). Emoluments

849. By the canons of 1603 "vicars, petty canons, singing men, and all others of the foundation" of every cathedral and collegiate church are to receive the communion four times yearly at the least (*o*); also "petty canons, vicars choral and other ministers" of every cathedral and collegiate church are to be urged by the dean to the study of Holy Scriptures, and every one of them is to have the New Testament not only in English but also in Latin (*p*). Must take
communion
and study.

Vicars choral have no cure of souls. Their office is not a benefice, for they never receive institution nor induction, neither are they called on to do what is imposed on any other beneficed clergyman, to read their assent or dissent (*q*). No cure of

the sealer (Statutory Order in Council of June 2nd, 1908, London Gazette, 1908, p. 4064; Statutory Rules and Orders, 1908, pp. 316, 317, 319; especially as to sealer).

(*g*) 4 & 5 Vict. c. 39, s. 15.

(*h*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 45.

(*i*) *Ibid.*, s. 46; and Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 15.

(*k*) Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 15. For the definition of minor canon in these Acts, see note (*c*), p. 434, *ante*.

(*l*) Cathedrals Act, 1864 (27 & 28 Vict. c. 70), s. 1.

(*m*) Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111).

(*n*) *Ibid.*, s. 18; and as to property generally, see p. 713, *post*; *Gleaves v. Parfitt* (1860), 7 O. B. (N. S.) 838 (dilapidations); *Shoubridge v. Clark* (1852), 12 O. B. 335 (sharing property by probationer).

(*o*) Canon 24.

(*p*) Canon 42.

(*q*) *Shaw v. Woods* (1855), 5 I. O. L. R. 156, *per* LEFROY, O.J., at p. 160; but

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Duties.

850. In some cases vicars choral have houses of residence for their several use and residence (*a*).

851. The duties of a vicar choral are to conduct the services, especially the musical ones, under the direction of the dean and chapter. As regards the process of performing service in the cathedral, the dean and chapter are a court of inquiry, and possess judicial functions (*b*).

It would seem that the vicars choral can enter into an agreement with the dean and chapter as to their duties and pay, but that questions of property must go before the Ecclesiastical Commissioners (*c*).

Scottish minister.

852. A minister ordained in the Protestant Episcopal Church of Scotland is "not entitled" to be admitted to the office of vicar choral without taking the steps mentioned in the Episcopal Church (Scotland) Act, 1864 (*d*), but if such a person is *de facto* admitted, it would seem the office cannot be avoided (*e*).

SUB-SECT. 4.—Archdeaconries and Archdeacons.

Extent.

853. An archdeaconry is a legal division of a diocese for administrative purposes. The dioceses in England and Wales are usually divided into two, three, or four archdeaconries, though an archdeaconry may comprise the whole diocese (*f*), or any part of one. It may not extend beyond the limits of one diocese (*g*). There are now ninety-five archdeaconries, which are subject to be re-arranged, divided, and added to pursuant to statute (*h*).

Estates.

854. Under the Ecclesiastical Commissioners Acts the estates of archdeaconries may be vested in the Ecclesiastical Commissioners (*i*), and, subject to the consent of the bishop, any archdeaconry may be endowed by the annexation either of an entire

it may be doubted whether they have not a "preachership" under the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 5.

(*a*) *Goodtitle d. Miller v. Wilson* (1809), 11 East, 334.

(*b*) *R. v. Hereford (Dean and Chapter)* (1897), 13 T. L. R. 374, C. A.

(*c*) For such an agreement, see *Innes v. Beddoe*, *Innes v. Duncombe* (1897), 13 T. L. R. 466.

(*d*) 27 & 28 Vict. c. 94.

(*e*) *Innes v. Beddoe* (1897), 13 T. L. R. 466, *per* WRIGHT, J., and see judgment of Lord PENZANCE, cited by Lord ESHER, M.R., in *R. v. Hereford (Bishop)* (1897), 13 T. L. R. 374.

(*f*) In this case the archdeacon used formerly to be called the archdeacon-general (1 Bl. Com. 383; *Chiverton v. Trudgeon* (1620), 2 Roll. Rep. 150). At the present time Rochester, Sodor and Man, and Birmingham dioceses have only one archdeaconry.

(*g*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), ss. 1, 10; Archdeaconries and Rural Deaneries Act, 1874 (37 & 38 Vict. c. 63), s. 1 (*b*), whereby it was enacted that in every re-arrangement, every parish and extra-parochial place be within a rural deanery, and every deanery within an archdeaconry, and that no archdeaconry extend beyond the limits of one diocese. And in 1840 it was further enacted that in case any archdeaconry or rural deanery should be found to be too large, or for any other peculiar circumstance, such archdeaconry or rural deanery might be divided into two or more portions (Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 32).

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canonry or part of a canonry, or by augmentation out of the common fund of the Ecclesiastical Commissioners, as provided for by the Ecclesiastical Commissioners Acts, under which there is power given to raise the annual average income of any archdeaconry to an amount not exceeding £200 per annum (*k*). Archdeacons may also be endowed with benefices (*l*), and the holders thereof are subject to the Pluralities Acts, whether the benefices are peculiars or not (*m*). Endowments may also be disannexed and transferred to another archdeaconry in the same diocese (*n*).

855. An archdeacon is a minister of the Word, having statutory jurisdiction under the Crown and next after the bishop over a portion of a diocese, called an archdeaconry, in matters ecclesiastical (*o*). Originally the office was, as the name (chief deacon) implies, limited to deacons (*p*), but now a clergyman to hold it must not only be a priest, but must have been for six years in priests orders (*q*). Thus, he must be thirty years of age at least (*r*). Archdeacon.

856. An archdeacon is usually appointed by the bishop, who prefers him by collation. But if an archdeaconry be in the gift of a layman, the patron presents to the bishop (*s*), who institutes in like manner as to another benefice, and the dean and chapter induct him, that is, after some ceremonies, place him in a stall of the cathedral church to which he belongs, whereby he is said to have *locum in choro* (*t*). Every archdeacon must before collation make and subscribe the Declaration of Assent to the Thirty-nine Articles and the Prayer Book, the declaration against simony, and take the oath of allegiance (*a*). It is doubtful whether an archdeacon has a cure of souls (*b*). Appointmen

(*k*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), ss. 16, 33, 34, 35, 56; Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77), ss. 8, 14; Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 25; Ecclesiastical Commissioners Act, 1840, Amendment Act, 1885 (48 & 49 Vict. c. 55); Ecclesiastical Commission Act, 1868 (31 & 32 Vict. c. 114), s. 13. See also as to Rochester and St. Albans, Bishopric of St. Albans Act, 1875 (38 & 39 Vict. c. 34), s. 9; Bishoprics Act, 1878 (41 & 42 Vict. c. 68), s. 10; as to Wells, stat. (1558) 1 Eliz. c. 4, s. 10; and see *King v. Baylay* (1831), 1 B. & Ad. 761; as to St. Albans, London Diocese Act, 1863 (26 & 27 Vict. c. 36), s. 3; and as to Truro, Archdeaconry of Cornwall Act, 1897 (61 & 62 Vict. c. 9).

(*l*) Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 9; and for details as to property, see p. 713, *post*.

(*m*) *Ibid.*, ss. 9, 10.

(*n*) *Ibid.*, s. 11.

(*o*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), see preamble and s. 19; Godolphin, Repertorium Canonicum, p. 60; 1 Bl. Com. 380.

(*p*) See Legatine Canons, made at London A.D. 1126—7; Johnson's Ecclesiastical Laws, "That none be promoted to an archdeaconry but a deacon."

(*q*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 27.

(*r*) By the Roman canon law a man can be an archdeacon at the age of twenty-five.

(*s*) *Sale v. Coventry (Bishop)* (1590), 1 And. 241.

(*t*) Watson, Clergyman's Law, p. 302; Godolphin, Repertorium Canonicum, p. 62; *Smalwood v. Coventry and Lichfield (Bishop)* (1589), 1 Leon. 205.

(*a*) Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 5. As to whether he must also "read himself in." see p. 420, *ante*.

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Duties.

857. The archdeacon's duties are : To hold visitations of parochial clergy (when the bishop is not there) ; to inspect and reform abuses among the clergy ; examine and present candidates for ordination (*d*) ; to institute, induct (*e*), and excommunicate (*f*) ; and to admit churchwardens, which duty he may be compelled to perform by mandamus (*g*). He may be an assessor under the Church Discipline Act, 1840 (*h*), and Clergy Discipline Act, 1892 (*i*), and has certain powers or duties under various statutes (*k*).

Jurisdiction.

858. Formerly the jurisdiction of archdeacons varied in different places according to circumstances and custom, and was in some places ordinary jurisdiction, and in others delegated only (*l*), but since 1836 all archdeacons throughout England and Wales have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding (*m*).

Court of the
archdeacon.

An archdeacon from ancient times has held a court called the Court of the Archdeacon (*n*), and appointed an "official" or "commissary" (usually a barrister) to preside over it, or he may preside himself. Such court has, except in certain cases, a concurrent jurisdiction with the bishop's court (*o*). The archdeacon also has a special statutory jurisdiction over parish clerks (*p*). Apparently in all cases there is an appeal from his court to the diocesan court (*q*), unless the archdeacon has a peculiar (*r*), and now the archbishops and bishops have jurisdiction in certain cases over peculiars (*a*).

Residence.

859. An archdeacon must be resident for eight months in every year within the diocese in which his archdeaconry is situate, subject

(*d*) See Ordinal ; and p. 549, *post*.

(*e*) As to induction he is the bishop's minister (Watson, Clergyman's Law, p. 395).

(*f*) Godolphin, Repertorium Canonicum, p. 61. Excommunication is now practically obsolete.

(*g*) *R. v Martin Rice* (1697), 1 Ld. Raym. 138 ; and as to churchwardens, see p. 460, *post*.

(*h*) 3 & 4 Vict. c. 86, s. 3.

(*i*) 55 & 56 Vict. c. 32, s. 3.

(*k*) Lecturers and Parish Clerks Act, 1844 (7 & 8 Vict. c. 59), see p. 475, *post* ; Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 8 ; Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), ss. 3, 8 ; Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44), s. 6 ; Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), ss. 3, 5 ; and as to rural deans, see p. 440, *post*.

(*l*) Godolphin, Repertorium Canonicum, p. 61.

(*m*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4 c. 77), s. 19.

(*n*) *Chiverton v. Trudgeon* (1620), 2 Roll. Rep. 150.

(*o*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 109. As to Ecclesiastical Courts, see p. 499, *post*.

(*p*) Lecturers and Parish Clerks Act, 1844 (7 & 8 Vict. c. 59) ; see p. 475, *post*.

(*q*) Godolphin, Repertorium Canonicum, pp. 62, 65, citing a case of *Gastrell v. Jones* (1623), 2 Roll. Rep. 357, 448, 448 ; stat. (1532) 24 Hen. 8, c. 12, s. 5 ; and p. 505, *post*.

(*r*) *Robinson v. Godsalve* (1696), 1 Ld. Raym. 123.

(*a*) See p. 411, *ante*.

to the same provisions as to licences for non-residence as are enacted with respect to incumbents of benefices under the Pluralities Act, 1838 (*b*). Otherwise he loses all his emoluments as archdeacon (*c*).

A benefice of peculiar or exempt jurisdiction is a benefice within the Pluralities Acts (*d*).

An archdeacon is allowed to hold, together with his archdeaconry, two benefices under the limitations contained in those Acts (*e*), one of which benefices must be situate within the diocese of which his archdeaconry forms a part; or one cathedral preferment (*f*) in any cathedral or collegiate church of the diocese of which his archdeaconry forms a part, and one benefice situate in such diocese.

860. There seems to be a difference of opinion as to whether a dean or archdeacon is of the higher rank (*g*).

It seems clear that an archdeacon is inferior in rank to the chancellor of the diocese. The precedency is given to the latter by all writers because the chancellor represents the person of the bishop, and has the greater jurisdiction, and an appeal lies from the archdeacon or his official to the chancellor (*h*).

An archdeacon is by custom styled "the Venerable."

861. Archdeacons have, subject to the superior rights of bishops, archbishops and the Crown (*i*), a power of visitation (*j*). Their visitations are usually held soon after Easter, and then churchwardens and sidesmen are admitted, and presentments received (*j*).

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Pluralities.

Rank and style.

Archidiaconal visitations.

(*b*) 1 & 2 Vict. c. 106.

(*c*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 34; and see p. 610, *post*. But nothing in these Acts is to prevent an archdeacon from holding together with his archdeaconry two benefices as hereinafter mentioned (Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 10); see p. 604, *post*.

(*d*) *Ibid*.

(*e*) As to these, see p. 604, *post*.

(*f*) The term "cathedral preferment" in the Pluralities Acts includes an archdeaconry, and under the Pluralities Act, 1850, the headship of a university college etc. is not to be held with any cathedral preferment, except in certain cases (Pluralities Act, 1850 (13 & 14 Vict. c. 98), ss. 6, 7); see p. 429, *ante*.

(*g*) A dean is styled *archpresbyter*. Therefore some authorities say that he is superior to an archdeacon in the same way as a priest is superior to a deacon (Stephens, *Laws relating to the Clergy*, p. 45). It has also been stated that a dean and chapter is of higher rank than an archdeacon (*Parham v. Templer* (1820), 3 Phillim. 223, *per* Sir JOHN NICHOLL, at p. 243). But Ayliffe says an archdeacon of common right within his own precinct is the next great person in point of dignity after the bishop and his chancellor, saving the right of the dean which belongs to him in the cathedral church (Ayl. Par. 95). Also a dean is a dignitary, whereas it has been doubted whether an archdeacon is one. Watson says he is (*Clergyman's Law*, p. 9); also Godolphin, *Repertorium Canonium*, p. 60; but see also Appendix, p. 5; *contra Boughton v. Gousley* (1599), Cro. Eliz. 663. See also *Rochester (Dean and Chapter) v. Pierce* (1808), 1 Camp. 466.

(*h*) Godolphin, *Repertorium Canonium*, Appendix, p. 5; Ayl. Par. 95.

(*i*) See p. 409, *ante*; and *R. v. Sowter*, [1901] 1 K. B. 396, O. A.

(*j*) Recognised by statute; see Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 28, repealed by Statute Law Revision Act (No. 2), 1874 (37 & 38 Vict. c. 96). As to presentments, see canons 113—119; *Selby's Case* (1680), Freem. (K. B.) 298, where it was stated that the archdeacons are not to direct the churchwardens to present at their pleasure.

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Dioceses.
Charge.

The archdeacon must on that occasion deliver an address (called a charge) to the clergy of his archdeaconry (*k*). It seems that the archdeacon has power also to require one of the clergy to preach a visitation sermon (*l*).

Letters of orders, institution and induction, dispensations, licences and faculties held by the clergy must be produced by them (if required) at an archdeacon's visitation (*m*). The archdeacon has power to cite the clergy to attend, but not the laity, except the churchwardens and sidesmen (*n*).

An archdeacon may visit by his official or commissary, if he himself is hindered (*o*).

The archdeacon's visitation is for the benefit of the parish at large, and, amongst others, of the churchwardens themselves (*p*). A visitation may be held by grouping a large number of parishes together, and holding the visitation for all at some one parish church (*p*).

SUB-SECT. 5.—Rural Deaneries and Rural Deans.

Office.

862. The rural dean is a very ancient and formerly important officer of the Church. The office fell into disuse after the Reformation, but was revived in 1836 (*q*).

Qualification
and appoint-
ment.

There appears to be no statutory qualification for the office of rural dean, but a clergyman beneficed in the deanery is usually appointed. The appointment is in the hands of the bishop of the diocese and the archdeacon (*r*), and the bishop sometimes appoints by letters patent under the episcopal seal. He is not a permanent officer, but may be removed at the will of his superior, whose

(*k*) Ayl. Par. 515.

(*l*) See *Huntley's Case* (1626), Burn, Ecclesiastical Law, Vol. IV., p. 27.

(*m*) Canon 137.

(*n*) *Anon.* (1608), Noy, 123.

(*o*) Ayl. Par. 161.

(*p*) *Shepherd v. Payne* (1862), 12 C. B. (N. S.) 414, 434, 435, approving the practice of centuries in Essex. The fees payable at an archidiaconal visitation amount to 18s. (in addition to procurations), namely, 2s. to the archdeacon or official, 12s. 6d. to the registrar or other officer by usage performing the duty, 3s. 6d. to the apparitor (Table of Ecclesiastical Fees of June 2nd, 1908 (superseding that of December 10th, 1895), made under the Pluralities Act, 1838 (1 & 2 Vict. c. 106), and Ecclesiastical Fees Act, 1867 (30 & 31 Vict. c. 135); Statutory Rules and Orders, 1908, pp. 316, 317, 319 (London Gazette, 1908, p. 4064)); but there seems to be no means of enforcing payment unless the churchwardens have funds in their hands available for the purpose (*Veley v. Pertwee* (1870), L. R. 5 Q. B. 573). Procurations were, in their origin, refreshments provided for the bishop or archdeacon by the incumbents of outlying parishes, when visited. They were afterwards commuted into fixed money payments, charged upon the benefice. Many of these charges still remain and are payable by the incumbent to the archdeacon apparently irrespective of visitation; others have been released (*Shepherd v. Payne* (1862), 31 L. J. (C. P.) 297, which contains a statement as to the practice in Essex; *Saunderson v. Clagget* (1720), 1 P. Wms. 657). The only actual "visitation" fees now payable are those mentioned above. Bishops' procurations seem to have lapsed altogether (see Stephens, *Laws relating to the Clergy*, pp. 1392—6).

(*q*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77).

(*r*) Godolphin, *Repertorium Canonicum*, Appendix, p. 6.

minister he is (a). It is said he may give induction in the absence of the archdeacon (b).

The rural dean is to be a clerk in holy orders resident in the rural deanery, of the best ability, integrity, and piety. He is to inform the bishop of the condition of "all things" and all persons in the deanery, and in order to do this he is empowered personally to hold visitations, to issue articles of inquiry under the bishop's direction and to make orders under his seal, to inspect churches, schools, and libraries connected with the Established Church, and report to the bishop, to examine curates' licences and report, to call ruri-decanal meetings (c), to notify vacancies in benefices to the bishops, and especially to report to the bishop all undue disposal of church property (d).

In certain cases rural deans (like archdeacons) are empowered by statute to act as commissioners to make inquiries and report, as in the case of resignations (e) and contemplated legal proceedings under the Church Discipline Act, 1840 (f). Rural deans (if any) of a diocese act jointly with the archdeacons, and subject to the approval of the bishop, in appointing diocesan surveyors (g), and a rural dean is entitled to complain to the bishop that the buildings of a benefice are in a state of dilapidation (h). Also they have powers under the Pluralities Acts Amendment Act, 1885 (i).

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tion of the
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Dioceses.
Duties.

(a) Godolphin, *Repertorium Canonicum*, Appendix, p. 6.

(b) *Ibid.* Godolphin says the rural dean succeeded the ancient archpresbyter.

(c) The legality of any meetings of the clergy, except by the King's licence, in convocation is doubtful. The old rules were abolished by the Act of Submission of the Clergy, 1533 (25 Hen. 8, c. 19), s. 7.

(d) This account of his duty is derived from the form of commission used in the diocese of Salisbury; see Makower, *Constitutional History of the Church of England* (English translation), p. 503. Their duties at an earlier period may be deduced from the old oath of office which is still extant (see Godolphin, *Repertorium Canonicum*, App. 6); the rural dean was to execute all processes directed by the bishop or his officers by authority, to attend the consistory court, to return processes and receive others, to give to the bishop the names of all persons who were open criminals or "vehemently suspected" of crime or offences punishable in the consistory courts, to furnish the names of persons who were administering the goods of a deceased person, before probate or administration (Burn, *Ecclesiastical Law*, tit. Rural Dean). The rural dean's special duty at this period seems to have been to provide the bishop's court with business. But long before the decay of the courts the office fell into disuse. For further information see Makower, *Constitutional History of the Church of England* (English translation), pp. 323 *et seq.*, and Kennett, *Parochial Antiquities*, pp. 633 *et seq.* In the course of the Reformation rural deans ceased completely to have their earlier importance, owing to the abolition of the canon law (see stat. (1545) 37 Hen. 8, c. 17, s. 2). They existed at the end of the 17th century in but few dioceses, and it was only in very exceptional instances that the institution survived through the 18th century. On the other hand, the local division into rural deaneries everywhere remained. Various attempts, begun almost at the Reformation, were made to revive the office; for instances see Makower, *Constitutional History of the Church of England*, p. 324.

(e) Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44), s. 6; see p. 627, *post*.

(f) 3 & 4 Vict. c. 86, s. 3.

(g) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 8; see p. 767, *post*.

(h) *Ibid.*, s. 12.

(i) 48 & 49 Vict. c. 54, s. 3; and generally, where similar powers are given to see p. 438, *ante*.

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Church into
Dioceses.

Rural
 deaneries.

863. Every parish is within some rural deanery (*k*). Subject to the approval of the bishop, rural deaneries may be divided into two or more portions, and the Ecclesiastical Commissioners may by scheme approved in the proper manner (1) alter the area of any rural deanery or rural deaneries for the time being; (2) diminish the number of rural deaneries for the time being; (3) constitute any new area a rural deanery; (4) alter the name of any rural deanery for the time being and give a name to any newly-constituted rural deanery (*l*). The consent of the bishop of the diocese affected by such scheme must be given under his hand and seal, and every parish must in its entirety be within a rural deanery, and every rural deanery must in its entirety be within an archdeaconry (*m*). A schedule under the hand and seal of the bishop should be deposited in the registry of each diocese, setting forth the portions or divisions of the diocese which were in 1874 accounted and held to be rural deaneries (*n*).

No remunera-
 tion.

864. The Ecclesiastical Commissioners do not appear to have been empowered to attach any stipend to the office of rural dean, and there do not appear to be any ancient endowments connected therewith.

SECT. 6.—Constitution of the Church into Parishes.

SUB-SECT. 1.—The Parish.

Definition
 and classifica-
 tion.

865. A parish is a district committed to the charge of one incumbent having the cure of souls therein (*a*). It may be either an ancient parish or a new ecclesiastical parish.

(*k*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), preamble and s. 10.

(*l*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 32.

(*m*) Archdeaconries and Rural Deaneries Act, 1874 (37 & 38 Vict. c. 63), s. 2; Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77); Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113).

(*n*) Archdeaconries and Rural Deaneries Act, 1874 (37 & 38 Vict. c. 63), s. 2.

(*a*) 1 Bl. Com. 112. Parishes were instituted for the ease and benefit of the people, and not of the parson (*Britton v. Standish* (1704), Holt (K. B.), 141). Originally there was but one diocese, which was called *parochia*, and the bishop was the sole parson and had the sole cure of souls in the entire diocese. In course of time the diocese was divided ecclesiastically into several districts, and ministers were ordained by the bishop to assist him and were sent out to serve the cure and preach in the several districts assigned to them by the bishop for the purpose; and they and the bishop resided together in the place where the church or cathedral was. When churches were founded and endowed, districts were annexed to them; and the bishop sent out his clergy to reside and officiate in these churches and in the annexed districts, which became parishes, reserving, however, a certain number in his cathedral to counsel and assist him, who are now called the dean, prebendaries, and canons. But the cathedral continued, as before, to be the parish church of the whole diocese. The bishop remained chief pastor or universal incumbent of the diocese, having the cure of souls therein and in all the parishes thereof; and he had, therefore, the right of instituting or collating clerks to these parishes. The instituted or collated clerks received the cure of souls in their parishes from him and as his assistants, and they were for a long time designated by the name of curates (*Down (Bishop) v. Miller* (1861), 11 L. Ch. R. Appendix, p. i., per Dr. RADCLIFF, at pp. vii., viii.). See also p. 714, *post*, as to the evolution and growth of the parish.

866. The ancient parishes appear to have been gradually formed between the seventh and twelfth or thirteenth centuries of our era. Their boundaries seem to have been originally identical with, or determined by those of manors; since a manor very seldom extends over more than one of these parishes, although in many cases one of them contains two or more manors (*b*). Besides being ecclesiastical units, ancient parishes have been at different periods, and still are, administrative areas for various civil purposes (*c*).

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Constitution of the Church into Parishes.

Ancient parishes.

867. In the ancient division of the country into parishes certain areas were for unknown reasons left extra-parochial (*d*). In many cases these have been united with adjoining parishes for ecclesiastical purposes (*e*). Where that has not been done the bishop is empowered to authorise the publication of banns and solemnization of marriages in any church or chapel belonging to or situate within the area; and, where this authority is given, marriage registers are to be kept in the church or chapel as if it were a parish church (*f*). A military station, with the consent of the bishop of the diocese, may by Order in Council be created an extra-parochial district for ecclesiastical purposes with an extra-parochial chapel under the charge of an army chaplain (*g*).

Extra-parochial areas.

868. Where the increase of population renders it necessary or expedient, a portion of one or more ancient parishes, or previously formed ecclesiastical parishes or districts, or extra-parochial places, is constituted a new ecclesiastical parish or district. This is effected in some instances by a local or special Act of Parliament, in which the particular conditions of the new parish or district are prescribed (*h*). But since 1818 the process has been generally carried out by Order in Council ratifying a scheme of the Church Building Commissioners or, since 1856, of the Ecclesiastical Commissioners under the Church Building Acts, 1818 to 1884,

New ecclesiastical parishes etc.

(*b*) 1 Bl. Com. 113, 114. There have, in consequence, been many instances of an isolated portion of an ancient parish separated from the rest by other parishes and even sometimes situate in the midst of another parish. These have been dealt with for civil purposes by the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), and the Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58).

(*c*) The boundaries of the parochial areas for civil purposes have in many cases been altered under statutory authority; see title LOCAL GOVERNMENT.

(*d*) 1 Bl. Com. 114. Extra-parochial places have been dealt with for civil purposes by modern legislation, and have in many cases been united for those purposes to adjoining parishes; see title LOCAL GOVERNMENT.

(*e*) See p. 451, *post*.

(*f*) Church Building Act, 1822 (3 Geo. 4, c. 72), ss. 18, 19; Marriage Act, 1823 (4 Geo. 4, c. 76), s. 3; Extra-Parochial Places Act, 1857 (20 Vict. c. 19), ss. 9, 10; Marriage Confirmation Act, 1860 (23 & 24 Vict. c. 24).

(*g*) Army Chaplains Act, 1868 (31 & 32 Vict. c. 83). By Order in Council, which may at any time be revoked, the district may be placed under the exclusive jurisdiction of the archbishop or bishop named in the Order (*ibid.*, s. 9); see p. 647, *post*.

(*h*) For instance, the Parish of Manchester Division Act, 1850 (13 & 14 Vict. c. 41), contains provisions for dividing the ancient parish of Manchester into new ecclesiastical parishes, and applies to them certain enactments of the New Parishes Act, 1843 (6 & 7 Vict. c. 37).

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and New Parishes Acts, 1843 to 1884 (*i*). Under these Acts the new area may be either (1) a distinct and separate parish formed under the Church Building Act, 1818 (*k*), or under the New Parishes Act, 1856 (*l*); or (2) a district parish formed under the Church Building Act, 1818 (*m*), or under the Church Building Act, 1838 (*n*); or (3) a consolidated chapelry formed under the Church Building Act, 1819 (*o*); or (4) a district chapelry formed under the same Act (*p*); or (5) a particular district formed under the Church Building Act, 1831 (*q*); or (6) a separate parish for spiritual purposes formed under the same Act (*r*); or (7) a Peel district formed under the New Parishes Act, 1843 (*s*); or (8) a Peel parish or new parish formed under that Act (*t*) or under the New Parishes Act, 1856 (*u*); or (9) a district parish, consolidated

(*i*) Church Building Act, 1818 (58 Geo. 3, c. 45); Church Building Act, 1819 (59 Geo. 3, c. 134); Church Building Act, 1822 (3 Geo. 4, c. 72); Church Building Act, 1824 (5 Geo. 4, c. 103); Church Building Act, 1827 (7 & 8 Geo. 4, c. 72); Church Building Act, 1831 (1 & 2 Will. 4, c. 38); Church Building Act, 1832 (2 & 3 Will. 4, c. 61); Church Building Act, 1838 (1 & 2 Vict. c. 107); Church Building Act, 1839 (2 & 3 Vict. c. 49); Church Building Act, 1840 (3 & 4 Vict. c. 60); New Parishes Act, 1843 (6 & 7 Vict. c. 37); Church Building (Banns and Marriages) Act, 1844 (7 & 8 Vict. c. 56); New Parishes Act, 1844 (7 & 8 Vict. c. 94); Church Building Act, 1845 (8 & 9 Vict. c. 70); Church Building (Burial Service in Chapels) Act, 1846 (9 & 10 Vict. c. 68); Church Building Act, 1848 (11 & 12 Vict. c. 37); Church Building Act, 1851 (14 & 15 Vict. c. 97); Church Building Act, 1854 (17 & 18 Vict. c. 32); Church Building Commissioners (Transfer of Powers) Act, 1856 (19 & 20 Vict. c. 55); New Parishes Act, 1856 (19 & 20 Vict. c. 104); New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94); New Parishes Acts and Church Building Acts Amendment Act, 1884 (47 & 48 Vict. c. 65). These Acts do not extend to the Isle of Man (Isle of Man (Church Building and New Parishes) Act, 1897 (60 & 61 Vict. c. 33)). By the Church Building Commissioners (Transfer of Powers) Act, 1856 (19 & 20 Vict. c. 55), the Church Building Commissioners were abolished, and their powers under the earlier Acts were transferred to the Ecclesiastical Commissioners. By the New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 30, the King in Council and Ecclesiastical Commissioners have, with respect to orders and schemes under the Church Building Acts, 1818 to 1884, and the New Parishes Acts, 1843 to 1884, the powers and authorities vested in them by the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), and the Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39). In the absence of express enactment to that effect, the provisions of the general Church Building and New Parishes Acts do not abrogate or alter inconsistent provisions of a local Act (*Fitzgerald v. Champneys* (1861), 2 John. & H. 31).

(*k*) 58 Geo. 3, c. 45, s. 16; *Tuckness v. Alexander* (1863), 2 Drew. & Sm. 614.

(*l*) 19 & 20 Vict. c. 104, s. 25.

(*m*) 58 Geo. 3, c. 45, ss. 21, 24; *Tuckness v. Alexander*, *supra*.

(*n*) 1 & 2 Vict. c. 107, s. 10.

(*o*) 59 Geo. 3, c. 134, s. 6; amended and extended by the Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 9, and the Church Building Act, 1851 (14 & 15 Vict. c. 97), ss. 19, 20.

(*p*) 59 Geo. 3, c. 134, s. 16; *Tuckness v. Alexander*, *supra*.

(*q*) 1 & 2 Will. 4, c. 38, s. 10.

(*r*) *Ibid.*, s. 23.

(*s*) 6 & 7 Vict. c. 37, s. 9. Peel districts and parishes are so called because the Act was brought in and carried by Sir Robert Peel, the then Prime Minister.

(*t*) *Ibid.*, s. 15.

(*u*) 19 & 20 Vict. c. 104, s. 2. This Act is sometimes called the Blandford

chapelry or district chapelry, which has become a separate ecclesiastical parish under the provisions of the New Parishes Act, 1856 (a). When a new cure is taken partly out of one diocese and partly out of one or more other dioceses, the scheme and Order in Council may provide that it shall, upon its formation, be wholly included in one of those dioceses (b).

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869. With the consent of the bishop of the diocese and the patron of the benefice out of which the division is made, distinct and separate parishes for all ecclesiastical purposes may be formed by the subdivision of an ancient parish, or the dividing off of any part or parts from an ancient parish or a new ecclesiastical parish or district of any description or an extra-parochial place. The division does not take effect until the next avoidance of the parish out of which it is made, unless the incumbent of that parish voluntarily resigns the cure of the newly-formed parish. Upon the division taking effect, a distinct and separate parish becomes a rectory, vicarage, or perpetual curacy, according to the character of the parish out of which it is formed, and is subject to the same law, as to the right of presentation and other laws, regulations, and jurisdiction, as applied to that parish. And the incumbent of each distinct and separate parish becomes entitled to such portions of the glebe, tithes, and other endowments, fees and dues of the parish out of which it is formed, as arise or accrue within the area of his distinct and separate parish or are apportioned to him by the Ecclesiastical Commissioners (c). With the consent of the bishop of the diocese and the patron and incumbent of the ancient parish out of which a district chapelry has been formed, the district chapelry may be made a distinct and separate parish if a house of residence and a competent maintenance is provided for its incumbent, and the incumbent of the ancient parish is compensated for all fees and dues lost to him in consequence (d).

(1) Distinct
and separate
parishes.

870. With the consent of the bishop of the diocese an ancient parish or extra-parochial place may be divided into ecclesiastical districts having a church or parochial chapel built or intended to be built therein; and these districts, on their boundaries being marked out, become district parishes; or an extra-parochial place

(2) District
parishes.

Act, and the parishes formed under it are called Blandford parishes, after its author, the Marquis of Blandford, afterwards Duke of Marlborough.

(a) 19 & 20 Vict. c. 104, s. 14.

(b) Diocesan Boundaries Act, 1872 (35 & 36 Vict. c. 14), s. 3.

(c) Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 16, 17, 19, 22—24, 26—29, 31; Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 8—14, 17, 18; Church Building Act, 1822 (3 Geo. 4, c. 72), ss. 16, 36, 37; Church Building Act, 1827 (7 & 8 Geo. 4, c. 72), s. 2; Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 26; Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 12; Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 22; Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 21; Church Building (Banns and Marriages) Act, 1844 (7 & 8 Vict. c. 56), ss. 5, 6; Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 22; Church Building Act, 1851 (14 & 15 Vict. c. 97), ss. 16, 21, 26; New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 25, 26; New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), s. 11.

(d) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 16.

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may be formed into a district parish (*e*). Moreover, with the consent of the bishop of the diocese and the patron and incumbent of the ancient parish out of which a district chapelry has been formed, the district chapelry may be made a district parish, if a house of residence and a competent maintenance is provided for its incumbent, and the incumbent of the ancient parish is compensated for all fees and dues lost to him in consequence (*f*). And where a church or chapel is built by subscription and endowed and subsequently augmented by Queen Anne's Bounty, and the patronage has been acquired under any of the Acts regulating Queen Anne's Bounty, a district may, with the consent of the bishop and of the patron and incumbent of the parish or district parish in which the church or chapel is situate, be assigned to the church or chapel and be made a district parish (*g*). A district parish becomes a perpetual curacy on the avoidance of the benefice of the parish out of which it is formed, or previously thereto, if the incumbent of that parish, with the consent of the bishop, voluntarily resigns the cure of the district parish (*h*). But the division of a parish into district parishes does not take from the incumbent of the parish, or otherwise affect, any of the glebe, tithes, or other endowments of the parish (*i*).

(3) Consoli-
dated
chapelries.

871. Where a population is collected together at the extreme ends of ancient or new parishes or extra-parochial places contiguous to each other, a consolidated chapelry may be constituted with the consent of the bishop of the diocese or of each of the dioceses in which the area is situate, and of the majority of the patrons of the parishes or extra-parochial places out of which it is formed. A chapel may be built for the chapelry, or a consecrated church already standing within its limits may be made the chapel. Unless there is a church within its limits which is a rectory or vicarage, the chapelry becomes a perpetual curacy. It is subject to the jurisdiction of the bishop and archdeacon within whose diocese and archdeaconry the holy table of the chapel is situate (*j*).

(*e*) Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 21—32; Church Building Act, 1819 (59 Geo. 3, c. 134), s. 17; Church Building Act, 1822 (3 Geo. 4, c. 72), ss. 12, 16, 36, 37; Church Building Act, 1824 (5 Geo. 4, c. 103), ss. 16, 17; Church Building Act, 1827 (7 & 8 Geo. 4, c. 72), s. 2; Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 12; Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 11; Church Building Act (Banns and Marriages) Act, 1844 (7 & 8 Vict. c. 56), ss. 5, 6; Church Building Act, 1845 (8 & 9 Vict. c. 70), ss. 15, 22; Church Building Act, 1848 (11 & 12 Vict. c. 37), s. 1; Church Building Act, 1851 (14 & 15 Vict. c. 97), ss. 16, 21, 26; New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 11, 12, 33.

(*f*) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 16.

(*g*) Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 10; Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 22; Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 21.

(*h*) Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 25, 28, 67, 68; Church Building Act, 1819 (59 Geo. 3, c. 134), s. 12; Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 15.

(*i*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 30.

(*j*) Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 6, 17, 18; Church Building Act, 1822 (3 Geo. 4, c. 72), ss. 36, 37; Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 26; Church Building Act, 1832 (2 & 3 Will. 4, c. 61); Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 14; Church Building Act, 1840

872. With the consent of the bishop of the diocese or each of the dioceses in which the area is situate, a particular district may be assigned as a district chapelry to a chapel of ease, or a parochial chapel, or a chapel built under the provisions of the Church Building Acts (*k*). The district is a perpetual curacy and benefice with exclusive cure of souls (*l*).

873. Where a church or chapel is provided and endowed to the satisfaction of the Ecclesiastical Commissioners by one or more individual members of the Church of England or by subscription, the commissioners, except where from special circumstances they deem it advisable not to do so, are to assign a particular district to the church or chapel, the minister whereof is to have the exclusive cure of souls in such district; and they have power to determine, with the consent of the bishop, whether banns shall be published and marriages and burials shall be performed in the church or chapel. Upon the assignment of the district the church or chapel becomes a perpetual curacy (*m*). Before the church or chapel is provided and endowed, notices are to be sent to the patron and incumbent of the parish in which it is intended to be provided, and if the district to be assigned to it extends into more than one parish, similar notices are to be sent to the patron and incumbent of each parish into which the district is to extend (*n*).

874. Where in a parish of large extent there is a chapel of ease at a considerable distance from the parish church, having a

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tion of the
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(4) Districts
chapelries.

(5) Particular
districts
under the
Act of 1831.

(6) Separate
parishes for
spiritual
purposes.

(3 & 4 Vict. c. 60), s. 21; Church Building (Banns and Marriages) Act, 1844 (7 & 8 Vict. c. 56), ss. 5, 6; Church Building Act, 1845 (8 & 9 Vict. c. 70), ss. 6, 8—12; Church Building Act, 1848 (11 & 12 Vict. c. 37), s. 1; Church Building Act, 1851 (14 & 15 Vict. c. 97), ss. 3, 5, 6, 16, 19—21; New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 11—14, 33; New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), s. 11; *Jones v. Gough* (1865), 3 Moo. P. C. C. (N. S.) 1.

(*k*) Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 16—18; Church Building Act, 1822 (3 Geo. 4, c. 72), ss. 16, 17, 36, 37; Church Building Act, 1838 (1 & 2 Vict. c. 107), ss. 12, 13; Church Building Act, 1839 (2 & 3 Vict. c. 49), ss. 1—4, 11; Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 1; Church Building (Banns and Marriages) Act, 1844 (7 & 8 Vict. c. 56), ss. 4—6; Church Building Act, 1848 (11 & 12 Vict. c. 37), ss. 1, 3; Church Building Act, 1851 (14 & 15 Vict. c. 97), ss. 2, 5, 6, 16, 17, 21, 26; New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 11, 12, 33.

(*l*) Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 2; Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 17. The assignment of a district chapelry to a chapel puts an end to the prior purposes to which the chapel was originally dedicated so far as they are inconsistent with the chapelry being a benefice (*Fitzgerald v. Fitzpatrick* (1864), 10 Jur. (N. S.) 913).

(*m*) Church Building Act, 1831 (1 & 2 Will. 4, c. 38), ss. 10—15, 27; Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 10; Church Building Act, 1840 (3 & 4 Vict. c. 60), ss. 12, 15—18; Church Building (Banns and Marriages) Act, 1844 (7 & 8 Vict. c. 56), ss. 1, 2, 5, 6; Church Building Act, 1848 (11 & 12 Vict. c. 37), ss. 1, 2; Church Building Act, 1851 (14 & 15 Vict. c. 97), ss. 4—16, 18; New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 11, 12, 33.

(*n*) Church Building Act, 1831 (1 & 2 Will. 4, c. 38), ss. 7, 11, 15, 26; Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 2; Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 22; Church Building Act, 1840 (3 & 4 Vict. c. 60), ss. 16, 21; Church Building Act, 1851 (14 & 15 Vict. c. 97), ss. 11, 12; New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), s. 11; *MacAllister v. Rochester (Bishop)* (1880), 5 O. P. D. 194.

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chapelry, township, or district belonging or supposed to belong thereto, and the chapel is endowed by some one or more persons with a provision secured on money in the funds, tithes, or other hereditaments sufficient in the opinion of the bishop to insure a competent stipend to the minister, the bishop, with the consent of the patron and incumbent of the parish, may declare that the chapel shall be separate from and independent of the parish church, and that the chapelry, township, or district shall be a separate and distinct parish for all spiritual purposes (*o*); and the patron, with the consent of the incumbent, may make an agreement with the bishop as to the patronage of the chapel. If the incumbent refuses his consent to the separation or to the agreement as to patronage, they do not take effect until the next avoidance of the parish church (*p*).

(7) Peel
parishes.

875. Under the New Parishes Act, 1843 (*q*), a part of one or more parishes, chapelries, or districts, or a part or the whole of one or more extra-parochial places, where the population is large and the provision for public worship and pastoral superintendence is insufficient, may, with the consent of the bishop of the diocese, by a scheme of the Ecclesiastical Commissioners ratified by Order in Council, be constituted a separate district for spiritual purposes, whether such part does or does not contain within its limits a consecrated building used for divine worship (*r*). The draft of the scheme must be submitted to the incumbent and patron of the benefice or each benefice out of which the district or any part thereof is proposed to be taken, so that they may have an opportunity of laying before the Commissioners or the bishop any observations or objections respecting the proposal; and the scheme is not to be laid before the King in Council until one month after the draft has been so submitted, unless in the meantime every such incumbent and patron consents thereto. Unless it appears to the Commissioners and is declared in the scheme that there is reason to expect from other sources an adequate maintenance for the minister of the new district, the scheme must recommend that such minister when duly licensed shall be permanently endowed under the provisions of the Act (*s*) to the extent of at least £100 per annum,

(*o*) "Spiritual purposes" differ from "ecclesiastical purposes" in not including the performance of marriages or burials, nor, necessarily, the registration of baptisms (New Parishes Act, 1843 (6 & 7 Vict. c. 37), ss. 9, 11, 15; *Hughes v. Lloyd* (1888), 22 Q. B. D. 157, 163).

(*p*) Church Building Act, 1831 (1 & 2 Will. 4, c. 38), ss. 23—26; Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 7; Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 22; Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 21.

(*q*) 6 & 7 Vict. c. 37. See Church Building (Banns and Marriages) Act, 1844 (7 & 8 Vict. c. 56), ss. 5, 6; New Parishes Act, 1844 (7 & 8 Vict. c. 94); Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 27; Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 24; New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 1, 4—10, 15—24, 30—32; New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), ss. 1, 12, 13; New Parishes Acts and Church Building Acts Amendment Act, 1884 (47 & 48 Vict. c. 65), ss. 2, 3.

(*r*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 9; New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 1.

(*s*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), ss. 19, 22.

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and also that the endowment, if less than £150 per annum, shall be increased under the same provisions to that amount at least, so soon as the district becomes a new parish (*t*). The scheme may specify some existing or intended church within the district as the parish church thereof, and in that case the district becomes a new parish immediately upon the issue of the Order in Council ratifying the scheme (*a*). In other cases a minister may be licensed by the bishop to perform in the district such pastoral duties as are specified in the licence, and also, when a building within the district is licensed for divine worship, to perform such services and offices, other than marriages and burials, as are specified in the same or any further licence (*b*); and the minister to that extent has the cure of souls in the district, and is a corporation sole with the style of minister of the district, and as regards irremovability is in the same position as a perpetual curate (*c*).

876. A district constituted under the New Parishes Acts, 1843, 1844 and 1856 (*d*), becomes a perpetual curacy and a new parish for ecclesiastical purposes, including the publication of banns and solemnisation of marriages, and burials, and the incumbent has exclusive cure of souls therein (1) so soon as a consecrated church or chapel which exists or has been provided within it has been approved by the Ecclesiastical Commissioners as the parish church of the district (*e*), or (2) immediately upon the ratification by Order in Council of the scheme for constituting the district (*f*), if the Commissioners specify in the scheme an existing or intended church as the parish church of the district (*g*). The new parish is an ecclesiastical district for the purposes of the Burial Acts (*h*). (8) New parishes.

877. On the application of the incumbent of a church or chapel to which a district belongs, the Commissioners may, if they think fit, with the consent of the bishop, make an order authorising the publication of banns and solemnisation of marriages, churchings, baptisms, and burials in the church or chapel; and thereupon all the fees payable for the performance of these offices and other ecclesiastical fees, dues, and offerings arising within the limits of the district are to be payable to the incumbent of the district. Where all or any of such fees and dues have been reserved or of right belong to the incumbent or clerk of the benefice out of which the district was taken, they are to be paid over to such incumbent and clerk respectively until the next avoidance of the benefice or the relinquishment of the fees by such incumbent, and until a (9) Chapelries and other districts converted into new parishes.

(*t*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 9; New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 1, 3.

(*a*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 2.

(*b*) The licence ceases when the district becomes a new parish (New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 15).

(*c*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), ss. 11, 12.

(*d*) 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; 19 & 20 Vict. c. 104; see p. 448, *ante*.

(*e*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), ss. 15, 16; New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 1.

(*f*) See p. 448, *ante*.

(*g*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 2.

(*h*) *Ibid.*, s. 32.

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vacancy in the situation of such clerk, or the award of compensation to him in lieu of fees; and thereafter all such fees and dues belong to the incumbent or clerk of the church of the district (i). And wherever banns and marriages, churchings and baptisms, are authorised to be published and performed in the consecrated church or chapel to which there is attached a district which was not on 29th July, 1856, a separate and distinct parish for ecclesiastical purposes, and the incumbent of the church or chapel becomes authoritatively entitled (k) to receive for his own benefit the entire fees for the performance of those offices without any reservation thereout, the district becomes and is a separate and distinct parish for ecclesiastical purposes to the same extent as a Peel parish (l).

Dissolution of
district
constituted
under the
New Parishes
Act.

878. Where a district has been constituted under the New Parishes Acts, 1843, 1844 and 1856 (m), but a church has not been provided for or allotted to it, an Order in Council may be made ratifying a scheme submitted by the Ecclesiastical Commissioners, with the consent of the bishop, that the district be dissolved, and its area or parts thereof be reincorporated in the parish or district or parishes or districts out of which it was constituted, or be added to some other parish or district or parishes or districts (n).

Alteration of
boundaries
of parishes.

879. Alterations may from time to time be made in the boundaries of distinct and separate parishes, district parishes, district chapelries and consolidated chapelries (o), particular districts (p), and other new ecclesiastical parishes and districts (q).

By an Order in Council ratifying a scheme of the bishop of the diocese which has been approved by the archbishop of the province, or a scheme of the archbishop in the case of his own diocese, with the consent of the patron of every benefice affected by the alteration,

(i) New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 11—13.

(k) This authoritative title is acquired either on the avoidance of the benefice or all the benefices out of which the district was taken, or on the previous relinquishment of the fees by the incumbent or incumbents entitled thereto (*Jones v. Gough* (1865), 3 Moo. P. O. O. (N. s.) 1).

(l) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 14.

(m) 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; 19 & 20 Vict. c. 104.

(n) New Parishes Acts and Church Building Acts Amendment Act, 1884 (47 & 48 Vict. c. 65), s. 2. The draft of the scheme is to be sent to every incumbent or minister and patron affected thereby, and the scheme is not to be submitted to the King in Council until one month after the draft has been so sent unless in the meantime every such incumbent, minister, and patron consent thereto; and if at the date of its ratification there is an incumbent or minister of the district proposed to be dissolved, it is not to operate unless or until he has consented thereto or has ceased to be such incumbent or minister. Any endowment which has been provided for the district is to be returned to the body or person who provided it (*ibid.*).

(o) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 23; Church Building Act, 1840 (3 & 4 Vict. c. 60), ss. 6, 7; Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 16; Church Building Act, 1848 (11 & 12 Vict. c. 37), s. 3.

(p) Church Building Act, 1848 (11 & 12 Vict. c. 37), s. 2.

(q) New Parishes Act, 1844 (7 & 8 Vict. c. 94), s. 9; Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 27; New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), s. 1; New Parishes Acts and Church Building Acts Amendment Act, 1884 (47 & 48 Vict. c. 65), s. 3.

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a tithing, hamlet, chapelry or district, or an extra-parochial place, may be annexed to another parish, or may, by itself or together with another adjoining tithing, hamlet, chapelry, district, or extra-parochial place, be constituted a separate parish and a perpetual curacy and benefice (*r*).

Union of parishes.

880. Where two or more parishes have been expressly united by Act of Parliament, and one or more of the churches have been abolished, the remaining church is the parish church of the united parishes (*s*). Where the benefices of parishes are united under the Union of Benefices Act, 1860 (*t*), the parishes become united for ecclesiastical purposes, and if only one church is left standing within them, it becomes the church of the united parish; but if more than one church is left, the scheme for uniting the benefices determines which of them shall be the church of the united parish; and, in either case, unless otherwise provided by the scheme, the vestry-room of that church becomes the vestry-room of the united parish for ecclesiastical purposes, and of each of the parishes for secular purposes and for the custody of the parish muniments (*u*).

Disuniting parishes.

881. Where two parishes have been united, or reputed to have been united, for ecclesiastical purposes for a period extending back beyond the 31st July, 1815, and on the 31st July, 1845, there was no consecrated church in one of such parishes, and a church is built in that parish wholly or in part out of funds at the disposal of the Ecclesiastical Commissioners, the whole of that parish may, after the consecration of that church, be disunited for ecclesiastical purposes from the other parish, and be formed into a separate and distinct parish for the same purposes and in the same manner and with the same consents and consequences as a distinct and separate parish may be formed out of one parish (*a*).

SUB-SECT. 2.—The Incumbent.

Who is incumbent.

882. The incumbent of the parish is the clergyman holding the church and benefice thereof, and having, under the bishop, the sole and exclusive cure of souls in the parish (*b*). He is the proper

(*r*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 26, 27; Church Building Act, 1839 (2 & 3 Vict. c. 49), ss. 6—8.

(*s*) *St. Swithin's Parish Case* (1695), Holt (K. B.), 139. Several parishes in the city of London were thus united after the fire of 1666 (stat. (1670) 22 Car. 2, c. 11, ss. 55, 56). Where two benefices have been united either (1) before 1838 by the patrons and the bishop at common law or under stat. (1545) 37 Hen. 8, c. 21, or (2) since 1838 under the Pluralities Act, 1838 (1 & 2 Vict. c. 106), and amending Acts (see pp. 605 *et seq.*, *post*), the union does not unite the two parishes or make the parish church of one of them the parish church of the other (*St. Swithin's Parish Case*, *supra*).

(*t*) 23 & 24 Vict. c. 142.

(*u*) *Ibid.*, s. 18. See pp. 606 *et seq.*, *post*.

(*a*) Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 5.

(*b*) See note (*a*), p. 442, *ante*. The term "incumbent" is derived from the Latin verb *incumbo* in the sense of being diligently resident (Co. Litt. 119 b). For his status generally see p. 609, *post*. For his rights and duties as to divine service see pp. 657, 661, *post*. For his rights as to the church and churchyard see pp. 703, 741, *post*; and title BURIAL AND CREMATION, Vol. III., pp. 408—411, 428—431. The term "incumbent" does not in itself necessarily imply

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Transfer of rights and duties under New Parishes Act.

custodian of the keys of the church (c) and of the register books (d), and has a general control over the church, including the vestry (e), and over the ringing of the bells (f).

883. Where, under the Church Building Acts and New Parishes Acts (g), a portion of an ancient or new ecclesiastical parish is ecclesiastically severed therefrom and formed into or made part of another new or previously existing parish, the rights and duties of the incumbent of the former parish in respect of the cure of souls and the performance of baptisms, marriages and burials, and other services and ministrations of the Church, and the lawful fees for the same, are transferred, so far as regards the severed portion, to the incumbent of the other parish (h).

Transfer of rights and status.

884. The rights and status of the incumbent of a parish church are transferred to the incumbent of a new church where such new church is made the parish church, and the former church is made a district church (i), or is pulled down (k), or where the former parish church was part of a cathedral church (l).

SUB-SECT. 3.—The Vestry.

(i.) *Constitution.*

Constitution of vestry.

885. The vestry is the council of the parish for ecclesiastical purposes (m). It includes the incumbent (n) or curate in charge (o)

a distinct and separate cure of souls or the status of a complete incumbent (*Dowdall v. Hewitt* (1863), 10 L. T. 823, 825).

(c) *Lee v. Matthews* (1830), 3 Hag. Ecc. 169, 173; *Daunt v. Crocker* (1867). L. R. 2 A. & E. 41.

(d) *R. v. Cumley, Ex parte Holloway* (1855), 3 W. R. 247.

(e) *Jackson v. Courtenay* (1857), 8 E. & B. 8; *R. v. O'Neill, Ex parte Oliver* (1867), 31 J. P. 742.

(f) *Harrison v. Forbes* (1860) 6 Jur. (N. S.) 1353; *Redhead v. Wait* (1862), 6 L. T. 580.

(g) See note (i), p. 444, *ante*.

(h) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 15; *Tuckness v. Alexander* (1863), 2 Drew. & Sm. 614; *Jones v. Gough* (1865), 3 Moo. P. O. C. (N. S.) 1; *Ormerod v. Blackburn Burial Board* (1873), 28 L. T. 438; *Cronshaw v. Wigan Burial Board* (1873), L. R. 8 Q. B. 217, Ex. Ch.; *Fuller v. Alford* (1883), 10 Q. B. D. 418. The transfer may be restricted in the case of a parish formed under a local Act (*Fitzgerald v. Champneys* (1861), 2 John. & H. 31).

(i) Church Building Act, 1838 (1 & 2 Vict. c. 107), ss. 16—18; Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 9; New Parishes Acts and Church Building Acts Amendment Act, 1884 (47 & 48 Vict. c. 65), s. 4.

(k) Church Building Act, 1845 (8 & 9 Vict. c. 70), ss. 1, 2; and see pp. 542, 734, *post*.

(l) *Ibid.*, s. 4.

(m) *Wilson v. M'Math* (1819), 3 Phillim. 67, 82. It takes its name from being held in the room in the church where the priest puts on his vestments (*ibid.*). By various Poor Law Acts, Public Health Acts, Highway Acts, Municipal Corporation Acts, Local Government Acts, and the London Government Act, 1899 (62 & 63 Vict. c. 14), certain civil powers and functions which formerly belonged to vestries have been transferred to other bodies. See titles LOCAL GOVERNMENT; PUBLIC HEALTH.

(n) Whether rector, vicar, or perpetual curate (*Wilson v. M'Math, supra*; S. O. (on rule for prohibition) (1819), 3 B. & Ald. 241; *R. v. D'Oyly* (1840), 12 Ad. & El. 139; *R. v. Allen* (1872), L. R. 8 Q. B. 69; *R. v. Salisbury (Bishop)*, [1901] 2 K. B. 225, O. A.). But his presence is not essential to the validity of the proceedings (*Mauvey v. Barbet* (1799), 2 Esp. 687).

(o) *Hubbard v. Penrice* (1746), 2 Stra. 1245.

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and the persons of both sexes who are rated for the relief of the poor in respect of the parish, whether resident therein or not (*p*), and the occupiers of hereditaments so rated (*q*). The right to attend and vote in vestry accrues immediately upon the person's name being inserted in the rate-book (*r*), but if, being a ratepayer, he fails to pay a poor rate made or become due three months previously, the right is thenceforth suspended until the rate is paid (*s*). Where a corporation or company are ratepayers, their clerk, secretary, or other authorised agent may attend and vote on their behalf (*t*).

(ii.) *Functions.*

886. In the absence of a local custom to the contrary, the churchwardens of a parish are annually chosen in vestry by the minister and parishioners jointly, or if they cannot agree, one by the minister and the other by the parishioners (*u*). The sidesmen are at the same time appointed by the minister and parishioners jointly (*a*).

Appoint-
ments of
church-
wardens and
sidesmen.

Church rates are made and assessed by the vestry (*b*), but, subject to certain exceptions (*c*), payment of such rates is merely voluntary and cannot be enforced (*d*).

Church rates.

At the end of their year of office the churchwardens render to the vestry an account of their receipts and expenditure (*e*). The vestry have no general right of inspecting the churchwardens' books, but can only claim to do so on special grounds (*f*). If the vestry decide to make a voluntary church rate, the churchwardens furnish estimates to the vestry of the amount which will probably be required (*g*). Where church trustees are appointed under the

Accounts and
estimates.

(*p*) Poor Relief Act, 1819 (59 Geo. 3, c. 12), ss. 19—22; Vestries Act, 1819 (59 Geo. 3, c. 85), s. 1; *R. v. Lambeth (Rector)* (1838), 8 Ad. & El. 356. As to the right of women to vote, see *Olive v. Ingram* (1739), 2 Stra. 1114.

(*q*) Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), ss. 7, 19; Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 14. The names of all such occupiers are to be inserted in the rate-book, whether the rates are payable or paid by them or by the owners of the hereditaments (Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 19). As to the right of the inhabitants of a new ecclesiastical parish carved out of an ancient parish to attend and vote at the election of churchwardens of the old parish church, see p. 481, *post*. It also includes a churchwarden who has by statute been made *ex officio* a part of the vestry and has been given a right to vote at it (*Leftly v. Monnington* (1879), 4 Ex. D. 307).

(*r*) Vestries Act, 1818 (58 Geo. 3, c. 69), s. 4.

(*s*) Vestries Act, 1819 (59 Geo. 3, c. 85), s. 3; Vestries Act, 1853 (16 & 17 Vict. c. 65), s. 1.

(*t*) Vestries Act, 1819 (59 Geo. 3, c. 85), s. 2.

(*u*) See p. 462, *post*.

(*a*) See p. 474, *post*.

(*b*) Ayl. Par. 455, 456; *Burder v. Veley* (1840), 12 Ad. & El. 233, 255; *Veley v. Burder* (1841), *ibid.*, 265, 302, Ex. Ch.

(*c*) See p. 784, *post*.

(*d*) Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), ss. 1—3, 5—8, 10. See also p. 784, *post*.

(*e*) *Canones Ecclesiastici* (1803), 89.

(*f*) *R. v. Daventry (Churchwardens)* (1859), 5 Jur. (n. s.) 940.

R. v. St. Margaret, Leicester (Select Vestry) (1839), 10 Ad. & El. 730.

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Consent to
alterations
or additions
in churches
etc.

Compulsory Church Rate Abolition Act, 1868 (*h*), they are to lay before the vestry once at least in every year an account of their receipts and expenditure and a statement of the balance, if any, remaining in their hands (*i*).

The consent of the vestry is generally requisite to the granting of a faculty for an alteration or addition in the fabric or furniture of the church or in the churchyard (*j*). But the resolution of the vestry on the subject is not conclusive, and will, for good reasons, be disregarded (*k*).

(iii.) Meetings and Voting.

Summoning.

887. The summoning of a vestry meeting rests with the incumbent or the churchwardens, or with them conjointly, and he or they may fix the hour of the meeting (*l*). The notice convening it must be signed by the incumbent or a churchwarden or overseer of the poor of the parish (*m*). A notice, so signed, of the place and day and hour of holding the meeting and of the purpose for which it is summoned (*n*) must be affixed previously to the commencement of divine service (*o*), on some Sunday at least three days before the day on which it is to be held (*p*), on or near to the doors of all the churches and chapels within the parish or other area for which the meeting is summoned (*q*).

(*h*) 31 & 32 Vict. c. 109.

(*i*) *Ibid.*, s. 9; see pp. 473, 784, *post*.

(*j*) *Clayton v. Dean* (1849), 7 Notes of Cases, 46, at p. 53; *Jackson v. Singer* (1868), 37 L. J. (ECCLES.) 9; *Evans v. Slack* (1869), 38 L. J. (ECCLES.) 38; *Peck v. Trower* (1881), 7 P. D. 21; see p. 734, *post*. The consent may be considered sufficient, although strict legal form was not observed in summoning the vestry (*Thomas v. Morris* (1823), 1 Add. 470).

(*k*) *Butterworth v. Walker* (1765), 3 Burr. 1689, at p. 1692; *Groves v. Hornsey* (Rector) (1793), 1 Hag. Con. 188; *St. John's, Margate* (Churchwardens) v. *Parishioners of the Same* (1794), 1 Hag. Con. 198; *Woodward v. Folkestone* (Parishioners) (1880), Trist. 177; *Nickalls v. Briscoe*, [1892] P. 269. If the circumstances so require, the votes of the members of the vestry who are Church people will be distinguished (*Tottenham* (Vicar) v. *Venn* (1874), L. R. 4 A. & E. 221). Where the ecclesiastical district remaining attached to an ancient parish church is not coterminous with the civil parish, the consent of the vestry of the civil parish will not be required (*Richmond* (Vicar) and *St. Matthias, Richmond* (Chapelwardens) v. *All Persons having Interest*, [1897] P. 70; *Re St. Mark's, Wimbledon, Wimbledon* (Vicar) v. *Eden*, [1908] P. 167).

(*l*) *R. v. Tottenham* (Vicar) (1879), 4 Q. B. D. 367, *per* COCKBURN, C.J., at p. 370, affirmed *sub nom.* *R. v. Wilson* (1880), 43 L. T. 560, O. A. In *Dawe v. Williams* (1824), 2 Add. 130, it was laid down by SIR JOHN NICHOLL, at p. 139, that vestries for church matters ought to be called by the churchwardens with the consent of the minister. In *Butt v. Fellowes* (1843), 3 Curt. 680, SIR H. JENNER FUST, at p. 696, expressed the opinion that notice of a vestry meeting given by a private parishioner was valid. But this is not law. If the incumbent or churchwardens improperly refuse to summon a meeting which ought to be held, the remedy lies in a mandamus to compel them to do so (*R. v. St. Margaret, Westminster* (Churchwardens) (1815), 4 M. & S. 260).

(*m*) Parish Notices Act, 1837 (7 Will. 4 & 1 Vict. c. 45), s. 3.

(*n*) It is sufficient if the notice indicates the purpose with reasonable certainty (*Clutton v. Cherry* (1816), 2 Phillim. 373; *Rand v. Green* (1860), 6 Jur. (N. S.) 303; S. C. (on rule for prohibition) (1860), 9 O. B. (N. S.) 470).

(*o*) It is sufficient if it is affixed after morning service but before the usual afternoon service (*Burnley v. Mathley Overseers* (1859), 1 E. & E. 789).

(*p*) The three days must be clear days (*R. v. Best* (1847), 16 L. J. (M. C.) 102).

(*q*) Vestries Act, 1818 (58 Geo. 3, c. 69), s. 1; Parish Notices Act, 1837

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888. Vestry meetings are ordinarily held in the vestry of the church, and may be held in the church itself (*r*). They may also be held elsewhere (*s*), and a meeting may be adjourned to a different place for the purpose of a poll, whether the intention so to adjourn it was stated in the notice summoning the meeting (*t*) or not (*a*).

889. The incumbent, or the minister acting as incumbent, is *ex officio* chairman of a vestry meeting (*b*). If he is absent, the members present elect one of their number as chairman (*c*). The chairman, besides his vote as a member of the vestry, has a casting vote if the votes are equal (*d*).

890. The voting is ordinarily in the first instance by show of hands, and a poll need not be demanded until after the chairman's decision on the show of hands, but it should then be demanded forthwith (*e*). It may, however, be directed to be taken without a previous show of hands (*f*). It can be demanded as of right, and if refused is enforceable by mandamus (*g*). If demanded, it ought,

Voting by
show of
hands and
poll.

(7 Will. 4 & 1 Vict. c. 45), s. 2. The notice need only be affixed on or near to the principal door of each church and chapel (*Ormerod v. Chadwick* (1847), 16 M. & W. 367). It must be so affixed at every church or chapel in the parish at which the service of the Church of England is parochially performed, but not at proprietary or private chapels at which it is performed, nor at disused chapels or dissenting chapels (*R. v. Whipp* (1843), 4 Q. B. 141; *Ormerod v. Chadwick*, *supra*).

(*r*) *Wilson v. M'Math* (1819), 3 Phillim. 67, *per* Sir JOHN NICHOLL, at p. 82; S. C. on rule for prohibition (1819), 3 B. & Ald. 241, *per* ABBOTT, C.J., and BAYLEY, J., at p. 243. By the Vestries Act, 1850 (13 & 14 Vict. c. 57), ss. 1, 10, the Poor Law Commissioners, whose powers have since been transferred to the Local Government Board (Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 2), were empowered, upon the application of the vestry of a parish containing a population exceeding 2,000, to order that the Act or any part thereof should be put in force in the parish. After twelve months from the date of making such an order, the vestry of the parish cannot meet in any consecrated church or chapel in the parish nor, except in case of urgency and with the approval of the Local Government Board, in the vestry room attached thereto; and the churchwardens and overseers or the overseers alone are empowered, with the sanction of the Local Government Board and a majority of the vestry, to hire or purchase or erect a building for the holding of vestry and other parochial meetings, and to borrow money for the purpose (Vestries Act, 1850 (13 & 14 Vict. c. 57), ss. 2—5).

(*a*) *R. v. St. Mary, Lambeth (Churchwardens)* (1832), 1 Ad. & El. 346, n. (*b*).

(*t*) *R. v. Chester (Archdeacon)* (1834), 1 Ad. & El. 342; *Baker v. Wood* (1837), 1 Curt. 507.

(*a*) *R. v. St. Mary, Lambeth (Churchwardens)*, *supra*; *R. v. D'Oyly* (1840), 12 Ad. & El. 139.

(*b*) *Wilson v. M'Math*, *supra*; *R. v. D'Oyly*, *supra*.

(*c*) Vestries Act, 1818 (58 Geo. 3, c. 69), s. 2.

(*d*) *Ibid.*, s. 2. But at an election of churchwardens his initial vote is exhausted by appointing one of them (*R. v. Salisbury (Bishop)*, [1901] 2 K. B. 225, C. A.). As to whether, if the votes of the parishioners for the other churchwarden are equal, he has a casting vote, see p. 463, *post*.

(*e*) *Campbell v. Maund* (1836), 5 Ad. & El. 865, Ex. Ch.; *R. v. St. Asaph (Vicar)*, [1883] W. N. 100.

(*f*) *R. v. Birmingham (Rector)* (1837), 7 Ad. & El. 254. But see *R. v. Goole (Incumbent etc.)* (1861), 4 L. T. 322.

(*g*) *Campbell v. Maund*, *supra*; *Ex parte Growsmith* (1841), 5 Jur. 551; *Gordon v. Hayward* (1905), 21 T. L. R. 298. If it is refused, the resolution carried by show of hands cannot be regarded as recording the opinion of the parish (*White v. Steele* (1862), 12 C. B. (N. S.) 383).

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in the absence of other business, to be taken immediately; but if there is no time for this, there must be an adjournment for the purpose(*h*). Members of the vestry, in the event of a poll being taken, have from one to six votes according to the annual rateable value of the hereditaments in respect of which their names are entered on the rate book. If it is under £50, they have one vote. If it amounts to £50 or upwards, they have one vote for every complete £25 of the rateable value up to £150. If it amounts to or exceeds £150, they have six votes. If two or more persons are entered jointly in respect of the same hereditament, the votes for that hereditament are divided between them; but if only one of them attends the meeting, he may give all the votes(*i*). When a poll is taken, all members of the vestry, whether present at the previous meeting or not, have a right to vote(*k*). The chairman arranges for the holding of the poll, and, being bound so to do, is in the first instance responsible for its expenses(*l*). In the absence of a local custom limiting its duration, it must be kept open for a sufficient length of time, having regard to the extent and population of the parish and to requisite publicity of the fact of the poll(*m*). But if a poll has been demanded in a particular way, and it has been so conducted without any objection at the time, any irregularity in the method of procedure will be held to have been waived(*n*). Votes at the poll must be tendered by the voters in person and openly(*o*), and an action will lie against a person who prevents a member of the vestry from voting(*p*). But a fresh poll will not be ordered on account of the chairman rejecting votes alleged to be admissible or committing some other irregularity, if the result does not appear to have been affected thereby(*q*).

(*h*) *R. v. D'Oily* (1840), 12 Ad. & El. 139.

(*i*) Vestries Act, 1818 (58 Geo. 3, c. 69), s. 3. Where a person is rated in respect of several hereditaments in the parish, their value is lumped together for the purpose of ascertaining the number of votes to which he is entitled (*Richardson v. Gladwin* (1858), E. B. & E. 138; *Lambe v. Grieses* (1862), 8 Jur. (N. S.) 288); even though he holds them in different capacities (*R. v. Kirby* (1861), 1 B. & S. 647). Where, by custom, the poor rates had been assessed according to the supposed ability of the persons charged and not according to the value of their hereditaments, the provision of the Act as to plurality of votes was held not to apply (*Nightingale v. Marshall* (1823), 2 B. & C. 313).

(*k*) *R. v. Lambeth (Rector)* (1838), 8 Ad. & El. 356.

(*l*) Shaw's Parish Law, 7th ed. (1892), Appendix V., pp. 607 *et seq.* In *Tiarks v. Hutton* (1866), L. R. 1 A. & E. 270, the expense of the attendance of a legal adviser at the poll was held to be payable out of the church rate.

(*m*) *R. v. Winchester (Bishop's Commissary)* (1806), 7 East, 573; *Baker v. Wood* (1837), 1 Curt. 507; *Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385. Disturbance is a ground for clearing the room, but not for closing the poll (*R. v. Graham* (1861), 9 W. R. 738).

(*n*) *Campbell v. Maund* (1836), 5 Ad. & El. 865, Ex. Ch.

(*o*) *Faulkner v. Elger* (1825), 4 B. & C. 449; *Story v. Colk* (1848), 6 Notes of Cases, Supplement, p. xxxiii. Where the parishioners have the right of electing the incumbent, the election may be conducted by secret ballot, since the vestry regulations as to plural voting and otherwise do not apply to it (*Shaw v. Thompson* (1876), 3 Ch. D. 233).

(*p*) *Phillibrown v. Ryland* (1725), 8 Mod. Rep. 351.

(*q*) *R. v. Lambeth (Rector)*, *supra*; *Ex parte Mawby* (1854), 3 E. & B. 718; *R. v. Goole (Incumbent etc.)* (1861), 4 L. T. 322.

891. Minutes of the proceedings and resolutions of every vestry meeting are to be entered in a book and signed by the chairman and by any other of the inhabitants who choose to affix their signatures (*r*).

892. The proceedings of one meeting do not require confirmation by a subsequent meeting (*s*). But one meeting cannot prescribe what shall be the procedure at future meetings (*t*).

(iv.) *Under Local Laws or Customs.*

893. The Vestries Act, 1818 (*a*), does not extend to the city of London or the borough of Southwark (*b*), nor does it affect the time of meeting, proceedings, or voting in the case of any vestry regulated by special Act of Parliament or special custom (*c*).

Where the London Government Act, 1899 (*d*), transferred the civil powers and duties of the vestry of an ancient metropolitan parish to a borough council, the ecclesiastical powers and duties of the vestry have by a scheme under the Act been vested in the inhabitants of some parish or ecclesiastical district, and the interest of the vestry in any church property, other than the vestry building, has in like manner been vested in the incumbent and churchwardens of some parish or ecclesiastical district or in one or some of them (*e*).

In some places, by local custom, the vestry have the right of electing the incumbent (*f*), the parish clerk (*g*), the sexton (*h*), or the organist (*i*).

(v.) *In New Parishes.*

894. In distinct and separate parishes and district parishes formed under the Church Building Act, 1818 (*k*), in separate spiritual parishes formed under the Church Building Act, 1831 (*l*), in consolidated chapelries and district chapelries (*m*), in Peel parishes formed under the New Parishes Act, 1843, in new parishes formed under the New Parishes Act, 1856, and in districts which have become separate ecclesiastical parishes under s. 14 of that Act (*n*),

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Minutes of proceedings.

How proceedings affected by subsequent meetings.

Non-application of Vestries Act, 1818, to certain places.

Ancient parishes in the metropolis.

Custom to elect incumbent and parish officers.

Vestry and quasi-vestry meetings.

(*r*) Vestries Act, 1818 (58 Geo. 3, c. 69), s. 2.

(*s*) *Mawley v. Barbet* (1799), 2 Esp. 687.

(*t*) *Ibid.*

(*a*) 58 Geo. 3, c. 69.

(*b*) *Ibid.*, ss. 9, 10.

(*c*) *Ibid.*, s. 8.

(*d*) 62 & 63 Vict. c. 14.

(*e*) *Ibid.*, s. 23 (1).

(*f*) *Shaw v. Thompson* (1876), 3 Ch. D. 233.

(*g*) *Parish-Clerk's Case* (1611), 13 Co. Rep. 70; see p. 475, *post*.

(*h*) *R. v. Stoke Damarel (Minister)* (1836), 5 Ad. & El. 584, 590, 591. See p. 478, *post*.

(*i*) *R. v. St. Stephen's, Coleman Street (Vicar)* (1844), 9 Jur. 255; see p. 479, *post*.

(*k*) 58 Geo. 3, c. 45, s. 73. The provision of the Church Building Act, 1819 (59 Geo. 3, c. 134), s. 30, as to constituting select vestries in these parishes is now repealed (Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91), s. 1, sched.).

(*l*) 1 & 2 Will. 4, c. 38, s. 25.

(*m*) Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 6.

(*n*) 6 & 7 Vict. c. 37, s. 17; 19 & 20 Vict. c. 104, ss. 14, 15; and see pp. 443 *et seq.*, *ante*.

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one of the churchwardens is chosen at a meeting in the nature of a vestry meeting (o) by the persons who would be entitled to take part in the election if the parish or chapelry were an ancient parish (p); and the same persons may meet in vestry and make and assess a voluntary church rate in respect of the church of their ecclesiastical parish or district (q). In these areas the question of obtaining a faculty for additions or alterations in the church or chapel is also submitted to a similar *quasi*-vestry meeting (r).

Mode of
summoning
and holding
meetings.

In consolidated chapelries and district chapelries the meeting for the appointment of churchwardens is to be summoned in all respects as if the chapelry were a parish and the meeting were a parish meeting (s). But no such imperative rule exists in the case of other new ecclesiastical parishes or districts (t). In Peel parishes, new parishes under the New Parishes Act, 1856 (u), and districts which have become separate ecclesiastical parishes under s. 14 of that Act, the meeting is to be summoned in such manner in all respects as the incumbent directs (a).

The Vestries Act, 1818 (b), does not apply to the *quasi*-vestries of new ecclesiastical areas (c).

(vi.) *Select Vestries.*

Select vestries
—constitution
and powers.

895. A select vestry, consisting of a limited body of parishioners, and having the powers of the whole number, may exist either (1) by immemorial custom (d), or (2) by a local Act of Parliament (e), or (3) by the adoption of the Vestries Act, 1831 (f). Where it exists it supersedes in every respect the general vestry (g).

Select vestry
by custom.

896. A select vestry existing by custom may by custom co-opt new members from among the parishioners, and may be of a variable

(o) So styled in the Burial Act, 1857 (20 & 21 Vict. c. 81), s. 5.

(p) See also Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 7.

(q) Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), ss. 6, 10.

(r) *St. Peter's, Eaton Square (Vicar) v. The Same (Parishioners)*, [1894] P. 350, 351.

(s) Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 6.

(t) *R. v. Barrow* (1869), L. R. 4 Q. B. 577, where it was held that the notice summoning the meeting need not be given on a Sunday three clear days previously.

(u) 19 & 20 Vict. c. 104.

(a) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 17.

(b) 58 Geo. 3, c. 69.

(c) *R. v. Barrow, supra*. There is consequently no plural voting in these *quasi*-vestries.

(d) Gib. Cod. 219, n.; Burn, Ecclesiastical Law, Vol. I., p. 415; *Butterworth v. Walker* (1765), 3 Burr. 1689, 1692; *Berry v. Banner* (1792), Peake, 156, 161. It cannot be created by faculty (*ibid.*, at pp. 160, 161).

(e) Burn, Ecclesiastical Law, Vol. I., p. 415, ii.; *R. v. Christchurch Overseers* (1857), 7 E. & B. 409, Ex. Ch.

(f) 1 & 2 Will. 4, c. 60.

(g) *Ibid.*, s. 27; Gib. Cod. 219, n.; Burn, Ecclesiastical Law, Vol. I., p. 415; *Butterworth v. Walker, supra*; *R. v. Peters* (1856), 6 E. & B. 225. As to the election of churchwardens by a select vestry, see *Berry v. Banner, supra*.

number (h). It may by custom consist of the incumbent and parishioners who have been elected to the office of churchwarden and have either served or been fined for not doing so (i); or of the rector and churchwardens, parishioners who have been upper churchwardens, and certain others elected by the vestry (k). A bankrupt is disqualified for being a member of a select vestry, and vacates his seat if he is a member (l).

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897. If a select vestry assemble on a particular day, not being the usual day of meeting, and for a special purpose, the meeting is not good unless all the members receive notice of it (m).

Notice of meeting.

898. In the absence of custom or enactment to the contrary, a majority of the whole number of select vestrymen must be present for the transaction of business (n). And where a local Act, constituting a select vestry in a parish, authorises action by the major part of the members assembled at a meeting, a motion is ineffectual which is carried only by a majority of those voting and not by a majority of those assembled, including such as decline to vote (o).

Requisite quorum and majority for transacting business.

899. At a poll taken in the month of March, on a requisition made in the prescribed manner, the Vestries Act, 1831 (p), may be adopted in any parish, except a rural parish not containing more than eight hundred ratepayers, and except parishes within the Metropolis Management Act, 1855 (q), by a two-thirds vote of a majority voting one way or the other of the ratepayers entitled to vote under the Act, that is to say, ratepayers who have been rated for the whole preceding year and have paid all rates except those due within the preceding six months; but if the adoption is not carried, no requisition for the same purpose can be made within the next three years (r). Where the Act is adopted, a select vestry is to be constituted consisting of the incumbent and churchwardens of the parish, and the incumbent of every ecclesiastical parish or district within it, and a number of resident householders assessed within the parish at not less than £10, or in parishes containing more than 3,000 ratepayers or situate in the city of London or within the metropolitan police district at not less than £40 (s), and elected by the ratepayers entitled to vote under the

Adoption and effect of the Vestries Act, 1831.

(h) *Batt v. Watkinson* (1690), 2 Lut. 1027; *Berry v. Banner* (1792), Peake, 156; *Golding v. Fenn* (1828), 7 B. & C. 765; *Goodall v. Whitmore* (1828), 2 Hag. Ecc. 369.

(i) *Gibbs v. Flight* (1846), 3 O. B. 581, 603.

(k) *B. v. Brain* (1832), 3 B. & Ad. 614.

(l) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 32 (1) (e), 34. As to the duration of the disqualification, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 89.

(m) *Dobson v. Fussy* (1831), 7 Bing. 305.

(n) *Blacket v. Blizzard* (1829), 9 B. & C. 851.

(o) *R. v. Christchurch Overseers* (1857), 7 E. & B. 409, Ex. Ch.

(p) 1 & 2 Will. 4, c. 60.

(q) 18 & 19 Vict. c. 120. S. 1 of this Act repealed, as to the parishes therein comprised, the Vestries Act, 1831 (1 & 2 Will. 4, c. 60).

(r) Vestries Act, 1831 (1 & 2 Will. 4, c. 60), ss. 1—9, 11, 40—43. Where under a special Act the select vestries of two parishes are a joint vestry for certain purposes, one of the parishes cannot separately adopt the Vestries Act, 1831 (*R. v. Basset* (1851), 17 Q. B. 332).

(s) Vestries Act, 1831 (1 & 2 Will. 4, c. 60), ss. 23, 26. The Act is

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Act in the month of May at the rate of twelve for every thousand or fraction of a thousand of the ratepayers, but not exceeding in any case one hundred and twenty, except where a special Act provides for a greater number (t). One-third of the number are to retire annually, but are to be capable of re-election (u). The major part of the vestrymen assembled may act when the prescribed quorum is present (a), and the proceedings are to be conducted, and accounts kept and published, and auditors appointed, in the prescribed manner (b).

(vii.) *Vestry Clerks.*

Vestry clerk.

900. The vestry may elect a clerk to act as their registrar or secretary, attend their meetings, draw up their orders, and keep their books and papers (c). But the office depends on the will of the vestry and is not permanent; nor is any fixed salary attached to it. A mandamus, therefore, will not be issued to admit to the office a person who is alleged to have been elected to it (d). A churchwarden cannot hold the office of vestry clerk (e).

SUB-SECT. 4.—Churchwardens.

(i.) *Qualification and Liability to Serve.*

Qualification
and liability
in ancient
parishes.

901. Unless disqualified or exempted, every householder (f) in an ancient parish is eligible and, if appointed, is bound to serve as

by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 1, as to the parishes comprised in that Act. The total assessment may be made up of several tenements, not all occupied by the vestryman elected, and the election of some unqualified persons does not render void the election of others who are qualified (*R. v. St. Pancras (Churchwardens)* (1834), 1 Ad. & El. 80).

(t) Vestries Act, 1831 (1 & 2 Will. 4, c. 60), ss. 22, 23. In other respects an earlier special Act is superseded by the adoption of the Vestries Act, 1831 (*R. v. St. Pancras (Churchwardens)*, *supra*). The provision of s. 22 of the Act as to taking the election in each district where a parish is divided into districts for ecclesiastical or other purposes does not apply to a division for the sake of convenience which may be changed from time to time (*ibid.*).

(u) Vestries Act, 1831 (1 & 2 Will. 4, c. 60), ss. 10—26, 41, 42. A special provision is made for the first three elections under the Act (*ibid.*, s. 24; *R. v. St. Pancras (Churchwardens)*, *supra*).

(a) *R. v. Christchurch Overseers* (1857), 7 E. & B. 409, Ex. Ch.

(b) Vestries Act, 1831 (1 & 2 Will. 4, c. 60), ss. 28—42.

(c) Burn, Ecclesiastical Law, Vol. I., p. 415. A vestry clerk can bring an action of detinue or trover to recover possession of books or papers belonging to him in respect of his office (*Anon.* (1816), 2 Chit. 255).

(d) *R. v. Croydon (Churchwardens)* (1794), 5 Term Rep. 713. But where, in a parish containing a population exceeding 2,000, the provisions of the Vestries Act, 1850 (13 & 14 Vict. c. 57), as to vestry clerks have been put in force and are applicable (see note (r), p. 455, *ante*), a vestry clerk is to be elected to perform the duties specified in that Act, at a salary fixed by the Local Government Board, and is not removable except by a resolution of the vestry specially called for the purpose and with the consent of the Local Government Board (*ibid.*, ss. 6—10). In such cases a *quo warranto* will lie against a holder of the office who has been unduly elected thereto (*R. v. Burrows*, [1892] 1 Q. B. 399). See title CROWN PRACTICE, Vol. X., p. 128.

(e) *R. v. Tidy*, [1892] 2 Q. B. 179.

(f) A servant occupying for his master is not a householder (*R. v. Spurrell* (1865), L. R. 1 Q. B. 72), nor is the occupier of mere apartments (*Searell v. Rowlandson* (1888), Trist. 50).

churchwarden of the parish church (*g*). A woman can hold the office (*h*).

Persons under age, aliens, Jews, and persons who have been convicted of felony, perjury, or fraud, are disqualified from serving (*i*).

The following persons are exempt from liability to serve, but may serve if they are appointed and consent so to do:—Peers, and members of Parliament (*k*), clergymen (*l*), Roman Catholic priests (*m*), dissenting ministers (*n*), sheriffs (*o*), practising barristers and solicitors and officers of the superior courts (*p*), practising physicians and members of the College of Surgeons (*q*), practising apothecaries (*r*), registered medical practitioners (*s*), and dental practitioners (*t*), persons serving in the militia (*a*), and men in the territorial force (*b*) or army reserve (*c*), naval coast volunteers (*d*), royal naval volunteers (*e*), registrars of births and deaths

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Constitution of the Church into Parishes.

Disqualification for service.
Exemption from service.

(*g*) *Brook v. Owen* (1718), cited in 3 Phillim. 517, n.; *Castle v. Richardson* (1726), 2 Stra. 715; *Burnie v. Weller* (1831), 3 Hag. Ecc. 474. He is not excused by a bodily infirmity such as deafness (*Cooper v. Allnutt* (1820), 3 Phillim. 165), nor by poverty (*Morgan v. Cardigan* (*Archdeacon*) (1697), 1 Salk. 166). He must be a resident in the parish (Gib. Cod. 215; *R. v. Cree* (1892), 67 L. T. 556; *R. v. Townson, Ex parte Broderip* (1908), 24 T. L. R. 690); and it is not a sufficient qualification to be the rated occupier of a store and stabling therein (*R. v. Harding* (1889), 6 T. L. R. 53). This case seems to have overruled *Harrison v. Bennett* (1876), Trist. 43, where the rated occupier of a room in the parish for convenience and pleasure only was held to be eligible. In *Brook v. Owen, supra*, a person was held bound to serve as churchwarden in a parish in which he had his house of business, although he lodged in another parish; and in *Stephenson v. Langston* (1804), 1 Hag. Con. 379, it was held that, according to the custom of the city of London, a partner in a banking house in the parish, who neither slept nor had his meals there, was eligible. A lodger or a son living with his father is ineligible (*Ford v. Chauncy* (1715), 1 Hag. Con. 382, n.). It would seem that where a parish is divided into new ecclesiastical parishes a resident in one of these is qualified to be churchwarden of the parish church (*Jones v. Hayworth* (1881), Trist. 47). There, however, the parish had been formed under the Church Building Act, 1818 (58 Geo. 3, c. 45), s. 16; and s. 73 of that Act does not expressly prescribe residence as a qualification for a churchwarden.

(*h*) *Gordon v. Hayward* (1905), 21 T. L. R. 298.

(*i*) *Anthony v. Seger* (1789), 1 Hag. Con. 9, per Lord STOWELL (then Sir WILLIAM SCOTT), at p. 10; Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 48.

(*k*) Gib. Cod. 215, n. (ee).

(*l*) *Ibid.*; *Anon.* (1704), 6 Mod. Rep. 140, n.

(*m*) Roman Catholic Relief Act, 1791 (31 Geo. 3, c. 32), s. 8.

(*n*) Stat. (1689) 1 Will. & Mar. c. 18, s. 8; Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 9.

(*o*) *Stephenson v. Langston, supra*, at p. 380.

(*p*) *Prouse's Case* (1634), Cro. Car. 389; Com. Dig. tit. Attorney, B. 15; *Ex parte Jefferies* (1829), 6 Bing. 195.

(*q*) Stat. (1513) 5 Hen. 8, c. 6; stat. (1540) 32 Hen. 8, c. 40, s. 1; stat. (1744) 18 Geo. 2, c. 15, s. 8.

(*r*) Stat. (1694) 6 & 7 Will. & Mar. c. 4.

(*s*) Medical Act (21 & 22 Vict. c. 90), s. 35.

(*t*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 30.

(*a*) Local Militia (England) Act, 1812 (52 Geo. 3, c. 38), s. 197; Militia Act, 1882 (45 & 46 Vict. c. 49), s. 41.

(*b*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 23 (4).

(*c*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 7.

(*d*) Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), s. 8.

(*e*) Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 7.

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Service by deputy.

Appointment of two churchwardens in ancient parish.

and of marriages (*f*), income tax commissioners (*g*), commissioners and officers of Inland Revenue (*h*) and of Customs (*i*), the Postmaster-General and officials serving under him (*k*), factory inspectors (*l*), aldermen (*m*), persons serving in a parochial office in another parish (*n*), and generally all persons holding a public office the duties of which must be discharged personally and cannot be performed by deputy (*o*).

Roman Catholics and dissenters, who are not priests or ministers, if they are appointed and decline to serve in person, must execute the office by deputy (*p*).

(ii.) *Appointment and Admission to Office.*

902. In an ancient parish, in the absence of a contrary custom (*q*), two churchwardens are chosen yearly (*r*) by the minister (*s*) and the parishioners entitled to vote in vestry jointly, if they can agree, and, if not, one by the minister and one by the other parishioners (*t*). In either case, both churchwardens have the same functions and there is no legal precedence between them (*a*). By custom, however, there may be only one churchwarden (*b*) or more than two (*c*). By custom, too, the parishioners may elect

(*f*) Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 18.

(*g*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 35.

(*h*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 8.

(*i*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 9.

(*k*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 43.

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 118 (6).

(*m*) *Abdy's Case* (1640), Cro. Car. 585.

(*n*) *Stephenson v. Langston*, on appeal (1805), 1 Hag. Con. 381, n., 383, n.

(*o*) *R. v. Wood* (1795), 1 Esp. 359. An acting justice of the peace or a lieutenant of marines ought not to be appointed to a parish office where there are other substantial householders capable of serving (*R. v. Gayer* (1757), 1 Burr. 245).

(*p*) Stat. (1689) 1 Will. & Mar. c. 18, s. 5; Roman Catholic Relief Act, 1791 (31 Geo. 3, c. 32), s. 7. But a Quaker has been held to be exempt from service either personally or by deputy (*Adey v. Theobald* (1836), 1 Curt. 447).

(*q*) *Anon.* (1675), 1 Vent. 267.

(*r*) No parish can legally be without churchwardens, and an election can be compelled by mandamus (*R. v. Wix (Inhabitants)* (1831), 2 B. & Ad. 197).

(*s*) A perpetual curate has the rights of a minister in the appointment (*R. v. Allen* (1872), L. R. 8 Q. B. 69). So, too, has a curate in charge, in the absence of the incumbent or during a vacancy in the benefice (*Hubbard v. Penrice* (1746), 2 Stra. 1246).

(*t*) *Stutter v. Freston* (1717), 1 Stra. 52; *R. v. Salisbury (Bishop)*, [1901] 2 K. B. 225, O. A. Where from any cause a minister does not join in the appointment, the parishioners can elect the two churchwardens (*Northampton (Churchwardens) Case* (1690), Carth. 118). As to the right of the inhabitants of a new ecclesiastical parish carved out of an ancient parish to attend and vote at the election of churchwardens of the old parish church, see p. 481, *post*.

(*a*) *Canones Ecclesiastici* (1603), 89. But a churchwarden acquires precedence by longer service (*R. v. Brain* (1832), 3 B. & Ad. 614).

(*b*) *R. v. Hinckley (Inhabitants)* (1810), 12 East, 361, 365; *R. v. Earl Shilton (Inhabitants)* (1818), 1 B. & Ald. 275; *R. v. Catesby (Inhabitants)* (1824), 2 B. & O. 814.

(*c*) *R. v. Marsh* (1836), 5 Ad. & El. 468; *Bremner v. Hull* (1866), L. R. 1 O. P. 748; *St. Sepulchre (Vicar) v. St. Sepulchre (Churchwardens)* (1879), 5 P. D. 64.

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both churchwardens (*d*), as is the case in the city of London (*e*). Or the choice may rest with the lord of the manor (*f*), or with a select vestry (*g*), who, again, by custom, may elect yearly one churchwarden, the person elected in the previous year retaining office as senior churchwarden (*h*). Or one may be chosen by the minister and the other by the outgoing churchwardens (*i*). Where a parish is divided into townships, there may be a special custom for the election of separate churchwardens for each township (*k*).

903. In the absence of custom to the contrary the appointment is made at the Easter vestry in Easter week (*l*). But an appointment at another time is valid (*m*). Before proceeding to elect, the vestry meeting may inquire as to the character of the proposed candidate, and, if he has held the office before, may investigate correspondence as to his conduct therein (*n*). If the person elected is released from service on payment of a fine or as incapable from ill-health or otherwise, or as legally exempt, the vestry may proceed to another election (*o*). A poll may be directed to be taken without a previous show of hands (*p*); but, if this is not done, a candidate who is defeated on a show of hands and desires a poll should demand it as soon as the result of the show of hands is declared (*q*), and can enforce it by mandamus if it is refused (*r*). If the votes are equal, the minister, as chairman of the vestry, has, perhaps, a casting vote (*s*). A defeated candidate, who desires to set aside the election of his rival on the ground of irregularity, can do so by

Time and
mode of
appointment.

(*d*) *Hubbard v. Penrice* (1746), 2 Stra. 1245; *Evelin's Case* (1639), Cro. Car. 551.

(*e*) *R. v. Rice* (1697), 1 Ld. Raym. 138.

(*f*) Godolphin, Repertorium Canonicum, p. 153.

(*g*) *R. v. St. James, Westminster (Churchwardens)* (1836), 5 Ad. & El. 391; *Gibbs v. Flight* (1846), 3 O. B. 581.

(*h*) *Gibbs v. Flight*, *supra*. As to the junior churchwarden of one year becoming by custom the senior churchwarden of the next, see also *Warner's Case* (1619), Cro. Jac. 532.

(*i*) *Oatten v. Barwick* (1719), 1 Stra. 145. But if the outgoing churchwardens cannot agree, the right of choice reverts to the parishioners by the ordinary law (*ibid.*).

(*k*) *Astle v. Thomas* (1823), 2 B. & O. 71; *R. v. Marsh* (1836), 5 Ad. & El. 468; *Bremner v. Hull* (1866), L. R. 1 O. P. 748; *Green v. R.* (1876), 1 App. Cas. 513; *St. Sepulchre (Vicar) v. St. Sepulchre (Churchwardens)* (1879), 5 P. D. 64.

(*l*) *Canones Ecclesiastici* (1603), 90.

(*m*) *Butt v. Fellowes* (1843), 3 Curt. 680; *R. v. St. Faith (Inhabitants)* (1856), 2 Jur. (N. S.) 212.

(*n*) *R. v. Hagbourne (Vicar)* (1886), 51 J. P. 276.

(*o*) *Birnie v. Weller* (1831), 3 Hag. Eco. 474.

(*p*) *R. v. Birmingham (Rector)* (1837), 7 Ad. & El. 254. For the qualification of the electors and the requisite formalities of the vestry meeting and poll, see pp. 452 *et seq.*, *ante*.

(*q*) *Campbell v. Maund* (1836), 5 Ad. & El. 865, Ex. Ch.; *R. v. St. Asaph (Vicar)*, [1883] W. N. 100. As to the mode of conducting the poll, see p. 456, *ante*.

(*r*) *Campbell v. Maund*, *supra*; *Ex parte Growsmith* (1841), 5 Jur. 551; *Gordon v. Hayward* (1905), 21 T. L. R. 298.

(*s*) *R. v. Salisbury (Bishop)*, [1901] 1 K. B. 573, *per* CHANNELL, J., at p. 579. But he is not entitled to it under the provision as to his casting vote in the Vestries Act, 1818 (58 Geo. 3, c. 69), s. 2 (S. O. on appeal, [1901] 2 K. B. 225, O. A.).

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Parishes.

Church-
wardens of
new parishes
and of
churches
without a
district.

mandamus (i), provided that he makes the application promptly (a). A churchwarden holding office is presumed to have been duly appointed until the contrary is shown (b).

904. For a church or chapel provided under the Church Building Acts or New Parishes Acts (c) two fit and proper persons are annually chosen as churchwardens at the usual period of appointing parish officers. If it has an ecclesiastical parish or district attached, they are chosen one by the incumbent and the other by the persons who, if the parish or district were an ancient parish, would be members of its vestry (d). If the church or chapel was provided under s. 2 of the Church Building Act, 1831 (e), they are chosen one by the incumbent and the other by the renters of pews therein (f). If the church was built on a site vested in the Ecclesiastical Commissioners and is without a district, they are chosen one by the minister of the church and the other by the pew-renters, or the majority of them, at a meeting summoned by the minister or, if there be none, by the outgoing churchwardens. If there are no rented pews, the minister chooses both churchwardens. In either case they continue in office until others are duly appointed and admitted in their stead (g). The churchwardens of new ecclesiastical parishes or districts are not invested with or competent to perform any civil duty attached to the office of churchwarden (h) unless the language of the statute creating the duty clearly indicates that it is to be performed by them (i).

(i) *R. v. Birmingham (Rector)* (1837), 7 Ad. & El. 254; *Re Barlow* (1861), 30 L. J. (Q. B.) 271; *R. v. Harding* (1889), 6 T. L. R. 53; *R. v. Cree* (1892), 67 L. T. 556. The question cannot be tried by a *quo warranto* (*R. v. Shepherd* (1791), 4 Term Rep. 381; *Re Barlow, supra*); nor in an ecclesiastical suit (*Williams v. Vaughan* (1748), 1 Wm. Bl. 28). See also title CROWN PRACTICE, Vol. X., p. 77.

(a) *R. v. Handborough (Churchwardens)* (1877), 37 L. T. 400, where an application in July to set aside an election held at Easter was refused as being too late.

(b) *Ganvill v. Utting* (1845), 9 Jur. 1081; *Doe d. Bowley v. Barnes* (1846), 8 Q. B. 1037.

(c) See note (i), p. 444, *ante*.

(d) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 73, as to a distinct and separate parish or district parish under that Act; Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 25, which requires that the churchwardens of a separate spiritual parish formed under s. 23 of that Act shall be members of the Church of England chosen out of the inhabitants of the parish; Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 6, which requires that the churchwardens of a consolidated chapelry or district chapelry shall be residing within the chapelry (see *R. v. Harding* (1889), 6 T. L. R. 53); New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 17, and New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 14, 15, which require that the churchwardens of a Peel parish, of a new parish formed under ss. 1, 2 of the New Parishes Act, 1856, and of a separate ecclesiastical parish which has become such under s. 14 of that Act, must be members of the Church of England. Probably the qualifications of residence and Church membership, where not expressly required, would be held to be implied as incidents to general fitness for the office (see, as to residence, *R. v. Cree* (1892), 67 L. T. 556). As to the meeting for choosing the churchwardens, see pp. 457, 463, *ante*.

(e) 1 & 2 Will. 4, c. 38.

(f) *Ibid.*, s. 16; *R. v. Cree, supra*.

(g) Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 7.

(h) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 17; Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 8; *R. v. Kingswinford Overseers* (1854), 3 E. & B. 688.

(i) *R. v. Northowram and Clayton (Ratepayers)* (1865), 7 B. & S. 110.

905. Every churchwarden, before beginning to discharge his duties, must be admitted to his office by making and subscribing before the ordinary or other proper official a declaration that he will faithfully and diligently perform the duties of his office (*k*). The declaration is made before the archdeacon or his official at his visitation, or, in years of episcopal visitation, before the bishop or his chancellor or a surrogate (*l*). The admission confers no title, the function of the ordinary being ministerial, not judicial; and though the person admitting ought not to admit a person clearly disqualified (*m*), it is his duty, which may be enforced by mandamus, to admit in a doubtful case both claimants (*n*), leaving them to determine their relative rights by legal proceedings (*o*). The fee to be paid by each parish at an episcopal or archidiaconal visitation, which includes the admission of the new churchwardens and sidesmen, is 18s. (*p*). It is recoverable from the churchwardens by action of debt if they have parochial or church funds out of which it can be paid (*q*); but, if they have none, they are not personally liable to pay it (*r*).

SECT. 6.
Constitution of the Church into Parishes.

Admission and declaration.

Fee for visitation.

(iii.) *Status.*

906. Churchwardens are a *quasi*-corporation for the purpose of holding in perpetual succession the goods of the church, and also, in the city of London, for the purpose of holding land (*s*). But,

Churchwardens as *quasi*-corporation for certain purposes.

(*k*) *Canones Ecclesiastici* (1603), 118; *Statutory Declarations Act*, 1835 (5 & 6 Will. 4, c. 62), s. 9; *Bray v. Somer* (1862), 2 B. & S. 374. Churchwardens have strictly no legal position until admission. But an action by several churchwardens may be maintained although some have not made the declaration (*Bremner v. Hull* (1866), L. R. 1 C. P. 748). A re-elected churchwarden ought to make it again at the beginning of his new year of office (*Warner's Case* (1619), Cro. Jac. 532; *Stoughton v. Reynolds* (1736), 2 Stra. 1045, 1047). But his not doing so will not prevent his acts from being legally binding on himself and the parish (*Edney v. Smallbones* (1869), 21 L. T. 506).

(*l*) *R. v. Sowter*, [1901] 1 K. B. 396, C. A.

(*m*) *Anthony v. Seger* (1789), 1 Hag. Con. 9, *per* Lord STOWELL (then Sir WILLIAM SCOTT), at p. 10.

(*n*) *R. v. Rice* (1697), 1 Ld. Raym. 138; *R. v. Harris (Dr.)* (1763), 1 Wm. Bl. 430; *Anon.* (1815), 2 Chit. 254; *Ex parte Winfield* (1835), 3 Ad. & El. 614; *R. v. Middlesex (Archdeacon)* (1835), *ibid.*, 615; *Ex parte Duffield* (1836), *ibid.*, 617; *Searell v. Rowlandson* (1888), Trist. 50. The rule for the mandamus is absolute in the first instance (*Anon.* (1815), 2 Chit. 254; *Ex parte Lowe* (1835), 4 Dowl. 15). If the mandamus avers that the applicant was duly elected, it will be a sufficient return to it to state that he was not duly elected (*R. v. Twitty* (1702), 2 Salk. 434; *R. v. Williams* (1828), 8 B. & C. 681).

(*o*) See p. 463, *ante*. The dispute may also be decided in an action of detinue or trover for the churchwardens' books and papers brought in the county court against the claimant who has possessed himself of them by the other claimant; see *Moss v. Thorneley* (1856), 4 W. R. 514.

(*p*) *Ecclesiastical Fees Act*, 1867 (30 & 31 Vict. c. 135), s. 1; *Table of Ecclesiastical Fees*, London Gazette, June 2, 1908.

(*q*) *Shephard v. Payne* (1864), 16 C. B. (N. S.) 132, Ex. Ch.

(*r*) *Veley v. Pertwee* (1870), L. R. 5 Q. B. 573.

(*s*) 1 Bl. Com. 394; Com. Dig. tit. Eglise, F. (3); Gib. Cod. 215; *R. v. Rice, Withnell v. Gartham* (1795), 6 Term Rep. 388, 396; *Fell v. Official Trustees of Charity Lands*, [1898] 2 Ch. 44, 51, 59, C. A. In *Warner's Case*, *supra*, it is said that in London the parson and churchwardens are a corporation to purchase and demise lands. As to *quasi*-corporations, see title CORPORATIONS, Vol. VIII., p. 304.

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Actions by
and against
church-
wardens.

except under the authority of a special enactment (a), they must sue and be sued in their individual names and not by a corporate or official title, and they have no other legal incidents of a corporation (b). They can bring an action in their own names in respect of a matter which occurred during their predecessors' term of office; and an action brought by them during their own term of office can be prosecuted after they have gone out of office, and their successors cannot be substituted for them as plaintiffs (c). If, however, supplementary proceedings are necessary, they can add their successors as co-plaintiffs (d). An action for a matter occurring in the discharge of their office cannot be prosecuted against their successors (e). As a rule both churchwardens must concur in bringing an action (f) and doing any other official act (g). But where a parish has two divisions, with two separate sets of churchwardens, one set need not join or be joined in proceedings affecting the other (h). An ecclesiastical suit by one of the churchwardens of a London parish against a trespasser in the churchyard has been sustained (i). And in the case of land being held by churchwardens as trustees an order for distress upon the tenant thereof for rent can be made by one of them (k). One churchwarden, too, can apply for a faculty for alterations in the church (l). If

(a) By the Church Building Act, 1818 (58 Geo. 3, c. 45), s. 73, the churchwardens of a church or chapel built under that Act are empowered to bring an action for pew rents by their official title of churchwardens, and the action is not to abate by their death or vacation of office.

(b) *Fell v. Official Trustee of Charity Lands*, [1898] 2 Ch. 44, O. A., per LINDLEY, M.R., at p. 51. A monition of an ecclesiastical court to remove ornaments and perform other acts in the church must be addressed to them by their title of churchwardens and not by name (*Liddell v. Beal* (1860), 14 Moo. P. C. C. 1). But in the city of London churchwardens can, by custom, acquire and hold land as a corporation for ecclesiastical or parochial purposes (Com. Dig. tit. *Eglise*, F. (3); Gib. Cod. 215), and it has been said that the parson and churchwardens together can also do so (*Warner's Case* (1619), Cro. Jac. 532). In some other places they have been made a corporation for certain definite purposes by local Acts. The School Sites Acts, 1841 and 1844 (4 & 5 Vict. c. 38, s. 7; 7 & 8 Vict. c. 37, ss. 4, 5), extended to ecclesiastical parishes by the School Sites Act, 1851 (14 & 15 Vict. c. 24), s. 1, empowered the incumbent, churchwardens, and overseers of the poor, or the incumbent and churchwardens of a parish, to hold as a corporation in perpetuity land and buildings for the education of the poor.

(c) *Hadman v. Ringwood* (1590), Cro. Eliz. 145, 179; Com. Dig. tit. *Eglise*, F. (3). The law is the same in the case of proceedings by churchwardens against an incumbent under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 8 (*Perkins v. Enraght* (1881), 7 P. D. 31; affirmed *sub nom. Harris v. Perkins* (1881), 7 P. D. 161, P. O.).

(d) *Marriott v. Tarpley* (1838), 9 Sim. 279.

(e) *Withnell v. Gartham* (1795), 6 Term Rep. 388, per Lord KENYON, O.J., at p. 398; *A.-G. v. Salkeld* (1853), 16 Beav. 554. But in a proper case an order will be made by the court for the intervention of succeeding churchwardens in the proceedings (*A.-G. v. Barker*, Reg. Lib. A. 1843, fol. 1801).

(f) *Fry v. Treasure* (1865), 2 Moo. P. C. C. (N. S.) 539.

(g) *Starkey v. Berton* (1610), Cro. Jac. 234; *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113.

(h) *Astle v. Thomas* (1823), 2 B. & O. 271; *St. Sepulchre (Vicar) v. St. Sepulchre (Churchwardens)* (1879), 5 P. D. 64.

(i) *Quilter v. Newton* (1690), Carth. 151.

(k) *Gouldsworth v. Knights* (1843), 11 M. & W. 337.

(l) *Bradford v. Fry* (1878), 4 P. D. 93, 99, 100. See p. 544, *post*.

proceedings are instituted against a churchwarden for an ecclesiastical offence, his colleague need not be joined as co-defendant (*m*).

SECT. 6.
Constitution of the Church into Parishes.

Liability under contracts and for misconduct.

907. Churchwardens are personally liable for goods ordered or on a contract entered into by them for the use or repair of the church or for any other purpose (*n*). They may, by appropriate language, stipulate that payment is only to be made out of the parish funds; but, if they enter into a personal contract for payment, a stipulation that the contract shall not render them personally liable, but shall be binding on the churchwardens for the time being, is void (*o*). Parishioners who request or authorise churchwardens to execute repairs are not legally liable to reimburse to them the cost of so doing (*p*). If one churchwarden orders repairs without the knowledge or consent of his colleague, he alone is liable for the cost of them (*q*). In the absence of malice a churchwarden is not liable to an action for refusing to accept a vote, or to recognise a candidate at an election at which he officially presides (*r*). It is doubtful whether a parishioner can restrain him by injunction from carrying on works in the church on the ground that they will be injurious to health (*s*). If a churchwarden commits an ecclesiastical offence in connection with his duty, he is personally liable to be sued for it in the ecclesiastical court (*t*). This is the proper procedure if he is guilty of a misuse of goods of the church in his possession, since, being lawfully in possession of them, he is not liable to be indicted for larceny in respect of the offence (*a*). A churchwarden is liable to indictment if he extorts a bribe for appointing a person to a church office or is otherwise guilty of extortion or corruption in the discharge of his duties (*b*). Churchwardens after going out of office are liable to an action at the suit of their successors for church money or church books remaining in their hands (*c*).

(*m*) *Adam v. Colthurst* (1867), 36 L. J. (ECL.) 14.

(*n*) *Shaw v. Hislop* (1824), 4 Dow. & Ry. (K. B.) 241; *Brook v. Guest* (1825), cited in *Sprott v. Powell* (1826), 3 Bing. 478, at pp. 481, 483; *Furnival v. Coombes* (1843), 5 Man. & G. 736. Under a local Act which directed that certain lighting and paving rates levied on churches should be paid by the churchwardens, they were held personally liable for the rates, notwithstanding the want of sufficient parochial funds (*Hopkinson v. Puncher* (1848), 3 Exch. 95).

(*o*) *Furnival v. Coombes*, *supra*, per TINDAL, C.J., at p. 751. They cannot maintain an action against their successors in office to recover money which they have spent on the church at the request of the parish (*Batteley v. Cook* (1692), Prec. Ch. 42).

(*p*) *Lanchester v. Thompson* (1820), 5 Madd. 4; *Lanchester v. Tricker* (1823), 1 Bing. 201; *Lanchester v. Frewer* (1824), 2 Bing. 361; compare *Jaquet v. Lewis* (1837), 8 Sim. 480.

(*q*) *Northwaite v. Bennett* (1834), 2 Cr. & M. 316.

(*r*) *Tozer v. Child* (1857), 7 E. & B. 377, Ex. Ch.

(*s*) *Woodman v. Robinson* (1852), 2 Sim. (N. S.) 204.

(*t*) *Adam v. Colthurst*, *supra*. As, for instance, if he obstructs his co-warden in discharging the duties of the office (*Gordon v. Hayward* (1905), 21 T. L. R. 298). See also pp. 512 *et seq.*, *post*.

(*a*) *Welcome v. Lake* (1666), 1 Sid. 281; *Jackson v. Adams* (1835), 2 Bing. (N. C.) 402, 408.

(*b*) *R. v. Eyres* (1666), 1 Sid. 307. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 481.

(*c*) *Turner v. Baynes* (1795), 2 Hy. Bl. 559; *Astle v. Thomas* (1823), 2 B. & C. 271; *Moss v. Thorncley* (1856), 4 W. R. 514.

SECT. 6.

Constitution of the Church into Parishes.

Extent of functions.

Ownership and care of movables.

Maintenance and repair of church and churchyard.

(iv.) Functions.

908. The functions of churchwardens extend to every consecrated church and chapel within the parish which is not provided with separate wardens, and to the churchyard and curtilage thereof (*d*). They consist of (1) the custody of the church goods; (2) the care of the church and churchyard; (3) the maintenance of order in the church and churchyard; (4) the seating of the parishioners in the church; (5) the providing for divine service; (6) the collecting and disposing of the alms; (7) special duties during a vacancy in the benefice.

909. The bells, bell ropes, organ, and other movable goods and ornaments and the books of the church, and any funds for the expenses and repair of the church, are in the legal ownership of the churchwardens as a *quasi*-corporation, and under their care (*e*). But they must allow the goods and ornaments of the church to be used in connection with divine service under the direction of the incumbent (*f*), and cannot remove any ornaments or other goods from the church, or introduce any new ornaments or goods without a faculty (*g*). They can, by an action of trover or trespass, or by obtaining an order and, if necessary, a monition for the purpose from the ecclesiastical court, recover goods which have been wrongfully removed from the church, whether during their own term of office or previously (*h*), and can, by an action of detinue, obtain possession of church books (*i*).

910. The freehold of the church, with its fixtures, and of the churchyard, is vested either in the incumbent or, in some cases, in the rector, when not the incumbent (*k*); but they are in the joint possession of the incumbent and churchwardens, without whose consent no one has a right to enter them except for the purpose of

(*d*) Ayl. Par. 166; *Moysey v. Hillcoat* (1828), 2 Hag. Ecc. 30, *per* Sir JOHN NICHOLL, at pp. 56, 57; Church Building Act, 1818 (58 Geo. 3, c. 45), s. 74, as to chapels of ease provided under that Act.

(*e*) 1 Bl. Com. 394; *A.-G. v. Ruper* (1722), 2 P. Wms. 125; *Jackson v. Adams* (1835), 2 Bing. (N. C.) 402. But as to any property rights of private individuals therein, see *Walker v. Clyde* (1861), 10 C. B. (N. S.) 381.

(*f*) *Harrison v. Forbes* (1860), 6 Jur. (N. S.) 1353; *Redhead v. Wait* (1862), 6 L. T. 580. But they have jointly with the incumbent a control as to the times when the bells may be rung (Canones Ecclesiastici (1603), 88; *Daunt v. Crocker* (1867), L. R. 2 A. & E. 41); and an agreement entered into by the vestry as to the ringing of the church bells can be enforced by injunction against the incumbent and subsequent churchwardens (*Martin v. Nutkin* (1724), 2 P. Wms. 266).

(*g*) *Durst v. Masters* (1876), 1 P. D. 123, 126, 127; S. C. on appeal, *ibid.*, 373, 383, P. O. This restriction does not apply to slight matters such as movable seats or hassocks (*Parham v. Templar* (1821), 3 Phillim. 515, 527).

(*h*) *Hadman v. Ringwood* (1590), Cro. Eliz. 145, 179; *Welcome v. Lake* (1666), 1 Sid. 281; *Starky v. Wallington (Churchwardens)* (1692), 2 Salk. 547; *Adlam v. Colthurst* (1867), L. R. 2 A. & E. 30; *Evans v. Dodson* (1874), Trist. 26. Churchwardens who remove articles from a church cannot be indicted for the theft of them, being in law the possessors of them (*Jackson v. Adams, supra*, at p. 408).

(*i*) *Moss v. Thorneley* (1856), 4 W. R. 514.

(*k*) See pp. 739, 741, *post*; *R. v. Hickman* (1784), 2 East, P. O. 593.

some service (*l*). The churchwardens are intrusted with the care and repair of them, including the provision of necessary furniture and fittings in the church and the proper fencing of the churchyard (*m*). They are not bound to perform this duty if they have no funds for the purpose (*n*); and the duty does not extend to the chancel where it is repairable by the rector (*o*), nor to a private chapel or aisle in the church (*p*). The incumbent has a right to keep the key of the church, and the churchwardens are only entitled to access to the church for the discharge of their duties, and have no right to break open the door for that purpose (*q*). An alleged custom in a parish for the churchwardens to erect monuments in the church is invalid (*r*). But local Acts have made them liable in certain places to pay special rates in respect of the church (*s*). Where the rector is liable to repair the chancel, the churchwardens should take proceedings against him in the ecclesiastical court if he neglects to do so (*t*). They can maintain an action in the Chancery Division of the High Court to restrain a person from pulling down the churchyard wall (*a*), and can proceed in the proper ecclesiastical court against a trespasser in the churchyard (*b*).

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Right of access to church.

No right to erect monuments.

Liability to rates in respect of the church.

911. Churchwardens are charged with the maintenance of order in the church and churchyard, and particularly during divine service (*c*). They may remove from the church persons who disturb the service (*d*), or who, before its commencement, indicate an

Maintenance of order in church and churchyard.

(*l*) *Jurratt v. Steele* (1820), 3 Phillim. 167; *Jones v. Ellis* (1828), 2 Y. & J. 265, 266, 273; *Worth v. Terrington* (1845), 13 M. & W. 781; *Griffin v. Dighton* (1864), 5 B. & S. 93, 108, Ex. Ch.; *Cope v. Barber* (1872), L. R. 7 C. P. 393, 404, n. (1).

(*m*) Stat. *Circumspecte agatis* (1285) 13 Edw. 1; *Canones Ecclesiastici* (1603), 80—86. They may be compelled by ecclesiastical censures to perform necessary repairs, if they have funds for the purpose (*Millar v. Palmer* (1837), 1 Curt. 540, 545, 550, 554).

(*n*) *Northwaite v. Bennett* (1834), 2 Cr. & M. 316, per BAYLEY, B., at p. 317; *Millar v. Palmer*, *supra*, at pp. 554, 555.

(*o*) See p. 732, *post*.

(*p*) See p. 733, *post*.

(*q*) *Bellars v. Geast* (1741), Rothery's Precedents, p. 77, No. 157; *Lee v. Matthews* (1830), 3 Hag. Ecc. 169, 173; *Harrison v. Forbes* (1860), 6 Jur. (N. S.) 1353; *Dewdney v. Good* (1861), 7 Jur. (N. S.) 637; *Redhead v. Wait* (1862), 6 L. T. 580; *R. v. O'Neill, Ex parte Oliver* (1867), 31 J. P. 742; *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113.

(*r*) *Deckwith v. Harding* (1818), 1 B. & Ald. 508.

(*a*) *Hopkinson v. Puncher* (1848), 3 Exch. 95; *Mills v. Rydon* (1854), 10 Exch. 67.

(*t*) *Morley v. Leacroft*, [1896] P. 92; see *Neville v. Kirby*, [1898] P. 160.

(*a*) *Marriott v. Tarpley* (1838), 9 Sim. 279.

(*b*) *Quilter v. Newton* (1690), Carth. 151.

(*c*) *Canones Ecclesiastici* (1603), 18, 19, 85, 88, 90, 111; Ayl. Par. 171; 1 Hawk. P. O., c. 63, s. 29; *Haw v. Planner* (1665), 2 Keb. 124, where it was held that a churchwarden might remove the hat from the head of a man who kept it on during divine service after being requested to take it off, and it was said that he might switch boys playing in the churchyard during divine service; *Cox v. Goodday* (1811), 2 Hag. Con. 138, 141; *Palmer v. Tijou* (1824), 2 Add. 196, per Sir JOHN NICHOLL, at pp. 200, 201; *Burton v. Henson* (1842), 10 M. & W. 105, per ALDERSON, B., at p. 108.

(*d*) *Glover v. Hynde* (1673), 1 Mod. Rep. 168; *Reynolds v. Monkton* (1841), 2 Mood. & R. 384. As to a churchwarden turning a trespasser out of church — no service is in progress or about to take place, see *Jurratt v. Steele*

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intention of doing so(e). But they cannot interfere with the conduct of the service by the minister on the ground of any impropriety in its performance, unless his behaviour amounts to being actually riotous, violent, or indecent(f). A person who is guilty of riotous, violent, or indecent behaviour in a church, whether during divine service or at any other time, or in a churchyard or burial ground, or disturbs or unlawfully disquiets an authorised preacher or clergyman officiating therein, may be at once apprehended by a constable or churchwarden and taken before a justice of the peace, and, on conviction before two justices, is liable to a penalty not exceeding £5, or to not more than two months' imprisonment, subject to an appeal to quarter sessions(g).

Seating of
parishioners.

912. There may in a church be rights of ownership in a private aisle or chapel(h) or, by faculty or prescription, in a pew in the chancel or elsewhere in the church(i), and the rector may have a right to a seat in the chancel for himself and his family(j), and, in some cases, the vicar may have a similar right to a seat in the church by prescription(k). Subject to these rights, where they exist, the churchwardens, as the officers of the ordinary(l) and under his direction, if an appeal is made to him against their action in the matter(m), are intrusted with the seating of the parishioners in the church, and may direct individuals as to where they shall or shall not sit, and may assign seats to individuals either beforehand or at the time for a particular service or for an indefinite period. But although they ought not lightly to disturb persons who are in possession of seats(n), they cannot make an irrevocable assignment

(1820), 3 Phillim. 167; *Worth v. Terrington* (1845), 13 M. & W. 781; *Cope v. Barber* (1872), L. R. 7 C. P. 393, 404, n. (1).

(e) *Hartley v. Cooke* (1833), 9 Bing. 728, 735; *Burton v. Henson* (1842), 10 M. & W. 105, where a person had intruded himself into the clerk's desk and refused to quit it.

(f) *Hutchins v. Denziloe* (1792), 1 Hag. Con. 170, per Lord STOWELL (then Sir WILLIAM SCOTT), at pp. 173, 174, where it is said that in other cases their proper course is to complain to the ordinary of his conduct, but that they and even private persons may interpose to preserve the decorum of public worship. See also *A.-G. v. St. Cross Hospital* (1854), 18 Beav. 601, 605 *et seq.*

(g) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), ss. 2—4; *Kensit v. St. Paul's (Dean and Chapter)*, [1905] 2 K. B. 249. A clerical offender can be dealt with under that Act (*Vallancey v. Fletcher*, [1897] 1 Q. B. 265), but he can also be sued for brawling in the ecclesiastical court (*Cox v. Goodday* (1811), 2 Hag. Con. 138, 141; Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 1). So much of s. 4 of the Act as relates to the interval between a conviction and the quarter sessions to which an appeal may be made, and to the procedure on the appeal, is repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4.

(h) *Chapman v. Jones* (1869), L. R. 4 Exch. 273. See p. 733, and note (p), p. 788, *post*.

(i) See p. 737, *post*.

(j) *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749, 761, 762. See p. 740, *post*.

(k) See also note (a), p. 738, and p. 786, *post*.

(l) Ayl. Par. 484—486; *Pettman v. Bridger* (1811), 1 Phillim. 316, per Sir JOHN NICHOLL, at p. 323. Of common right the disposal of pews in a church belongs to the ordinary (*St. Swithin's Parish Case* (1695), Holt (K. B.), 139).

(m) *Corven's Case* (1612), 12 Co. Rep. 105; *Claverley (Vicar etc.) v. Claverley (Parishioners etc.)*, [1909] P. 195, 212. Parishioners to whom seats are assigned by the ordinary are entitled to occupy them at all services (*ibid.*, at pp. 215, 216).

(n) *Drury v. Harrison* (1794), 3 Phillim. 515, n.

or divest themselves or their successors of the power of making a fresh arrangement whenever circumstances render it desirable (o). They have no right to prevent a parishioner from entering the church to attend service on the ground of insufficiency of convenient accommodation or from standing during the service if he cannot get a seat (p). Except where expressly directed or sanctioned by statute (q), they cannot demand a rent or payment for a pew or seat (r); but they may, at any rate in a church provided under the Church Building Acts and New Parishes Acts (s), appropriate seats by preference to parishioners who pay a voluntary church rate or subscribe to a church repair fund (t). Subject to the rector's rights (u), the functions of the churchwardens as to seating parishioners extend to the chancel (x). But if they or the ordinary do not dispose of the seats there, the rector may do so (a). They may remove a parishioner who intrudes into a seat which they have assigned to another, provided they do so without using any unnecessary force and without causing public scandal or disturbing divine service (b).

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Seats in the
chancel.

Removal of
intruders.

913. It is the duty of the churchwardens at the expense of the parish to provide the necessary requisites for divine service, and in particular a copy of the Book of Common Prayer, a large Bible, and the Books of Homilies (c), a carpet of silk or other decent stuff and fair linen cloth for the communion table (d), a stone font (e), a

Providing
for divine
service.

(o) *Corven's Case* (1612), 12 Co. Rep. 105; *Pettman v. Bridger* (1811), 1 Phillim. 316, 323, 324; *Parham v. Templar* (1821), 3 Phillim. 515, 523, 526; *Fuller v. Lane* (1825), 2 Add. 419, 425; *Asher v. Calcraft* (1887), 18 Q. B. D. 607; and see pp. 737 *et seq.*, *post*. Before dispossessing a parishioner of a seat usually occupied by him, the churchwardens ought to give him notice and an opportunity for remonstrance (*Horsfall v. Holland* (1859), 6 Jur. (N. S.) 278). In the absence of special custom the vestry have no authority as to the seats in the church, though their opinion on the subject ought to have weight with the churchwardens (*Pettman v. Bridger*, *supra*, per Sir JOHN NICHOLL, at pp. 323, 324; *Claverley (Vicar etc.) v. Claverley (Parishioners etc.)*, [1909] P. 195, at p. 216). But there may be an immemorial custom in a parish for the seats in the church to be assigned by the churchwardens and the majority of the parishioners or a particular number of them (*Brabin v. Trediman* (1618), 2 Roll. Rep. 24; *Colebach v. Baldwin* (1692), 2 Lut. 1032; Gib. Cod. 198). Seats can only legally be assigned to parishioners; and the parishioners to whom seats are assigned have no right to exclude others if they and their families do not occupy the whole. In that case the churchwardens can fill up the assigned seats after service commences (*Re Cathedral Church of St. Columb, Londonderry (Pews)* (1863), 8 L. T. 861), but not before (*Claverley (Vicar etc.) v. Claverley (Parishioners etc.)*, *supra*, at p. 216). See also pp. 481, 740, *post*.

(p) *Taylor v. Timson* (1888), 20 Q. B. D. 671.

(q) For the provisions of the Church Building Acts and New Parishes Acts as to pew rents and the duties of churchwardens in connection therewith, see pp. 740, 784, 786, *post*.

(r) *Walter v. Gunner* (1798), 1 Hag. Con. 314, 317, 318.

(s) See note (t), p. 444, *ante*.

(t) *St. Saviour, Westgate-on-Sea (Vicar and Churchwardens) v. Same (Parishioners)*, [1898] P. 217, 221.

(u) See p. 470, *ante*.

(x) *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749, 762.

(a) *Ibid.*, at p. 763.

(b) *Reynolds v. Monkton* (1841), 2 Mood. & R. 384.

(c) *Canones Ecclesiastici* (1603), 80.

(d) *Ibid.*, 82.

(e) *Ibid.*, 81.

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decent pulpit (*f*), a surplice for the minister (*g*), bread and wine for Holy Communion (*h*), a basin for the reception of the alms (*i*), a chest for alms (*j*), a parchment book for registering baptisms, marriages, and burials, and a chest for keeping it, with three locks, of which the minister and churchwardens respectively are to keep the keys (*k*), a book for publishing and registering banns of marriage (*l*), and a book for entering the names of any strange preachers (*m*), and a table of the prohibited degrees of marriage (*n*).

Collection
and disposal
of the alms.

914. Churchwardens take part in the collection and disposal of the alms and other offerings given at the offertory in the Communion Service; while the offertory sentences are being read the deacons, churchwardens, or other fit persons appointed for the purpose are to receive the alms in a decent basin and reverently bring it to the priest to be humbly presented and placed by him upon the holy table (*o*). After divine service the money given at the offertory is to be disposed of to such pious and charitable uses as the minister and churchwardens think fit; wherein if they disagree, it is to be disposed of as the ordinary appoints (*p*).

Duties during
a vacancy in
the benefice.

915. When a benefice becomes vacant and its profits are sequestrated (*q*), the churchwardens are usually appointed sequestrators (*r*). Their right and duty in reference to the performance of divine service during the vacancy arises from their filling that position (*s*). The register books of the church are in their custody during the vacancy (*t*). Where the parishioners have the right of electing the incumbent, the election is conducted by

(*f*) *Canones Ecclesiastici* (1603), 83.

(*g*) *Ibid.*, 58.

(*h*) *Ibid.*, 20.

(*i*) Book of Common Prayer (Rubric at the end of the Offertory Sentences).

(*j*) *Canones Ecclesiastici* (1603), 84.

(*k*) *Ibid.*, 70. As to registers of baptisms, see also p. 686, *post*; of marriages, p. 705, *post*; and of burials, title BURIAL AND CREMATION, Vol. III., pp. 555—564, and p. 712, *post*. The duties of churchwardens in relation to marriage registers extend to the wardens of churches or chapels of extra-parochial places in which the publication of banns and the solemnisation of marriages are duly authorised (Extra-Parochial Places Act, 1857 (20 Vict. c. 19), s. 10).

(*l*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 6.

(*m*) *Canones Ecclesiastici* (1603), 52.

(*n*) *Ibid.*, 99.

(*o*) Book of Common Prayer (Rubric at the end of the Offertory Sentences); *Cope v. Barber* (1872), L. R. 7 O. P. 393.

(*p*) Book of Common Prayer (Rubric at the end of the Communion Office); *R. v. O'Neill, Ex parte Oliver* (1867), 31 J. P. 742; *Howell v. Holdroyd*, [1897] P. 198; and, as to churches of district chapelries and consolidated chapelries, see Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 6. Alms collected at the offertory in a chapel in the parish are at the disposal of the incumbent and churchwardens of the parish church (*Moysey v. Hillcoat* (1828), 2 Hag. Ecc. 30, 56); *Dowdall v. Hewitt* (1863), 10 L. T. 823). As to collections in church made at other times, see note (*k*), p. 661, *post*.

(*q*) See p. 624, *post*; *Drury v. Harrison* (1794), 3 Phillim. 515, n., 517, n.; *Walter v. Gunner* (1798), 1 Hag. Con. 314, 317.

(*r*) See pp. 616, 624, *post*.

(*s*) *A.-G. v. St. Cross Hospital* (1856), 8 De G. M. & G. 38, 55, C. A.

(*t*) *R. v. Cumley, Ex parte Holloway* (1855), 3 W. R. 247.

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the churchwardens (*a*). Before the bishop institutes, collates, or admits a new incumbent to a vacant benefice he must send to the churchwardens by registered letter a notice of his intention, stating the ecclesiastical preferments which the proposed incumbent has previously held and directing the notice to be fixed on the principal door or notice-board of the church or chapel of the parish, or, if there is more than one, of the church or chapel named in the notice, for not less than one month, and then to be returned to the bishop with a certificate of the direction having been complied with (*b*).

(v.) *Vacation of Office.*

916. Churchwardens may be re-elected at the expiration of their year of office (*c*); but, if not re-elected, they vacate office as soon as their successors are admitted (*d*). At the end of their year of office they must render to the vestry an account of their receipts and payments, and can be compelled to do so by an ecclesiastical court (*e*). It is also their duty to make any necessary presentments (*f*), and to deliver to their successors all church funds, property, and documents (*g*). They can be sued by their successors in an action of debt for money remaining in their hands (*h*). It is questionable whether a churchwarden can resign his office (*i*); and he does not vacate it by removal from the parish (*j*). But his removal may be a good ground for appointing another churchwarden in his place (*k*). He *ipso facto* vacates his office if he is convicted of treason or felony and is sentenced to death, or penal servitude, or to imprisonment either with hard labour or for a period exceeding twelve months (*l*). If he wastes the goods of the parish or is guilty of other misconduct in his office, such as refusing to join with his colleague in instituting proper legal proceedings, he may be removed from office by an ecclesiastical court on the complaint of the parishioners (*m*).

Accounts to
be rendered
on vacating
office.

Vacation by
resignation
or removal.

Removal for
misconduct.

(*a*) *A.-G. v. Forster* (1805), 10 Ves. 335, 343; *Faulkner v. Elger* (1825), 4 B. & C. 449.

(*b*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 2 (2); Benefices Rules, 1898, rr. 11, 12, Sched., Form No. 7 (Statutory Rules and Orders Revised, Vol. I., Benefice, England, pp. 2, 3, 6).

(*c*) *Canones Ecclesiastici* (1603), 89; *Stoughton v. Reynolds* (1736), 2 Stra. 1045.

(*d*) *Canones Ecclesiastici* (1603), 118.

(*e*) *Ibid.*, 89; *Wainwright v. Bagshaw* (1734), 2 Stra. 974; *Hooper v. Leach* (1784), 3 Doug. (x. b.) 434. But the ecclesiastical court cannot decide as to the correctness of the account (*Wainwright v. Bagshaw*, *supra*; *Adams v. Rush* (1740), 2 Stra. 1133; *Leman v. Goulty* (1789), 3 Term Rep. 3). Nor can the ecclesiastical court entertain a suit respecting the account after it has been passed by the vestry (*Nutkins v. Robinson* (1727), Bunb. 247; *Snowden v. Herring* (1730), Bunb. 289).

(*f*) *Canones Ecclesiastici* (1603), 118, 119.

(*g*) *Ibid.*, 89.

(*h*) *Astle v. Thomas* (1823), 2 B. & C. 271.

(*i*) See *R. v. Freeman* (1868), 18 L. T. 88.

(*j*) *Ganvill v. Utting* (1845), 9 Jur. 1081.

(*k*) *Stephenson v. Langston* (1805), 1 Hag. Con. 379, 381, n., *per* Sir WILLIAM WYNN, at p. 383, n.

(*l*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 2. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 428.

(*m*) *Parish Clerk's Case* (1610), 13 Co. Rep. 70; Com. Dig. tit. *Eglise*,

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Appointment and duties.

SUB-SECT. 5.—*Sidesmen.*

917. Sidesmen can, by law, be appointed in ancient parishes to assist the churchwardens. They are to be chosen annually at the same time as the churchwardens by the minister and parishioners if they can agree; and, if not, the appointment rests with the bishop as ordinary (*n*). They are admitted, together with the churchwardens (*o*), and make and subscribe a declaration that they will faithfully and diligently assist the churchwardens in the performance of the duties of the office (*p*); and they hold office with the churchwardens until the admission of the churchwardens of the succeeding year (*q*). There is no limit as to their number (*r*). Their appointment is optional, and in practice they have not been invariably appointed in every parish. Their principal duty is to assist the churchwardens in keeping order in the church and in preserving the decency of public worship (*s*). In some cases they have been vested in gowns and paid a salary at the expense of the parish (*t*).

SUB-SECT. 6.—*Church Trustees.*

Appointment, status, and functions.

918. In any parish as defined by the Compulsory Church Rate Abolition Act, 1868 (*u*), a body of church trustees may be constituted under that Act for the purpose of acquiring by gift, contract, or otherwise, and holding, contributions for ecclesiastical purposes in the parish (*x*). They are to consist of the incumbent, who is their chairman, and two householders or owners or occupiers of land in the parish, who are to be chosen in the first instance and on the occurrence of any vacancy by death, incapacity, or resignation, one by the patron of the benefice, and the other by the bishop of the diocese. Where appointed, they are a body corporate by the name of the church trustees of the particular parish, with perpetual succession and a common seal, and power to sue and be sued in their corporate name. Subject to any directions of the donors

F. (1); *Dawe v. Williams* (1824), 2 Add. 130, 133—135; *Fry v. Treasure* (1865), 2 Moo. P. C. C. (N. S.) 539, 555; *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113, per Sir ROBERT PHILLIMORE, at pp. 117, 118.

(*n*) *Canones Ecclesiastici* (1603), 90. The name is a corruption of *synodsmen* or *synodmen*. They are called *sidemen* in *Canones Ecclesiastici* (1603) and Gib. Cod. 215, 216.

(*o*) See p. 465, *ante*.

(*p*) Statutory Declarations Act, 1835 (5 & 6 Will. 4, c. 62), s. 9.

(*q*) *Canones Ecclesiastici* (1603), 118.

(*r*) "Two or three or more discreet persons" may be appointed (*ibid.*, 90).

(*s*) *Canones Ecclesiastici* (1603), 19, 88, 90, 111; *Palmer v. Tijou* (1824), 2 Add. 196, per Sir JOHN NICHOLL, at pp. 200, 201.

(*t*) *Rand v. Green* (1860), 6 Jur. (N. S.) 303.

(*u*) 31 & 32 Vict. c. 109. "Parish" is defined as meaning any parish, ecclesiastical district, chapelry or place, within which any person has the exclusive cure of souls (*ibid.*, s. 10).

(*x*) "Ecclesiastical purposes" means the building, rebuilding, enlargement and repair of any church or chapel, and any purpose to which by common or ecclesiastical law a church rate is applicable, or any of such purposes; and "church rate" means a rate for such purposes (*ibid.*).

of funds contributed for special ecclesiastical purposes, they may, as circumstances require, pay over funds in their hands to the churchwardens to be applied either to the general ecclesiastical purposes or some specific ecclesiastical purposes of the parish, and may invest and accumulate funds in their hands in Government and real securities and otherwise deal with such funds conformably with the provisions of the Act. Once at least in every year the trustees are to lay before the vestry an account of their income and expenditure during the preceding year and of the mode in which the income has been derived and the expenditure incurred, and a statement of the amount, if any, of funds remaining in their hands at the date of the account (a).

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SUB-SECT. 7.—*Parish Clerks, Sextons, Beadles, and Organists.*

(i.) *Parish Clerks.*

919. The office of parish clerk is a temporal office within the jurisdiction of the temporal courts (b). In ancient parishes it is a freehold for life (c). Except where there is a custom for the parishioners in vestry to elect to the office (d) or to appoint to it jointly with the incumbent (e), the appointment rests with the incumbent (f) or the minister in charge if the incumbent is suspended or inhibited (g). The appointment may be made by parol and without formal words (h), but the exercise of the duties of the office without an appointment of any kind does not confer a title to the office (i). A layman who is appointed parish clerk must be at least twenty years of age, and of good character and competent to read, write, and, if possible, sing (k). He may be licensed to and confirmed in his office by the bishop; but this is not essential (l),

Nature of office and method of appointment in ancient parishes.

(a) Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), s. 9.

(b) 1 Bl. Com. 395; *Peak v. Bourne* (1732), 2 Stra. 942; *Pitts v. Evans* (1739), 2 Stra. 1108; *R. v. Ashton* (1754), Say. 159; *Tarrant v. Hazby* (1757), 1 Burr. 367; *R. v. Warren* (1776), 1 Cowp. 370; *Lawrence v. Edwards*, [1891] 2 Ch. 72.

(c) 1 Bl. Com. 395; *Gatton (Parish) v. Milwich (Parish)* (1712), 2 Salk. 536; *R. v. Over (Inhabitants)* (1773), Burr. S. O. 746, per ASTON, J., at p. 748; *Ashfield's Case* (1804), 2 Peck. 88; *Kentish's Case* (1804), 2 Peck. 92; *Anon.* (1814), 2 Chit. 254; *Stephenson v. Raine* (1853), 2 E. & B. 744; *Pinder v. Barr* (1854), 4 E. & B. 105, 117. But as to his claim to a parliamentary vote, see note (f), p. 477, post.

(d) *Parish Clerk's Case* (1610), 13 Co. Rep. 70; *Jermyn's Case* (1623), Cro. Jac. 670; *Orme v. Pemberton* (1640), Cro. Car. 589.

(e) *Hartley v. Cooke* (1833), 9 Bing. 728.

(f) *Canones Ecclesiastici* (1603), 91; 1 Bl. Com. 395; Burn, *Ecclesiastical Law*, Vol. III., p. 82. The incumbent retains the right of appointment where the benefice is sequestered, but he has not been suspended or inhibited (*Lawrence v. Edwards*, [1891] 1 Ch. 144; 2 Ch. 72). A mandamus will lie to compel the appointment of a parish clerk or the restoration of one who has been removed without sufficient cause (*R. v. St. Anne's, Soho (Rector)* (1766), 3 Burr. 1877; *R. v. Warren*, *supra*; *Anon.* (1814), 2 Chit. 254; *Ex parte Cirkett* (1835), 3 Dowl. 327; *R. v. Neale* (1835), 4 Nev. & M. (N. B.) 868; *R. v. Smith* (1844), 5 Q. B. 614.

(g) *Pinder v. Barr*, *supra*.

(h) *Gatton (Parish) v. Milwich (Parish)*, *supra*; *Parish Clerk's Case* (1774), Loft, 434; *R. v. Bobbing (Inhabitants)* (1836), 5 Ad. & El. 682; *Roberts v. Drewitt* (1864), 18 C. B. (N. S.) 48.

(i) *R. v. Stogursey (Inhabitants)* (1831), 1 B. & Ad. 795.

(k) *Canones Ecclesiastici* (1603), 91.

(l) Burn, *Ecclesiastical Law*, Vol. III., p. 84; *Peak v. Bourne* (1732), 2 Stra.

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Appointment
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 holy orders.

Duties and
 emolumenta.

and he may be admitted by the archdeacon (*m*). The office cannot be assigned (*n*), but it may be performed by a deputy (*o*) who does not require the licence of the bishop (*p*).

920. The clerk of churches and chapels provided under the Church Building Acts, 1818 and 1819 (*q*), is to be appointed by the minister annually (*r*); but in parishes constituted under the New Parishes Acts, 1843, 1844 and 1856 (*s*), the parish clerk is appointed by the incumbent for an indefinite period subject to removal by him, with the consent of the bishop, for misconduct (*t*).

921. A person in holy orders may be appointed or elected to the office of parish clerk (*u*). But he must be licensed by the bishop in the same manner as a stipendiary curate (*x*); and if the appointment or election is made by a person or persons other than the incumbent of the benefice it is subject to his consent and approval (*y*). After being licensed by the bishop the clerk is entitled to the profits and emoluments of the office, and to perform in respect thereof all such spiritual and ecclesiastical duties within the parish or district as the incumbent with the sanction of the bishop from time to time requires (*a*). But his appointment or election, unlike that of a lay holder of the office in an ancient parish, does not confer on him any freehold or absolute right to or interest in the office or the profits or emoluments thereof; and he may be suspended or removed from the office in the same manner and for the like causes and subject to the same appeal as a stipendiary curate (*b*), and the appointment or election does not exempt the incumbent from any obligation to employ a curate or curates to assist him in his ministrations to which he would be otherwise subject (*c*).

922. The present legal duties of a parish clerk are to lead the laity in their part in divine service and the offices of the church, and he is remunerated by the accustomed fees on marriages, burials, and

942. The stamp duty on the licence is 10s. (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I., Licence).

(*m*) Burn, Ecclesiastical Law, Vol. III., p. 84.

(*n*) *Nichols v. Davis* (1868), L. R. 4 O. P. 80.

(*o*) *Parish Clerk's Case* (1774), Lofft, 434; *R. v. Warren* (1776), 1 Cowp. 370, 371; *Nichols v. Davis*, *supra*, at p. 83; Lecturers and Parish Clerks Act, 1844 (7 & 8 Vict. c. 59), s. 5.

(*p*) *Peak v. Bourne* (1732), 2 Stra. 942.

(*q*) 58 Geo. 3, c. 45; 59 Geo. 3, c. 134.

(*r*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 29; *R. v. Ossett (Inhabitants)* (1851), 16 Q. B. 975. That case is no authority for the right of appointment being in the rector of the ancient parish as against the minister of the church or chapel (*Jackson v. Courtenay* (1857), 8 E. & B. 8, at p. 20). The continuance in office of the clerk after being originally appointed is construed as a reappointment of him at the commencement of each succeeding year (*ibid.*).

(*s*) 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; 19 & 20 Vict. c. 104.

(*t*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 9; *Fitzgerald v. Fitzpatrick* (1864), 10 Jur. (N. S.) 913.

Lecturers and Parish Clerks Act, 1844 (7 & 8 Vict. c. 59), s. 2.

See pp. 638 *et seq.*, *post*.

Lecturers and Parish Clerks Act, 1844 (7 & 8 Vict. c. 59), s. 3.

Ibid., s. 2.

See p. 644, *post*.

Lecturers and Parish Clerks Act, 1844 (7 & 8 Vict. c. 59), ss. 2—4.

other occasions (*d*). He can recover these fees by action from the incumbent or churchwardens to whom they have been paid (*e*). His emoluments may consist in part of a freehold interest in land (*f*) or of an accustomed fee on the opening of every grave in the churchyard (*g*). Provision is made in the Church Building Acts and New Parishes Acts (*h*) for the payment of clerks of churches or chapels provided under those Acts by salaries out of pew rents (*i*) and fees (*k*).

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Removal from office.

923. A parish clerk can be removed from his office by the incumbent for misconduct after he has been given an opportunity of exculpating himself (*l*). In new parishes the consent of the bishop is requisite to his removal (*m*). He cannot be removed without good cause where he holds the office for life (*n*), nor during his year of office where he is annually appointed (*o*). By the Lecturers and Parish Clerks Act, 1844 (*p*), the archdeacon or other ordinary may try a parish clerk within his jurisdiction who appears, upon complaint or otherwise, to have been guilty of wilful neglect or misbehaviour in his office or to be unfit to hold the office by reason of misconduct; and if the imputation or charge is found to be true, the archdeacon or ordinary may suspend or remove him from his office and certify that the office is vacant, and it may accordingly be filled up by the appointment or election of some other person; and under a warrant of a justice of the peace obtained upon a certificate from the bishop the suspended or removed clerk may be ejected from any premises held by him in right of his office (*q*).

(*d*) Ayl. Par. 409; Gib. Cod. 214; Burn, Ecclesiastical Law, Vol. III., pp. 84, 85. Originally all parish clerks were in holy orders (Gib. Cod. 214). As to his duties and fees in respect of the burial of persons found drowned, see title BURIAL AND CREMATION, Vol. III., pp. 547, 548; and as to his duties and fees in respect of interments in a burial ground maintained by a burial authority, see *ibid.*, pp. 469—471, 482, 483.

(*e*) *Parker v. Clerk* (1704), 6 Mod. Rep. 252, 253; *Nichols v. Davis* (1868), L. R. 4 C. P. 80.

(*f*) *Roberts v. Drewitt* (1864), 18 C. B. (N. s.) 48. He has a right to a parliamentary vote in respect of such interest (*ibid.*), but not in respect of his office (*Bushell v. Eastes* (1861), 11 C. B. (N. s.) 106).

(*g*) *Bushell v. Eastes*, *supra*.

(*h*) See note (*i*), p. 444, *ante*.

(*i*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 73; Church Building Act, 1819 (59 Geo. 3, c. 134), s. 26; Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 16.

(*k*) Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 6, 10, 11; Church Building Act, 1822 (3 Geo. 4, c. 72), s. 18; New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 15. But by the Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 14, these provisions as to fees are not to apply to the churches or chapels of particular districts under that Act; nor do they apply to the chapels of district chapelries (*Roberts v. Aulton* (1857), 2 H. & N. 432).

(*l*) *Barton v. Ashton and Gray* (1753), 1 Lee, 350; *R. v. Warren* (1776), 1 Cowp. 370; *R. v. Gaskin* (1799), 8 Term Rep. 209; *Ex parte Cirkett* (1835), 3 Dowl. 327; *R. v. Neale* (1835), 4 Nev. & M. (K. B.) 868; *R. v. Smith* (1844), 5 Q. B. 614.

(*m*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 9. One who is appointed to perform the duties of a parish clerk may be within the protection of this section although he is paid by a weekly salary in addition to his fees (*Bailey v. Edmundson and Others* (1909), 25 T. L. R. 681).

(*n*) *Kid v. Watkinson* (1709), 11 Mod. Rep. 221; *R. v. Wall* (1709), 11 Mod. Rep. 261.

(*o*) *Jackson v. Courtenay* (1857), 8 E. & B. 8, 20.

(*p*) 7 & 8 Vict. c. 59.

(*q*) *Ibid.*, ss. 5, 6.

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Nature of office and method of appointment.

(ii.)

924. In the absence of a custom to the contrary the office of sexton in ancient parishes is a freehold for life (*r*). But he may, by custom, hold it during pleasure only (*s*). By the general law, the appointment to it lies in the incumbent (*t*) or, if the office is confined to the care of the church and its furniture and the ringing of the bells, in the churchwardens (*a*). The appointment may be in the incumbent and churchwardens jointly if the sexton unites those duties with the digging of graves, or in the incumbent alone if, as is frequently the case, he is appointed clerk as well as sexton or his duties are confined to grave-digging and the care of the churchyard (*b*). But in many places, by custom, the churchwardens and parishioners or the parishioners in vestry elect to the office (*c*). It may be held by a woman (*d*). In new parishes the sexton is appointed by the incumbent (*e*).

Duties and emoluments.

925. In different parishes the sexton has different duties to perform (*f*): (1) He may have the care of the church and its furniture and the sacred vestments, and the ringing of the bells; or (2) he may have the care of the churchyard and the digging of the graves; or (3) he may exercise all these functions combined (*g*). His emoluments consist of accustomed fees (*h*) and sometimes of a salary (*i*). In the case of churches or chapels provided under the Church Building Acts, 1818 to 1884, and the New Parishes Acts, 1843 to 1884 (*k*), special provisions are made for payment of the sexton by fees (*l*).

(*r*) 1 Bl. Com. 395; Burn, Ecclesiastical Law, Vol. III., p. 603; *R. v. Kingscleere (Churchwardens)* (1671), 2 Lev. 18; also reported *sub nom. Ile's Case* (1671), 1 Vent. 143, 153. In *Merrick's Case* (1804), 2 Peck. 91, the office was not presumed to be for life in the absence of affirmative proof. If a sexton is licensed to his office by the bishop, the stamp duty on the licence is 10s. (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I., Licence).

(*s*) *R. v. Thame (Churchwardens)* (1718), 1 Stra. 115; *R. v. Taunton St. James (Churchwardens)* (1776), 1 Cowp. 413.

(*t*) *R. v. Stoke Damerel (Minister)* (1836) 5 Ad. & El. 584, 590, 591; *Cansfield v. Blenkinsop* (1849), 4 Exch. 234, 239. A parol appointment is sufficient (*R. v. Bobbing (Inhabitants)* (1836), 5 Ad. & El. 682).

(*a*) *Cansfield v. Blenkinsop*, *supra*, at pp. 239, 240.

(*b*) *Ibid.*

(*c*) *R. v. Thame (Churchwardens)*, *supra*; *Olive v. Ingram* (1739), 2 Stra. 1114; *R. v. Taunton St. James (Churchwardens)*, *supra*.

(*d*) *Olive v. Ingram*, *supra*.

(*e*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 9; *Fitzgerald v. Fitzpatrick* (1864), 10 Jur (N. S.) 913.

(*f*) *Cansfield v. Blenkinsop*, *supra*.

(*g*) *Ibid.* His name, which is identical with *sacristan*, points to his being charged with the first set of duties (Burn, Ecclesiastical Law, Vol. III., p. 602); but where there is a churchyard, the digging of graves is always part of his office (*R. v. Liverpool (Inhabitants)* (1789), 3 Term Rep. 118). He has no claim as of right to possession of the keys of the church (*Anon.* (1814), 2 Ohit. 255). As to his duties and fees in respect of the burial of persons found drowned, see title BURIAL AND CREMATION, Vol. III., pp. 547, 548; and as to his duties and fees in respect of interments in a burial ground maintained by a burial authority, see *ibid.*, pp. 469, 469—473, 479, 480, 482, 483.

(*h*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 10.

(*i*) *Stokes v. Lewis* (1785), 1 Term Rep. 20.

(*k*) See note (*i*), p. 444, *ante*.

(*l*) Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 6, 10, 11; Church

926. Where in an ancient parish the sexton's office is a freehold for life, he can only be removed for grave misconduct after an opportunity has been given to him to rebut the imputation (*m*). But in some parishes he is removable at pleasure by the person or persons in whom the appointment to the office is vested (*n*). In new parishes he is removable by the incumbent, with the consent of the bishop, for misconduct (*o*).

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(iii.) *Beadles.*

927. The beadle in an ancient parish is chosen by the vestry. His duties are to attend the meetings of the vestry, to give notice to the parishioners when and where they are held, and, as the messenger and servant of the vestry, to execute its orders (*p*). The title is also applied to a messenger or servant employed by an incumbent or churchwardens about the affairs of their church. In the case of churches or chapels provided under the Church Building Act, 1831 (*q*), the salary of the beadle is specified as one of the expenses incident to the performance of divine service which the churchwardens are to pay out of the pew rents (*r*).

Office and duties.

(iv.) *Organists.*

928. The office of organist is not an office known to the common law, and where it had been the custom for an organist to be elected by the parishioners in vestry and to be paid a salary out of the church rates, it was competent to them to determine that there should be no organist in future (*s*). Since the abolition of compulsory church rates (*t*) the appointment of organists practically depends on the person or persons willing to become responsible for their salaries; and the duration and other conditions of their office are regulated by the terms of their appointment.

Office and appointment.

Building Act, 1822 (3 Geo. 4, c. 72), s. 18; New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 15. But by the Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 14, these provisions as to fees are not to apply to the churches or chapels of particular districts under that Act; nor do they apply to the chapels of district chapelries (*Roberts v. Aulton* (1857), 2 H. & N. 432). As to the sexton's fees in respect of interments in a burial ground provided and maintained by a burial authority, see title BURIAL AND CREMATION, Vol. III., pp. 471, 472, note (*f*).

(*m*) *R. v. Smith* (1844), 5 Q. B. 614.

(*n*) *R. v. Thame (Churchwardens)* (1718), 1 Stra. 115; *R. v. Taunton St. James (Churchwardens)* (1776), 1 Cowp. 413.

(*o*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 9.

(*p*) Burn, Ecclesiastical Law, Vol. I., p. 415 r. The name signifies that he is the bidder or crier of the parish (*ibid.*). In former times he was employed as a constable or to assist the constable in the maintenance of public order (*Laurence v. Hedger* (1810), 3 Taunt. 14).

(*q*) 1 & 2 Will. 4, c. 38.

(*r*) *Ibid.*, s. 16.

(*s*) *Ex parte Le Oren* (1844), 2 Dow. & L. 571, 574, 575; S. C. *sub nom. R. v. St. Stephen's, Coleman Street (Vicar)*, 9 Jur. 255. In former times an organ was not considered an essential part of the fittings of a church (*St. John's Margate (Churchwardens) v. The Same (Parishioners)* (1794), 1 Hag. Con. 198).

(*t*) Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), s. 1.

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An organist cannot at any time play on the organ in a church or chapel in defiance of the directions of the minister. If he does so, he commits an ecclesiastical offence for which he is liable to a criminal suit in the ecclesiastical courts (a). If the minister arbitrarily forbids his playing, he may appeal to the ordinary, but must provisionally obey the minister's directions until the ordinary prescribes the right course for the minister to adopt (b).

SUB-SECT. 8.—Lay Readers.

Office and status.

929. The office of lay reader to assist the parochial clergy in their spiritual ministrations has of late years been revived in the Church. The functions of lay readers are defined by Regulations of the Archbishops and Bishops issued in October, 1905, but they have otherwise no legal status (c).

SUB-SECT. 9.—Parishioners.

Who are parishioners.

930. The term "parishioners," in reference to a parish, includes not only the inhabitant householders of the parish, but also persons who do not reside therein, but occupy lands or tenements therein, and pay rates and duties in respect of such lands (d).

Rights of parishioners.

931. Parishioners are entitled personally to attend and take part in the meetings of the parish vestry, or in the case of new ecclesiastical parishes, meetings in the nature of a vestry (e); and they and their families and households are entitled to be

(a) *Wyndham v. Cole* (1875), 1 P. D. 130.

(b) *Ibid.*, per Sir ROBERT PHILLIMORE, at p. 134.

(c) In *Martyn v. Hind* (1776), 2 Cowp. 437, Lord MANSFIELD, C.J., in delivering the judgment of the court, said, at p. 444: "The term *reader* is made use of by the canon law; but a reader known to the canon law is always put in opposition to a clergyman. It is one of the five orders of the Romish Church inferior to the deacon; they are always considered laymen in the idea of the canon law, and are expressly put in opposition to clergymen. I have been informed that in the Welsh dioceses, where there is no endowment worth the while of a clergyman to accept (and in Chester there are many such) many persons officiate as readers in opposition to clergymen. At the Reformation there were several objections started with respect to readers; every one of which consider them not as clergymen."

(d) *Jeffrey's Case* (1589), 5 Co. Rep. 66 b; *Drury v. Harrison* (1794), 3 Phillim. 515, n., 517, n.; *A.-G. v. Parker* (1747), 3 Atk. 576; *A.-G. v. Forster* (1805), 10 Ves. 335, 339, 343; *Veley v. Burder* (1841), 12 Ad. & El. 265, 301, Ex. Ch.; *Etherington v. Wilson* (1875), 1 Ch. D. 160, O. A. In reference to church privileges the term also includes persons lodging in the parish (*St. Swithin's Parish Case* (1695), Holt (K. B.), 139); and the tenant of a house in an ecclesiastical parish, who pays rates but does not reside in it, can maintain a suit for a faculty in respect of the church (*Kensit v. St. Ethelburga, Bishopsgate Within (Rector)*, [1900] P. 80; *Davey v. Hinde*, [1901] P. 95). As to "parishioners" and "inhabitants," see also title CHARITIES, Vol. IV., pp. 165, 250, 251. *Prima facie* all the inhabitants of a parish have a right to "seat and sepulture" in the church and churchyard, and all are deemed members of the Church of England in the absence of evidence to the contrary. But nonconformists, as a class, having serious disabilities and some privileges, have long been recognised in Acts of Parliament and in judicial proceedings (*Baker v. Lee* (1860), 8 H. L. Cas. 495, per Lord CAMPBELL, L.O., at p. 505).

(e) See pp. 452 *et seq.*, 457, *ante*.

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accommodated with seats in the parish church (*f*) and to receive the ministrations of the Church and of the parish clergy in the parish church and other proper places (*g*), and to be buried in the churchyard or burial ground of, or belonging to, the parish (*h*). When a parish is divided into new ecclesiastical parishes, the right of the parishioners of any such new parish to join in the election of churchwardens of the old parish church, where not taken away by express enactment, appears to depend on whether these churchwardens retain any functions extending over the whole area (*i*). But such parishioners have no vote in respect of a church rate for the original parish, nor are they liable to be assessed thereto (*k*); and their status as parishioners of the new parish takes the place of their status as parishioners of the original parish in respect of the right of themselves and their families and households to seats in church (*l*) and to receive the ministrations of the Church and of the clergy (including the solemnisation of marriage) (*m*), and also to burial, when the new parish has a burial ground of its own (*n*).

932. All persons, except those dissenting from the worship or doctrines of the Church of England and usually attending some place of worship not belonging to the Church of England, are, if they have no lawful or reasonable excuse for absence, to endeavour to attend their parish church or accustomed chapel, or, if reasonably prevented from so doing, some other place where the divine service of the Church of England is performed, on all Sundays and other days ordained and used to be kept as holy days, and to abide there orderly and soberly during the time of common prayer, preaching, or other divine service there performed (*o*). Every parishioner is to communicate at least three times in the year, of which Easter is to be one; and annually at Easter every parishioner is to reckon with the incumbent or his deputy and pay him all

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and inhabi-
tants of
parishes.

(*f*) *St. Swithin's Parish Case* (1695), Holt (K. B.), 139; *Groves v. Hornsey* (Rector etc.) (1793), 1 Hag. Con. 188, per Lord STOWELL (then Sir WILLIAM SCOTT), at p. 194; *Walter v. Gunner* (1798), 1 Hag. Con. 314, 317; *Taylor v. Timson* (1888), 20 Q. B. D. 671, 682. See also pp. 470, 471, ante.

(*g*) *Williams's Case* (1592), 5 Co. Rep. 72 b; *Henley v. Burstow* (1666), 1 Keb. 947; *St. David's (Bishop) v. De Rutzen (Baron)* (1861), 7 Jur. (N. S.) 884, 887; *Jenkins v. Cook* (1876), 1 P. D. 80, P. C.; *Banister v. Thompson*, [1908] P. 362; S. C. (on rule for prohibition) *sub nom. R. v. Dibdin* (1909), 26 T. L. R. 150, C. A.

(*h*) See title BURIAL AND CREMATION, Vol. III., pp. 413—416, 424—428, 445 *et seq.*

(*i*) *Nunn v. Varty* (1843), 3 Curt. 352, 383—386; *R. v. Stevens* (1863), 3 B. & S. 333; also reported *sub nom. R. v. Exeter (Archdeacon)*, 11 W. R. 262.

(*k*) Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), s. 6.

(*l*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 5, 15.

(*m*) *Ibid.*, ss. 14, 15; *Fuller v. Alford* (1883), 10 Q. B. D. 418.

(*n*) See title BURIAL AND CREMATION, Vol. III., p. 414.

(*o*) Act of Uniformity, 1552 (5 & 6 Edw. 6, c. 1), s. 1; Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59), s. 1; *Taylor v. Timson* (1888), 20 Q. B. D. 671, per STEPHEN, J., at pp. 681, 682. Attendance at another Church of England church or chapel is a good excuse for absence from the parish church (*Britton v. Standish* (1704), Holt (K. B.), 141).

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ecclesiastical dues accustomed to be then paid (*p*). By the common law parishioners are bound to repair the body of their parish church whenever necessary, and to provide all things essential to the performance of divine service therein (*q*); but since the 31st July, 1868, they have not been compellable to pay church rates for the purpose (*r*).

Discipline

933. If a parishioner or inhabitant of a parish, not being legally exempt from so doing, offends against the law requiring his attendance at divine service on Sundays and holy days, he may be liable in proceedings taken against him in the ecclesiastical courts to be censured for the offence and admonished as to his attendance in the future, and to be condemned in the costs of the proceedings, but he does not incur any pecuniary penalty (*s*). A parishioner is liable to proceedings in the ecclesiastical courts for the offence of pulling down or altering a church or its furniture without a faculty, and may be ordered to restore the church or its furniture to the same state as before the demolition or alteration (*t*). A criminal suit can be maintained in the ecclesiastical courts against a lay rector who is bound to repair the chancel for letting it fall into disrepair (*u*). But the exercise by these courts of discipline over lay persons not holding office in the church has become obsolete (*x*).

(*p*) Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 20; Book of Common Prayer, Rubric at the end of the Communion Office.

(*q*) *Ball v. Cross* (1689), Holt (K. B.), 138; *Hawkins v. Rouse* (1695), Holt (K. B.), 139; *St. Swithin's Parish Case* (1695), *ibid.*, 139; *Veley v. Burder* (1841), 12 Ad. & El. 265, 301, Ex. Ch. In London, by particular custom, they repair the chancel also (*Ball v. Cross*, *supra*); but in the absence of special custom the rector is bound to repair the chancel (*Hawkins v. Rouse*, *supra*). The inhabitants of a chapelry may be exempt from the duty of repairing the parish church where they have never contributed towards it and they have separate rights of baptism and burial in the chapelry, but not otherwise (*Aston (Parish) v. Castle Birmidge Chapel* (1614), Hob. 66; *Ball v. Cross*, *supra*; *Craven v. Sanderson* (1838), 7 Ad. & El. 880).

(*r*) Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), s. 1.

(*s*) Act of Uniformity, 1552 (5 & 6 Edw. 6, c. 1), ss. 1, 3; Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59), s. 1; *Taylor v. Timson* (1888), 20 Q. B. D. 671, *per* STEPHEN, J., at p. 682.

(*t*) *St. David's (Bishop) v. De Ruizen (Baron)* (1861), 7 Jur. (N. S.) 884.

(*u*) *Morley v. Leacroft*, [1896] P. 92. But the suit cannot be instituted after the churchwardens have put the chancel into repair (*Neville v. Kirby*, [1898] P. 160).

(*x*) *Phillimore v. Machon* (1876), 1 P. D. 481, where, in a criminal suit brought into the Court of Arches by letters of request against a layman for falsely swearing an affidavit leading to a marriage licence, Lord PENZANCE said, at p. 487: "It cannot, I think, be doubted, that a recurrence to the punishment of the laity for the good of their souls by ecclesiastical courts would not be in harmony with modern ideas or the position which ecclesiastical authority now occupies in the country. Nor do I think that the enforcement of such powers, where they still exist, if they do exist, is likely to benefit the community." The jurisdiction of the ecclesiastical courts over all persons in respect of defamation was abolished by the Ecclesiastical Courts Act, 1855 (18 & 19 Vict. c. 41), s. 1; and their jurisdiction over lay persons in respect of brawling was abolished by the Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 1.

SECT. 7.—*The Church of England in the Colonies and India and in Foreign Parts.*

SUB-SECT. 1.—*In General.*

934. The ministrations of the Church of England are not confined within the boundaries of England and Wales, but may be extended throughout all the other dominions (a) of the King (b), and on the high seas (c), and throughout foreign parts, wherever persons reside, whether subjects of the King or not, who are desirous that the Word of God and the sacraments should be administered to them according to the liturgy of that Church (d).

The State recognises a duty to provide for religious ministrations to those who are in its direct employment, whether within or without the realm, and while provision is made for the appointment of ministers of other denominations where a sufficient number of members of a particular denomination are serving to justify it (e), the provisions in general made relate both in the Army and Navy and other services to the appointment of ministers and the provision of ministrations of the Church of England (f).

935. Although there is no legal obligation on the State (excepting as above mentioned in respect of its own servants) or on any officers

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The Church
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in Colonies
etc.

Church
ministrations
abroad.

Provision of
ministrations

(a) "The colonies" includes every part of the King's dominion exclusive of the United Kingdom, the Channel Islands and the Isle of Man, and of India, whether acquired by settlement by British subjects or by conquest or by treaty; see title CONSTITUTIONAL LAW, Vol. VI., p. 422; Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 1; and title DEPENDENCIES AND COLONIES, Vol. X., pp. 503 *et seq.*

(b) His Majesty's Declaration; Preface to the Articles of Religion, and art. 37.

(c) The Prayer Book provides special forms of prayer to be used at sea, in addition to the morning and evening service, which according to the rubric is to be used at sea daily. The Preface to the Prayer Book makes particular mention of the special provision of prayers and thanksgivings for those at sea, and of the office for the baptism of such as are of riper years, which it states "may be always useful for the baptizing of natives in His Majesty's plantations and others converted to the faith." A marriage ceremony performed on the seas by a clergyman of the Church of England between members of that Church is valid (*Culling v. Culling*, [1896] P. 116).

(d) See p. 498, *post*.

(e) See p. 648, *post*.

(f) Thus, the King's Regulations and Orders for the Army contain instructions for the guidance of chaplains of the Church of England. The Army Chaplains Act, 1868 (31 & 32 Vict. c. 83), which extends to England, Ireland, the Channel Islands, and the Isle of Man, defines army chaplain for the purposes of that Act as meaning a commissioned chaplain to His Majesty's military forces in holy orders of that Church, and in India express provision has been made for the erection for the benefit of the troops of churches consecrated to the service of the Church of England, and such churches can only be used for services for other denominations by permission of the bishop of the diocese. In the Navy express provision is made for Church of England services (see p. 649, *post*), and the rubric preceding the special prayers for use at sea in the Book of Common Prayer expressly provides that the two first prayers shall be used in His Majesty's Navy every day. In foreign parts the Consular Advances Act, 1825 (6 Geo. 4, c. 87), which included provisions relating to churches, chapels, and chaplains of the Church of England in connection with consulates, is unrepealed so far as it related to churches, chapels, or chaplains for whom provision was being made out of money provided by Parliament on the 21st July, 1891 (see Consular Salaries and Fees Act, 1891 (54 & 55 Vict. c. 36), sched.). As to India, see further p. 496, *post*.

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or members of the Church of England as such to provide for such ministrations outside the boundaries of England and Wales, provision has been freely made, not only by the State (including therein the Crown, as representing the Home Government, and the Government of the particular locality, where it has independent powers), but also by officers and members of the Church, and by societies formed for the express purpose of providing or assisting such ministrations wherever they may be required or needed (g). By these means, as

(g) The principal organisations engaged in providing for such ministrations are, the Society for Promoting Christian Knowledge, founded in 1698; the Society for the Propagation of the Gospel in Foreign Parts, founded in 1701; the Church Missionary Society, founded in 1799; the Colonial and Continental Church Society, founded in 1838; the Colonial Bishops' Fund, constituted in 1841; and the Universities Mission to Central Africa. The societies named administer large funds, derived from voluntary subscriptions and endowments, in providing and assisting the ministering of the Word of God and the sacraments according to the liturgy of the Church of England, and they take such precautions as are deemed necessary to secure that their funds are administered for the purposes for which they have been given for the benefit of the Church of England as by law established, or of churches forming branches of it, or, where the trusts permit of it, for the benefit of churches in communion with the Church of England; but they do not directly interfere in the organisation of churches or the foundation of bishoprics or of dioceses, excepting in so far as the provision of funds and the taking of due precautions for the right application of them are concerned.

The Council administering the Colonial Bishops' Fund, although a voluntary association without any power as an association to give its decisions any binding legal form, has undertaken the duty of applying funds for the endowment of additional bishoprics in the colonies so as to provide for a systematic superintendence of the clergy and the administration of those ordinances which are committed to the episcopal order, having due regard to the insufficient provision which has been made for the spiritual care of the members of the Church of England in the colonies and in distant parts of the world. With these objects in view it promotes and assists the formation, constitution, and endowment of those dioceses which it considers to be most urgently needed, and by means of the influence of the archbishops and bishops who compose it, and by invoking the assistance of the prerogative rights of the Crown in some cases and of the colonial legislatures in other cases, it has succeeded in effectively constituting many colonial archbishoprics and bishoprics on a valid legal basis and in fixing the boundaries of their provinces and dioceses.

The procedure which was followed in the case of the creation of bishoprics from the formation of the council in 1841 until the year 1872 was that the council, having satisfied themselves that it would be expedient to found a bishopric in a particular colony and that sufficient funds for the due maintenance of a bishop were available, obtained the assent of Her Majesty's Government and entered into an agreement with the Crown through Her Majesty's ministers that a specified annual income should be appropriated out of the Colonial Bishopric Fund for the use of such bishop, and Her Majesty thereupon granted her letters patent purporting to create the diocese required, and then appointed some priest to be consecrated as bishop of such diocese (*Natal (Bishop) v. Gladstone* (1866), L. R. 3 Eq. 1, 25).

Before 1873 Her Majesty's Government (having come to the conclusion that the colonial churches should be disconnected from the State and that they would not in future appoint by patent bishops in the colonies with territorial jurisdiction) laid down a rule of practice that facilities should be granted by legislative enactment to churches thus disestablished to form corporate bodies by which all religious matters should be administered without the interference of the Government, and to which such endowments as it might prove expedient to maintain might be handed over in trust for the use and benefit of their members, on the condition that the Colonial Government was satisfied that the purposes to which the money was to be applied were not contrary to public policy, and that thenceforth the Government would leave all Church questions, including

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well as by the organised efforts of persons living in the colonies or abroad, provision has been and is being made for such ministrations. The Church of England regarded as the aggregate of the individual members of that Church (*h*), having been defined as that part of the congregation of Christ's Catholic Church which conforms to the liturgy and ordinances of the Church of England as by law established, includes all those by whom such ministrations are accepted, wherever they may be and whatever may be the means by which such ministrations are provided (*i*).

On the other hand, the Church of England regarded as the organised institution which carries on the religious work of that Church in England and Wales, and to some extent elsewhere (*h*), does not necessarily include all those institutions which carry on the work of that Church outside England and Wales and are separately organised for that purpose, or, for other reasons, while agreeing in doctrine and discipline with that Church, are to some extent dissociated from it. The development of the organisation on which the provision of such ministrations is based in each part of the King's dominions, and the relation of such organisation to the Church of England as by law established, may result from the operation of one or more of several factors, the principal of which are the constitution of the government in the particular locality and the forms which it has assumed in the past, and the action which the State and voluntary societies have taken in relation to religious bodies in the locality, and in order to ascertain the legal nature of each such organisation and its relation to the Church of England it is necessary to have regard to such of these factors as have operated in each particular case (*k*).

the expediency of maintaining a bishop for the colony, to be decided, without interference from the Government, by the Church bodies to be so formed (Parliamentary Paper, 1873, Cd., 259—II., p. 46; 1873, Vol. 48, p. 897).

(*h*) See pp. 356, 360, 370, *ante*.

(*i*) Membership of the Church of Christ implies that the person has been baptized (see p. 684, *post*).

(*k*) Consequent on the decision of the Home Government referred to above (note (*g*), p. 484, *ante*) and the decisions of the Privy Council in relation to the Church in South Africa, a need arose for some means of co-ordinating the work of those organisations in the colonies and abroad which not being part of the Church of England yet are offshoots from it or so closely connected with it as to be rightly described as daughter churches of, or as churches in communion with, the Church of England. This need has to some extent been supplied by the Conference of Bishops of the Anglican Communion, commonly called the Lambeth Conference, which met at Lambeth in 1867, 1878, 1888, and again in 1897 and 1908. This conference includes the archbishops, bishops, metropolitan and other bishops of the Holy Catholic Church in full communion with the Church of England having superintendence over dioceses or lawfully commissioned to exercise episcopal functions therein summoned in accordance with a register kept in the Principal Registry of the Province of Canterbury, where a certificate of the consecration of every bishop in communion with the Church of England is received and filed. This conference does not constitute or form the basis of any organised church, but depends for the carrying into effect of any resolutions which it passes on the voluntary acts of the individuals composing it and their acceptance by the churches represented by them, but various resolutions passed by the conference have been received with general acceptance by all the churches represented, and have thereby derived on a consensual basis an authoritative

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of Churches.

936. Where a new and uninhabited country is discovered by subjects of the King, they carry their laws with them (*l*), including such, if any, of the ecclesiastical laws as are binding on them, and, in the absence of any express provision, any church then and there constituted by them is *prima facie* presumed to be organised on the basis of those laws, so far as they are applicable in the particular case (*m*); but the supremacy of the Crown in

character in the churches which have accepted them. A central consultative body has been formed consisting of the Archbishop of Canterbury and seventeen representative bishops appointed, two by the province of Canterbury and one each by the province of York, the Church of Ireland, the Episcopal Church in Scotland, four by the Protestant Episcopal Church in the United States, and one each by the Church of England in Canada, the Church of England in the dioceses of Australia and Tasmania, the Church of the province of New Zealand, the province of the West Indies, the Church of the province of South Africa, the province of India and Ceylon, the dioceses of China and Corea and the Church of Japan, and the missionary and other extra-provincial bishops under the jurisdiction of the Archbishop of Canterbury. Where the appointment is by a church, the church is left to fix the mode of appointing its representative, and where any question is referred by a bishop to the consultative body regard must be had to any limitations imposed on such reference by provincial regulation. The most important resolution passed is that known as the Lambeth quadrilateral, which affirms as a basis on which approach may be made towards reunion of the various bodies into which the Christianity of the English-speaking races is divided the four points of doctrine in the following terms:—

(A) The Holy Scriptures of the Old and New Testaments, as “containing all things necessary to salvation” and as being the rule and ultimate standard of faith.

(B) The Apostles’ Creed, as the baptismal symbol; and the Nicene Creed, as the sufficient statement of the Christian faith.

(C) The two Sacraments ordained by Christ Himself—Baptism and the Supper of the Lord—ministered with the unfailing use of Christ’s words of Institution, and of the elements ordained by Him.

(D) The Historic Episcopate, locally adapted in the methods of its administration to the varying needs of the nations and peoples called of God into the unity of His Church. (Report of Lambeth Conference of 1888, pp. 24 and 81—89.)

An important resolution (No. 24) passed at the conference of 1897 was reaffirmed (No. 22) at the conference of 1908, and provides that while it is the duty of the whole Church to make disciples of all nations, yet in the discharge of this duty independent churches of the Anglican Communion ought to recognise the equal rights of each other when establishing foreign missionary jurisdictions so that two bishops of that communion may not exercise jurisdiction in the same place, and every bishop is recommended to gain the adhesion of the synods of his particular church to these principles. Such voluntary adhesion by the particular churches appears to be required for the continuance of the existing voluntary confederation of the Anglican churches, unless some basis for co-ordination can be obtained from a reassertion of the supremacy of the civil power and the necessity of the consent of that power to the consecration of a bishop with a territorial diocese. As to the necessity for this consent, see p. 489, *post*; and as to the possibility of using such consent as a means of co-ordinating the jurisdictions assigned to bishops on their appointment and consecration, see note (*w*), p. 489, *post*. In response to a series of questions circulated by the United Boards of Missions of the provinces of Canterbury and York to the societies and bishops concerned in the organisation of native churches a general consensus of opinion was shown that while it was necessary for the jurisdiction of a diocesan bishop to be limited territorially the same necessity did not exist in respect of assistant bishops who might be appointed for particular races or languages. As to the assigning of territorial limits to the jurisdiction of bishops in the colonies, see p. 491, *post*; and abroad, see p. 499, *post*.

(*l*) *B. v. Brampton (Inhabitants)* (1808), 10 East, 282, 288; see note (*p*), p. 487, *post*, and title **DEPENDENCIES AND COLONIES**, Vol. X., p. 668.

(*m*) Forsyth, *Cases and Opinions on Constitutional Law*, pp. 35, 42, 44.

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ecclesiastical affairs extends to all the King's dominions (*n*), and while in the case of a settled colony acquired by conquest or treaty the terms of cession might involve the exercise of the prerogative in support of some already established church (*o*), in a newly settled colony in which there exists no church established by law, nor any independent legislature, the Crown may by an exercise of the royal prerogative, unless and until the exercise has been limited by statute, constitute a church which need not necessarily be in connection with the Church of England and need not be confined to those who profess to worship according to the principles of that Church. Where no church has in fact been established or constituted in connection with the Church of England, the ecclesiastical law of the Church of England ceases to be applicable and the presumption that it is binding on those who had while in England been subject to it ceases to apply (*p*).

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Where a church is organised in connection with the Church of England, or for the benefit of those who profess to worship according to the principles of that Church, it cannot form a complete branch of that Church capable of independent organisation until a bishop has been duly consecrated to minister over it (*q*). The prerogative of the Crown extends, in all colonies which have not any established church and have not been granted an independent legislature, to the creation of bishoprics and other ecclesiastical offices and the appointment of bishops (*r*), but this power has never been universally exercised, and unless and until it was exercised the constitutional basis of the extension of the Church of England to the colony was provided, in the first instance, by the inclusion of express provisions in the grant or charter, in the case of a proprietary colony, or in the commission, in the case of a Crown

(*n*) Articles of Religion, 37.

(*o*) In such cases where the church had been established in the full sense of the term before the date of acquisition the courts take judicial notice of the law of the church, but in all other respects all churches in the colonies, including the Church of England, stand on the same footing (*Brown v. Montreal (Curé etc.)* (1874), L. R. 6 P. O. 157).

(*p*) "It cannot be said that any ecclesiastical tribunal or jurisdiction is required in any colony or settlement where there is no established church, and in the case of a settled colony the ecclesiastical law of England cannot for the same reason be treated as part of the law which the settlers carried with them from the mother country" (*Re Natal (Bishop)* (1864), 3 Moo. P. O. C. (N. S.) 115, 152). Having regard to the authority of *R. v. Brampton (Inhabitants)* (1808), 10 East, 282, 288, the latter part of this statement should be read as limited in accordance with the former part to colonies where no church was established.

(*q*) The doctrine of the Church of England being that there are three orders of ministers, bishops, priests, and deacons, and that no man may presume to execute any of them except he be first called, tried, examined, and known to have such qualities as are requisite and be approved and admitted thereto by lawful authority, it is essential, before a branch of the Church of England can be deemed to be duly constituted and to have an independent existence in any locality, that provision should be made for this purpose. Of late years a rule of practice has been adopted by which missionary churches are not recognised as a branch of the Church of England having an independent existence until they are capable of being constituted a separate province, and this does not take place until at least three dioceses under separate bishops are prepared and sufficiently organised to be united under an archbishop.

(*r*) *R. v. Eton College* 1867, 8 E. & B. 610

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colony. These provisions usually took the form of orders or directions for preaching the Word of God according to the rites and ceremonies of the Church of England (s), and such express provisions receive, and so long as the colony remains without a legislature retain, their force by virtue of the authority delegated from the Crown.

Supply of
ministers.

937. The supply of ministers duly ordained according to the rites of the Church of England may either be derived from persons already ordained who are appointed to and accept a cure or are willing to serve without express appointment in the colony, or from persons who are expressly ordained for that purpose. To provide for the furtherance of the last-named means of supply the Archbishop of Canterbury or the Archbishop of York or the Bishop of London, or any bishop authorised by either of them, may admit to holy orders any person whom he shall find upon examination to be qualified for the purpose of serving any cure of souls or other spiritual function in the colonies or foreign possessions of the Crown, and a declaration of such purpose and a written engagement to perform the same is to be a sufficient title to orders (t).

Provision for
episcopal
supervision.

938. The necessity of episcopal supervision may either be met by bestowing jurisdiction in the particular locality on a bishop having already a territorial jurisdiction in England or elsewhere, or by the consecration of bishops for service in the colonies and the foundation of branches of the Church of England complete in themselves and capable of independent organisation. The different powers exercised by the Crown in relation to the consecration and appointment of bishops for service in the colonies are affected in different ways by a subsequent grant of independent government to the colony, and it is therefore necessary to carefully distinguish these powers and to ascertain in the case of each independent organisation what powers were in fact exercised.

Powers
relating to
consecration.

939. By the laws of the realm no person can be consecrated to the office of a bishop without the King's licence for his election to that office and the royal mandate under the Great Seal for his

(s) The Governor acted as ordinary in so far as it was possible for a layman so to act. Thus, in Virginia the Governor was constituted ordinary and the advowsons and right of presentation were subject to the laws of England, there being no express laws of that plantation made further concerning the same (Forsyth, *Cases and Opinions on Constitutional Law*, p. 42). The grant of Maryland to Lord Baltimore gave him the advowsons of and power to erect and consecrate churches and such power as the Bishop of Durham had as Earl Palatine in the County Palatine, who was subject to the laws of England (*ibid.*, p. 35). The Order in Council of Charles I., by which all British subjects abroad were placed under the care of the Bishop of London, does not appear to have been applied in the colonies, since in 1764 A.D. the jurisdiction of the Bishop of London in the colonies was still regarded as resting on the foot of custom and was stated not to be established nor exercised effectually. The Virginia Company were merely recommended to apply to the Bishop of London to assist in sending some clergy of the Church of England to reside in that colony. On the other hand, on the supposition that the Bishop of London had some jurisdiction, all instructions to Governors up to 1764 ordered them to give countenance to the Bishop of London's jurisdiction (*ibid.*, p. 45), and where rectors of parishes were appointed in Prince Edward's Island by the rectors pursuant to the colonial stat. (1802) 43 Geo. 3, c. 6, the rectors' functions were confined to licensing the clerk, if not already licensed by the Bishop of London (Forsyth, *Cases and Opinions on Constitutional Law*, p. 64). See Act. 1819 (59 Geo. 3, c. 60): see pp. 550, 553, *post*.

confirmation and consecration (*u*), and every person so consecrated was required to take the oaths of allegiance and supremacy and of due obedience to the archbishop (*v*).

Except in so far as statutory provisions extend, the discretion of the Crown to give or withhold a mandate for consecration remains unaltered, and, excepting in cases where the power to give such consent has been either expressly or impliedly transferred to some other authority, the necessity for it exists as well in the colonies as in England and Wales (*w*); and as consecration in accordance with the doctrines and ceremonies of the Church of England is an essential to the capacity to exercise the spiritual functions of a bishop of that Church wherever the consecration takes place within the King's dominions, the assent of the Crown, either express or implied, is required, and in order to prove that any consecration performed within the King's dominions is valid there must be some evidence or presumption that such assent has expressly or impliedly been given.

940. The Crown is the source of all titles (*x*), and, therefore, so far as the title of a bishop is concerned, it can bestow a title even of

Territorial
titles.

(*u*) When the consecration takes place in England of a bishop for service in the colonies, the usual course where no statutory provisions apply is for the archbishop to nominate the person to be consecrated and for the Secretary of State for the Colonies thereupon to advise His Majesty to issue a mandate for the consecration (see Parliamentary Paper, 1873, Cd. 259—II., p. 54; 1873, Vol. 48, p. 905).

(*v*) It is lawful for the Archbishop of Canterbury or the Archbishop of York in consecrating any person to the office of bishop for the purpose of exercising episcopal functions elsewhere than in England to dispense, if he thinks fit, with the oath of due obedience to the archbishop (Colonial Clergy Act, 1874 (37 & 35 Vict. c. 77), s. 12); and it is now customary, when it is proposed that the bishop should exercise his functions in a sphere under another metropolitan, for the oath of due obedience to that metropolitan to be substituted and a declaration made of deference to the Archbishop of Canterbury, as approved by the Lambeth Conference of 1897.

(*w*) The Colonial Office have held that such a mandate is necessary only where the bishop is consecrated in England (Parliamentary Paper, 1873, 259—II., p. 51; Vol. 48, p. 902), and accordingly a practice has prevailed of consecrating bishops in the colonies without any licence or mandate from the Crown. The fact that the Crown does not dissent from this practice having been publicly stated in official documents which are known to and recognised by the executive Governments of the colonies is sufficient to render valid such consecrations so long as the practice prevails, but the practice results in the anomaly that the bishops of a branch of the Church of England in a colony can without any express sanction from the Crown consecrate a bishop to minister over any diocese, while the archbishops and bishops of the Church of England require express sanction, and in the practical difficulty that no opportunity arises of limiting the sphere of action of a bishop consecrated in a colony so as not to conflict with the spiritual jurisdiction of any other bishops. An effective opportunity would be afforded for avoiding such conflict if the above-mentioned rule of practice was varied and any consecration of a bishop in a colony required the consent of the representative of the Crown in the colony, such consent to be given in a self-governing colony on the advice of a responsible minister (*Natal (Bishop) v. Gladstone* (1866), L. R. 3 Eq. 1, 49).

(*x*) The Ecclesiastical Titles Act, 1871 (34 & 35 Vict. c. 53), recites that no ecclesiastical title of honour or dignity derived from any see, province, or deanery recognised by law or from any city, town, place, or territory within this realm can be validly created, nor can any such see, province, diocese, or deanery be validly created, nor can any pre-eminence or coercive power be conferred otherwise than under the authority and by the favour of Her Majesty. The royal mandate in these cases does not itself confer any territorial title, designation, or jurisdiction. These were formerly provided for in Crown

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Territorial limits of see.

a territorial character, but neither the mandate for consecration nor the title bestows any territorial jurisdiction either of a spiritual or of a temporal character.

941. The Crown has power, until such power is limited by statute or superseded by the grant of independent powers, to form dioceses or sees, but such power must be exercised with due regard to the territorial limits of any jurisdiction, whether spiritual or temporal, already created by the exercise of the power of the Crown, or of any similar power exercised by any authority by devolution from the Crown or established by any other process and recognised by the law of the locality (y).

Territorial limits of coercive jurisdiction.

942. The Crown has power, until such power is limited by statute or superseded by the grant of independent powers, to create ecclesiastical courts with jurisdiction of a directly coercive character, appointing such officers and making such rules for the administration of justice in ecclesiastical causes as it pleases (z).

colonies by express provisions in the letters patent, which where there was an existing church varied the powers delegated by commission to the Governor by substituting for his power to collate to benefices a direction to present to the bishop, and are since the cessation of the issue of such letters patent provided for by the consensual agreement of those members of the Church of England who voluntarily submit themselves to the bishop's jurisdiction (Parliamentary Paper, 1873, Cd. 259—II., p. 51; Vol. 48, p. 902), reinforced if necessary by an ordinance or other legislative action. See also note (h), p. 493, *post*.

(y) *Natal (Bishop) v. Gladstone* (1866), L. R. 3 Eq. 1, 42.

(z) See title CONSTITUTIONAL LAW, Vol. VI., pp. 398, 426. The power which was expressly given by stat. (1558) 1 Eliz. c. 1, s. 8, to the Crown in all its dominions to assign commissions to exercise ecclesiastical jurisdiction was repealed by stat. (1640) 16 Car. 1, c. 11, s. 3, but by the express words of s. 5 of this Act the provision that no new court should thenceforth be erected having the like powers as the said High Commission Court applied only to the realm of England and dominion of Wales. This statute was explained by an Act passed in 1661 for that purpose (stat. (1661) 13 Car. 2, c. 12), which enacted that nothing therein contained should take away any ordinary power or authority from any archbishop, bishop, vicar-general, or other spiritual or ecclesiastical judge exercising spiritual or ecclesiastical power or authority or jurisdiction by any grant, licence, or commission of the King, or by any power or authority derived from him, but that they might proceed, determine, sanction, execute, and exercise all manner of ecclesiastical jurisdiction and all censures and coercions appertaining and belonging to the same in as ample manner and form as they might have done before the said Act, and repealed 16 Car. 1, c. 11, "excepting what concerns the High Commission Court or the new erection of some such like court by commission," and provided that nothing in the said Act (13 Car. 2, c. 12) "should extend to revive or give force to the said branch of the said statute (1 Eliz. c. 1, s. 18) mentioned in the said Act (11 Car. 1, c. 11), but that the said branch of the said statute made in the first year of Queen Elizabeth shall stand and be repealed" ("unrepealed," Ruffhead) "as if this Act had never been made." Although stat. (1640) 16 Car. 1, c. 11, was thus repealed, the inference from the express words of s. 5 remains good, namely, that the provision that no new court should be erected applied only to England and Wales, and that the power of the Crown to create ecclesiastical courts in the colonies remains until the colony is given independent powers. Accordingly the statement (*Re Natal (Bishop)* (1864), 3 Moo. P. C. C. (N. s.) 115, 154) that "there is no power in the Crown to create any new or additional ecclesiastical tribunal or jurisdiction and the clauses which purport to do so in the patent are simply void in law" must be taken as applying only to colonies having independent powers and to be based on the ground that the Crown stands in the same position in relation to such a colony as it does to the United Kingdom (*Natal (Bishop) v. Gladstone*,

943. The Crown as supreme governor of the Church of England has power by sanctioning the act of consecration to enable the exercise of pastoral or spiritual authority to be conferred as incidental to the office of a bishop of the Church of England (a), provided that such sanction is not inconsistent with the authority given by any similar sanction or otherwise already lawfully existing. In the ceremony of consecration it is implied that the bishop to be consecrated has been chosen bishop of a particular church and see and owes due reverence and obedience to some metropolitical church, and that although the office and work of a bishop may be exercised in the Church of God without any local limitation, yet the power to correct and punish such as be unquiet, disobedient, and criminous is to be exercised within his diocese and according to such authority as is committed to him by the Ordinance of the Realm (b).

As any person adhering to the Church of England accepts the supreme authority of the Crown, the acceptance of the pastoral or spiritual authority so conferred is implied from adherence to the Church, and effect will be given to the proper exercise of such authority on a consensual basis (c).

944. By the exercise of any or all of the above powers of the Crown (d), or by an Act of Parliament (e), the Church of England

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Limits of spiritual jurisdiction.

Formation of a branch of the Church of England.

(a) *Re Natal (Bishop)* (1864), 3 Moo. P. O. O. (N. s.) 115, 154; *Natal (Bishop) v. Gladstone* (1866), L. R. 3 Eq. 1, 29.

(b) Form of Consecrating an Archbishop or Bishop.

(c) *Natal (Bishop) v. Gladstone*, *supra*, at pp. 39—41. The mere fact that a bishop has recommended a certain person to the Crown for appointment as chaplain to a district within his diocese does not give him any jurisdiction to hold an inquiry as to the fitness of such person for the post, and when such an inquiry has been held the Privy Council will not entertain an appeal from any finding arrived at (*Ward v. Mauritius (Bishop)* (1906), 23 T. L. R. 52).

(d) Consequent on the decision in *Re Natal (Bishop)*, *supra*, the Imperial Government determined to issue no more letters patent creating episcopal sees, and wherever throughout British dominions it has been found practicable to carry out the principle of religious equality by the disestablishment of churches previously placed by law on a footing of preference, and by refraining from any exercise of the prerogative for the creation of ecclesiastical offices or the appointment to vacant bishoprics, this has since been done (Todd, *Parliamentary Government in the British Colonies*, 2nd ed., p. 409).

In 1869 and subsequent years the Imperial Government notified the Governors of the colonies in the West Indies, Gibraltar, Australia, Mauritius, and elsewhere of their intention to enforce the same principle, notwithstanding that it might not have been sought after. Thus, in Jamaica State endowments have been entirely withdrawn, while in Trinidad, Barbados, British Guiana, the Cape, Lagos, Gibraltar, and Mauritius the Government have acquiesced in their retention, provided that the endowment should be distributed equally amongst all denominations willing to receive them. This policy is strictly adhered to, and all State connection in any colony conferring a preference over other denominations has ceased. In 1873 the allowance granted under the Consular Advancements Act, 1825 (6 Geo. 4, c. 87), in aid of chaplains at consular stations abroad was discontinued. In 1881 the policy of withdrawing State grants was applied to Ceylon. The old Dutch Church protested because of the treaty of capitulation of 1796, but the law officers advised that the Imperial policy must prevail and that the particular article could not be deemed binding on the Government for all time and in all circumstances. Similar action was taken in Labuan and the Straits Settlements, but in the latter case was reversed in response to the unanimous wish of the Legislative Council (Todd, *Parliamentary Government in the British Colonies*, 2nd ed., pp. 410, 411).

(e) In Canada by the Clergy Endowments (Canada) Act, 1791 (31 Geo. 3, c. 31),

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may be organised, assisted, or established in any colony or dependency which has not received independent powers, and the result of such organisation or establishment may be that that portion of the Church of England which is within the particular colony may become a branch capable of an independent existence so far as organisation is concerned.

In so far as these powers do not extend or are not exercised it devolves upon the Anglican Communion in each colony, with the assistance of the societies formed for that purpose, to take such steps as are required for securing effective episcopal organisation, and for clothing any church synod or ecclesiastical court with the necessary powers on a consensual basis, so that the exercise of those powers may be enforced by the ordinary courts of law (f).

SUB-SECT. 2.—In Self-governing Colonies.

Church in
self-governing
colony.

945. As soon as any colony receives a grant of a representative or representative and responsible legislature the Crown ceases to have any prerogative power to create any new or additional ecclesiastical tribunal or jurisdiction capable of enforcing decisions without recourse to the ordinary courts of law, unless such power is expressly reserved (g), and any such new or additional tribunal or jurisdiction can only be created by an Act passed by the colonial legislature. The change which thus takes place does not affect any tribunal or jurisdiction already established, nor does it affect the identity of any church already existing in the colony, nor the limits

the Church of England was practically established and the "Protestant clergy" were endowed by grants of land for their support, but Presbyterians and other non-episcopal communions claimed equal rights, both civil and religious, in the colonies, and the words "a Protestant clergy" in the principal enabling statute were held by a unanimous opinion of the judges given in the House of Lords in 1840 to include other clergy than those of the Church of England (*Mirror of Parliament*, May, 1840). This decision was followed by statutory provisions removing the connection between the Church of England and the State in most of the colonies in which it had been established by statute (see stat. (1840) 3 & 4 Vict. c. 78; stat. (1853) 16 & 17 Vict. c. 21; and the principle of disestablishment and disendowment was afterwards enforced in other British colonies; but the following Acts are still in force:—An Act providing for the division of the diocese of Quebec, stat. (1852) 15 & 16 Vict. c. 53; an Act to remove doubts as to the constitution of the Bishopric of Christchurch, New Zealand, and to enable Her Majesty to constitute such bishopric and to subdivide the diocese, stat. (1852) 15 & 16 Vict. c. 88. In Canada in 1874 the question arose whether a provincial Act passed by the Legislature of Ontario uniting certain churches in that province could affect property outside the province, and it was held that the Act was not *ultra vires*, but that the provisions purporting to deal with property outside the province were *ultra vires* and inoperative, but capable of being cured by legislation in the other province, Quebec, and that this removed all ground of objection to the legality of the statute and to the agreement between the churches based thereon. In 1875 the necessary Acts were passed by Quebec, and it was held that although the churches concerned existed in more than one province, yet the Dominion Legislature had no right to interfere (*Dobie v. Presbyterian Funds Board* (1880), *Doutre*, *Constitution of Canada*, pp. 247—265). In Australia the Commonwealth cannot make any law for establishing or prohibiting any religion (*Commonwealth of Australia Act*, 1900 (63 & 64 Vict. c. 12), s. 116).

(f) As to the powers of synods of colonial churches, see *Lang v. Purves* 1862), 15 Moo. P. C. C. 389; *Long v. Cape Town (Bishop)* (1863), 1 Moo. P. C. C. n. s.) 411; *Murray v. Burgers* (1866), 4 Moo. P. C. C. (n. s.) 250.

(g) See title CONSTITUTIONAL LAW. Vol. VI., p. 426.

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of any dioceses, nor the functions and powers of any officers of any church (*h*). In so far as the Church of England or any other church was established by law before the change it remains established by law after the change, unless and until express legislative enactment, or unanimous consensual contract, or the *bonâ fide* exercise of some power reserved in the system of organisation of the church, brings about an alteration. The change to self-government does not affect either the past or the future exercise of any of the other powers of the Crown enumerated above (*i*), and after the grant of self-government, as before it, the principle of the supremacy of the Crown in all causes, ecclesiastical as well as civil, prevails (*j*), and is necessarily accepted by all members of the Church of England as such, and is therefore binding on them on a consensual basis, whether the Church of England in the particular colony is or is not established (*k*). A branch of the Church of England established or organised on a consensual basis in a colony can, without losing its connection with the Church of England, accept such changes of organisation as are rendered necessary by the change of the form of government or by legislative enactments in the colony, or are *bonâ fide* made pursuant to powers reserved in its own system of organisation, provided that it adheres to a declaration

(*h*) But such powers may cease on a failure in the succession to the office. In 1873 the Privy Council reported that, on the presumption that having regard to the decisions of the Judicial Committee as to the Colenso case the Crown would not appoint by letters patent any successor to the then Bishop of Natal, the legal succession to the bishopric would fail on Dr. Colenso ceasing to be bishop, and that the vesting of the property of the bishopric in trustees so as to perpetuate the trust should be provided for by an Act of the colonial legislature, and this report was approved (Parliamentary Paper, 1874, Cd. 979, Vol. 44, p. 5).

In the case of South Australia the legislature refused to pass an Act for the incorporation of the members of the Church of England there. Thereupon the Bishop of Adelaide agreed to vest any property held by him in the dean and chapter of the diocese of Adelaide, incorporated under a local Act, upon trusts which provided that the successors to the bishop should be canonically confirmed and consecrated according to the usages of the Church of England and that they should sign a declaration to maintain, and as far as may be cause to be maintained, in all churches and congregations subject to their pastoral authority the doctrines and sacraments of Christ as the Lord has commanded and the Church of England by law established receives the same, together with the Book of Common Prayer and all the canonical scriptures as they are received and used in the said Church (Parliamentary Paper, 1874, Cd. 979, Vol. 44, p. 75).

(*i*) The jurisdiction of the Crown to hear cases on appeal is, however, in fact exercised by way of appeal from the ordinary courts of law and not by way of appeal to the Crown as supreme in ecclesiastical affairs. See title CONSTITUTIONAL LAW, Vol. VI., p. 402.

(*j*) This principle is formally enunciated in the oaths required to be taken in the colonies by the governor or other chief magistrate and the members of the legislature (Parliamentary Paper, 1866, Vol. 50, p. 525; Todd, Parliamentary Government in the Colonies, 2nd ed., p. 420).

(*k*) This does not prevent a church from declaring as part of its constitution, as the Church of West Australia has done, that no recourse shall be had by its members to any court of law, but it does preclude a church from being regarded as in connection with the Church of England if a fundamental part of the constitution of such church is declared to be that it will not recognise the validity of the decisions of the King's courts (*Merriman v. Williams* (1882), 7 App. Cas. 484, P. C.).

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of its doctrines and tenets which is in fundamental agreement with those of the Church of England, and that any alterations made are consistent with such declaration, but if a substantial element exists or is introduced in the constitution of a colonial church which is not merely incidental but conflicts with a substantial element in the constitution of the Church of England, the connection with the Church of England as by law established is annulled, notwithstanding the affirmation in general terms of adherence to the faith and doctrine of that Church (l). Such a breach of connection does not necessarily preclude a continuance of intercommunion, provided no fundamental point of doctrine is involved (m).

(l) *Merriman v. Williams* (1882), 7 App. Cas. 484, P. O. The diocesan synod as the basis of the organisation of a colonial church was instituted at Toronto and Melbourne in 1851, at Adelaide in 1855, at Cape Town in 1856, at Auckland in 1857, in Sydney in 1866, and in Colombo in 1885. Synods are now established at the creation of every new see, and dioceses have in most cases been grouped together in provinces, and provincial synods have been instituted in New Zealand in 1859, in Canada in 1861, in New South Wales in 1866, in South Africa in 1870, in Rupertsland in 1875, and in the West Indies in 1883, while general synods representing both provinces and independent bishoprics were created in Australia and Tasmania in 1872, and in the Dominion of Canada in 1893 (Report of Joint Committee of Convocation of Canterbury on position of the laity, 29th April, 1902). The basis of representation in diocesan synods is the parish, the incumbent sitting *ex officio* and other representatives being elected.

Such a synod, within the limits fixed by the constitution agreed on, has power to make rules for the regulation and discipline of the particular church. The constitution invariably provides that the choice of a new bishop by direct election or delegation lies with the diocesan synod (with provision in most cases for confirmation by the metropolitan and the bishops of the province), and usually provides for the appointment of standing committees of clergy and laity to act as councils of the bishops, limited so as not to interfere with the performance of distinctively episcopal functions, and also for committees of triers, which under episcopal presidency have power to determine questions relating to ecclesiastical offences. The constitution usually contains a specific declaration of principles and doctrines, which cannot be changed, designed to secure fundamental agreement with the principles and doctrines of the Church of England, and such declaration is now based on the resolution commonly called the Lambeth quadrilateral; see note (k), p. 485, *ante*.

Where by such a declaration accepted on a consensual basis as an unalterable part of the constitution of the church the particular church is brought into agreement with the principles and doctrines of the Church of England, such alterations of an incidental character as are rendered necessary by the law of the locality or result from a *bonâ fide* exercise of powers reserved in the constitution will not necessarily involve a breach of connection with the Church of England (*Merriman v. Williams*, *supra*, at p. 510). Where an alteration is proposed which is not within any powers expressly provided by the constitution it can only be effectively carried out with the unanimous consent of the members of the church, and accordingly where it has appeared desirable to found a new and independent diocese out of a portion of the area included within the constitution of an existing church, the constitution of such new diocese has been postponed until delegates representing all the members of the existing church have consented to the proposal.

Where, as in some cases, the constitution framed by consent has been given statutory recognition by being inserted in the schedule of an Act of Parliament any subsequent modification will also require statutory sanction.

(m) See p. 365, *ante*; Colonial Clergy Act, 1874 (37 & 38 Vict. c. 77), s. 8; *Natal (Bishop) v. Gladstone* (1866), L. R. 3 Eq. 1, 47. The Church of South Africa remains in communion with the Church of England notwithstanding the breach of connection affirmed by the decision in *Merriman v. Williams*, *supra*.

SUB-SECT. 3.—*In India.*

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The Church
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etc.Establish-
ment in
India.

946. A religious establishment is maintained in India for which provision is made out of the Indian revenues partly by statutory authority and partly under the authority of the Government of India acting under the sanction of the Secretary of State for India in Council (n). Provision has been made for the maintenance and support of the Church of England by royal letters patent issued in accordance with the provisions of statutes which imposed on the directors of the East India Company the duty of paying the salaries of three bishops and three archdeacons as soon as these offices had been created and filled by the Crown. The letters patent thus issued in the first instance erected one bishopric for the whole of the British territories in the East Indies and other parts within the Company's charter, and one archdeaconry for the presidency of Fort William, one for the presidency of St. George, and one for the presidency of Bombay (o), and subsequently erected bishoprics of Madras and Bombay, subordinate and subject to the Bishop of Calcutta, who is Metropolitan in India subject to the general supervision and revision of the Archbishop of Canterbury for the time being, and to whom the Bishops of Madras and Bombay at the time of their consecration take the oath of due obedience. Each bishop can only exercise such ecclesiastical jurisdiction and episcopal functions for the administering of holy ceremonies and for the superintendence and good government of the ministers of the church establishment within his jurisdiction as were limited to him by the letters patent (p).

(n) Matters relating to this religious establishment are dealt with in India by an ecclesiastical department the work of which is shared between the supreme and the local Governments. This establishment, which is not now confined to the Church of England, is a development of the duty imposed on the East India Company by their charters to maintain one minister in every garrison and superior factory and to take a chaplain on every ship above 500 tons. The charters also provided that no minister should be sent to the East Indies unless approved by the Archbishop of Canterbury or the Bishop of London. (Charter granted by William III. to the East India Company, dated September 6, 1698.)

(o) East India Company Act, 1813 (53 Geo. 3, c. 155), ss. 49, 51, 52; Government of India Act, 1833 (3 & 4 Will. 4, c. 85), ss. 89, 92, 93, 94. Power having been expressly given by these Acts to vary the territorial jurisdiction of the bishops, it was considered so doubtful whether the Crown had power to vary the archdeaconries by patent that the law officers advised that an Act ought to be passed for the purpose (Forsyth, *Cases and Opinions on Constitutional Law*, pp. 62, 63).

(p) Government of India Act, 1833 (3 & 4 Will. 4, c. 85), ss. 92, 93. These limits were extended so as to allow anyone who exercises or has exercised the office of Bishop of Calcutta, Madras, or Bombay, upon the request and by commission under the hand and seal of a bishop of any diocese in England or Ireland with the consent in writing of the archbishop over such diocese, to ordain any persons presented under the direction of the bishop of such diocese and to perform all other functions of a bishop within such diocese (Colonial Bishops Act, 1852 (15 & 16 Vict. c. 52), s. 1). The Colonial Clergy Act, 1874 (37 & 38 Vict. c. 77), s. 13, provides that nothing in the East India Company Act, 1813 (53 Geo. 3, c. 155), and the Government of India Act, 1833 (3 & 4 Will. 4, c. 85), or in any letters patent issued as mentioned in the said Acts, shall prevent any person who is or has been bishop of any diocese in India from performing episcopal functions not extending to the exercise of jurisdiction in any diocese or reputed diocese at the request of the bishop thereof. The supreme courts received under their charters (see Charter dated 26th March, 1774, and note

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Limits of
dioceses.

Additional
bishoprics.

Government
chaplains.

The Crown has power by patent under the Great Seal to assign limits to the respective dioceses and to vary those limits from time to time (*q*). If any person under the degree of a bishop resident in India is appointed to either of the bishoprics the Crown may by patent require the Archbishop of Canterbury to issue a commission to the two remaining bishops to consecrate such person to the office of bishop (*r*).

In addition to the bishoprics thus established the Secretary of State for India appoints bishops to other dioceses (*s*), and in some cases additional bishoprics have been endowed by the voluntary action of the Colonial Bishoprics Fund (*t*). The functions and territorial limits of the sees of these bishops have been defined in some cases by letters patent constituting the see and in other cases by agreement.

Government chaplains are also appointed by the Secretary of State, and under his sanction allowances are granted to other clergymen to provide the ministrations of religion to British-born subjects of the Crown, and especially to soldiers and their families (*u*).

thereon in Belchambers, Rules and Orders, pp. 11, 12) jurisdiction to administer ecclesiastical law as then exercised in the diocese of London so far as the circumstances and occasions of the provinces and peoples should admit or require, and to proceed in all causes appertaining to the ecclesiastical court against British subjects. This jurisdiction so far as it was purely ecclesiastical was repealed when the supreme courts were abolished and the high courts were established, but the High Court still issues special marriage licences authorising chaplains on the establishment to perform the ceremony between the parties named, excepting that from and after the creation of the different bishoprics the courts have ceased to issue such licences to chaplains of the Church of England.

(*q*) Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 93. Australia and New Zealand were separated from the diocese of Calcutta in 1836. The Straits Settlements are excluded from the diocese of Calcutta by stat. (1869) 32 & 33 Vict. c. 88, and by an Order in Council of 8th October, 1869, were annexed to the diocese of Labuan (Parliamentary Paper, 1882, Cd. 3228, p. 61, Vol. 46, p. 637).

(*r*) Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 99. Allowances of stated amounts for the Bishops and Archdeacons of Calcutta, Bombay, and Madras were provided for by statute, but these are all now open to review from time to time by the Secretary of State for India. Provision is also made by the Indian Bishops Act, 1842 (5 & 6 Vict. c. 119), and by statute for furlough allowances, and by the Indian Bishops Act, 1871 (34 & 35 Vict. c. 62), for leave of absence on furlough or medical certificate; see also stat. (1874) 37 & 38 Vict. c. 13.

(*s*) A bishop so appointed derives no authority from any statute, and his status regarded as a servant of the Government is rather that of a superintending chaplain. The appointments are made by patent, as in the cases of Rangoon, Lahore, Lucknow, and Nagpur, or by letters of licence to the Archbishop of Canterbury to consecrate, as in the case of Travancore and Cochin, which was regarded as a foreign country.

(*t*) The see of Colombo was formed in 1845, the sees of Lahore and Rangoon in 1877, the see of Travancore and Cochin in 1879, and Chota Nagpur in 1890. In 1893 the Bishop of Lucknow received by commission from the Bishop of Calcutta charge of the North-West Provinces, and by patent from the Crown charge of Oudh, which had been added to British India since the formation of the see of Calcutta. The see of Tinnevely and Madura was constituted in 1896.

(*u*) This provision is made not only for Anglicans, but also for Presbyterians, Wesleyans, and Roman Catholics. The Government of India Act, 1833 (3 & 4

SUB-SECT. 4.—*In Foreign Parts.*

947. The doctrine of the Church of England that the supreme government of all estates, whether ecclesiastical or civil, appertains to the sovereign power, applies not only to the power of the Crown within the dominions of the Crown, but also to the supreme government of a foreign State within that State, and accordingly the direct application of the supremacy of the King is expressly limited to the realm and his other dominions (*v*), and in territories subject to a different sovereign power the doctrine has no application, either direct or indirect, which would interfere with the exercise of the supreme authority of that power.

In places outside the King's dominions where the ministrations of God's Word and of the sacraments according to the liturgy of the Church of England are not forbidden, persons desirous of receiving those ministrations may form any organisation which is permitted by the law of the locality for that purpose, and may avail themselves of the existence and co-operation not only of organisations and societies expressly associated with the Church of England, but also of the sovereign power having supreme authority in the locality, and of other churches in communion with the Church of England, provided such assistance and co-operation do not involve dissociation from the Church of England as by law established in England (*w*).

948. A priest of the Church of England, while expressly authorised to preach the Word of God and to minister the sacraments in the congregation where he shall be lawfully appointed, is at the same time ordained for the office and work of a priest in the Church of God without any limitation (*x*), and he is therefore justified in carrying on his work as a priest in any congregation which accepts his ministrations and is not under the jurisdiction of any duly appointed bishop without any express appointment thereto, provided that his so doing is consistent with due obedience to his ordinary and other chief ministers to whom is committed the government over him and with due diligence in serving the cure, if any, committed specially to his charge, and that he has at his ordination duly complied with the canonical requirements in respect of the title of such as are to be made ministers (*a*).

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Church of England in foreign parts.

Clergy ministering abroad.

Will. 4, c. 85), s. 102, provided that two of the chaplains in each of the Presidencies must be ministers of the Church of Scotland and that nothing in the Act should prevent grants being made to any other sect, persuasion, or community of Christians for instruction or for the maintenance of places of worship. The rules regulating the nomination and appointment of chaplains of the Church of England require that candidates shall be approved by the Bishop of London. Candidates for appointment to the Church of Scotland establishment must be recommended by the General Assembly's Committee on Indian Churches.

(*v*) Articles of Religion, 37.

(*w*) As to the assistance to be given to and derived from churches in essential agreement with the Church of England in other countries, see the Report of the Lambeth Conference, 1908, pp. 169—182.

(*x*) Form for the Ordering of Priests.

(*a*) See p. 549, *post*.

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in Colonies
etc.

Ordination
for ministry
abroad.

Consecration
of bishop
to a spiritual
sphere
abroad.

949. The Bishop of London, or any other bishop appointed by him, has power to admit to holy orders subjects or citizens of countries out of His Majesty's dominions, without their taking the oath of allegiance, for the purpose of ministering to persons inhabiting and residing in such countries who profess the public worship of God according to the liturgy of the Church of England and desire that the Word of God and the sacraments shall continue to be ministered to them according to that liturgy by subjects or citizens ordained according to the form of ordination in the Church of England (*b*).

950. In order to meet the needs of citizens of foreign countries residing abroad who profess the worship of God according to the principles of the Church of England, and who, for the purpose of providing a regular succession of ministers for the service of their church, are desirous of having citizens of those countries consecrated bishops, provision has been made that, without any licence or mandate for election having been obtained, the Archbishops of Canterbury and York, together with such other bishops as they call to their assistance, under His Majesty's licence naming the person to be consecrated may consecrate British subjects or the subjects of any foreign State to be bishops in any foreign country without requiring such of them as may be subjects of a foreign State to take the oaths of allegiance and supremacy and the oath of due obedience to the archbishop (*c*). Bishops so consecrated may exercise, within such limits as may from time to time be assigned for that purpose in such foreign countries by His Majesty, spiritual jurisdiction over the ministers of British congregations of the Church of England, and over such other Protestant congregations as may be desirous of placing themselves under his or their authority (*d*), and the name of the church in which the bishop is appointed is certified to each bishop by the archbishop who consecrates him (*e*). This is the procedure followed where no part of the bishop's jurisdiction is within the realm (*f*). In other cases a bishop having a diocese

(*b*) Ordination of Aliens Act, 1784 (24 Geo. 3, sess. 2, c. 35).

(*c*) Bishops in Foreign Countries Act, 1841 (5 Vict. c. 6). This Act, commonly called the Jerusalem Bishopric Act, was passed in order to facilitate the appointment of a bishop in Jerusalem, for which an endowment was provided by agreement between the Queen of England and the King of Prussia. The powers given by the Act have been used in relation to the consecration of bishops for service entirely in foreign parts, and the licence for the consecration specifies the territorial limits of the jurisdiction. If it becomes desirable to alter these territorial limits while the see is full, a fresh warrant specifying the new limits of the jurisdiction is issued under s. 2 of the Act.

(*d*) *Ibid.*, s. 2.

(*e*) *Ibid.*, s. 5. When a bishop is consecrated by the King's licence with the intent that he shall exercise the episcopal office in one of His Majesty's possessions abroad, but no particular possession or territory is mentioned in the licence, it is usual for the Archbishop of Canterbury to issue to the bishop a commission assigning a sphere of action, but the bishop is not entitled to any territorial designation nor to be addressed as Lord Bishop. In such cases bishops commonly adopt a territorial designation for convenience of reference, but this is not officially recognised, and the bishop should be described as the Right Reverend Bishop — (Parliamentary Paper, Od. 1882, 3228, p. 7, Vol. 46, p. 638).

(*f*) Where no part of a bishop's jurisdiction is within the realm he is styled

within a colony or dependency is given a spiritual sphere outside the colony with the approval of the Crown, and this may be done by a commission from the Archbishop of Canterbury naming the additional jurisdiction (*g*). When a bishop already consecrated is appointed to serve in a foreign country, any territorial limitations of his jurisdiction are defined by warrant from the Crown if he has been consecrated under the Jerusalem Bishopric Act (*h*), or if not so consecrated, then by the Archbishop of Canterbury with the consent of the Crown and in consultation with the society or body providing the endowment when submitting the appointment to the Archbishop of Canterbury for his approval.

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In some cases the representatives of existing churches of the Anglican Communion in a foreign country have entered into an agreement for the formation of one church out of the existing bodies (*i*), but a church so formed has no legal basis beyond that which is derived from the agreement and such sanction as is given by the laws of the particular country.

Church
formed in
foreign
country.

Part III.—Ecclesiastical Courts.

SECT. 1.—*Origin and History.*

SUB-SECT. 1.—*Courts in Pre-Norman Times.*

951. Previously to the Norman Conquest the principal civil and ecclesiastical court in each county in England was the county court, which was of great power and dignity and was held twice a year. In it the bishop of the diocese and the alderman or, in his absence, the sheriff of the county, sat as presidents, and had cognisance over all ecclesiastical and civil causes and controversies arising in the county (*a*).

The county
court.

There was also in each hundred of the county a minor court called the hundred court, in which the lord of the hundred and the bishop or archdeacon presided. These courts were held more

The hundred
court.

Bishop in ———. Where the part of his jurisdiction from which he derives his title is within the realm he is styled Bishop of ———.

(*g*) This course was followed in 1906, when the Bishop of Victoria, Hong Kong, was given a spiritual sphere outside that colony.

(*h*) See note (*c*) on p. 498, *ante*.

(*i*) An Anglican Church in Japan with a title meaning "The Holy Catholic Church of Japan" has been formed on the basis of an agreement between the four English and two American bishops of the Anglican Communion working there and is provided with a constitution and canons and a triennial synod. The bishops and representative clergy and laymen of churches of the Anglican Communion in China have also agreed at a conference held in April, 1909, on the constitution of a church of the Anglican Communion to be called by a title meaning "The Holy Catholic Church of China," which has been referred to the authorities of the Church of England, the Episcopal Church of the United States, and the Church of England in Canada for provisional sanction.

(*a*) Johnson, *Ecclesiastical Laws*, Part I., Preface, p. xxxii.; 3 Bl. Com. 61; Burn, *Ecclesiastical Law*, Vol. II., pp. 31 *et seq.*

SECT. 1. frequently, and had cognisance of ecclesiastical as well as civil
Origin and causes arising within the hundred (b).
History. From these courts there appears to have been an appeal to the
Appeal. King in his court of nobles (c).

SUB-SECT. 2.—Courts after the Conquest.

**Separation of
civil and
ecclesiastical
courts.**

952. During the earlier years of his reign William I. established and confirmed the laws of Edward the Confessor and of his other predecessors as binding throughout England. He also recognised the validity of the decisions and proceedings of the county courts and hundred courts, subject to an appeal to the King (d). But about the year 1085, William, by a charter made in a common council of the chief men of the kingdom, separated the ecclesiastical courts (e) from the civil courts, and prohibited the bishops from sitting as judges and the clergy from being suitors in the civil courts, and ordered all ecclesiastical causes to be tried in Church courts (f). The courts of the archdeacons, bishops, and archbishops date from this period (g).

**Appeals to
Rome
prohibited.**

953. Appeals from the ecclesiastical courts to Rome were first recognised in the reign of Stephen (h). But in 1164 the Constitutions of Clarendon prescribed that appeals from the archdeacon ought to proceed to the bishop, and from the bishop to the archbishop, and, in case of the archbishop failing to give justice, recourse must last of all be had to the King, so that by his precept the controversy might be ended in the court of the archbishop, and so that it ought not to proceed further without the assent of the King (i). This course of appeal was re-enacted at the Reformation in 1532, and again in the following year, when appeals to Rome were finally prohibited, and it was laid down that for lack of justice in the court of an archbishop the parties aggrieved might appeal to the King in his court of Chancery, and that in all other cases, where an appeal had formerly been made to Rome, it should thenceforth be made to the King in Chancery (k).

(b) Burn, *Ecclesiastical Law*, Vol. II., p. 31.

(c) *Ibid.*, Vol. I., p. 57 a.

(d) Freeman, *Norman Conquest*, Vol. IV., pp. 324 *et seq.* This state of things was temporarily revived by Henry I. (4 Co. Inst. 260; 3 Bl. Com. 63).

(e) The ecclesiastical courts are also called spiritual courts (*Articuli Cleri*, 1315 (9 Edw. 2, stat. 1), c. 6), or courts Christian (1 Bl. Com. 83; 3 Bl. Com. 64).

(f) Freeman, *Norman Conquest*, Vol. IV., pp. 391, 392; 3 Bl. Com. 62, 63. See Spelman, *Concilia*, Vol. II., p. 14, whereby it appears that William I. "Communi Concilio, et Concilio Archiepiscoporum et episcoporum et abbatum et omnium principum regni," instituted the courts for holding pleas of ecclesiastical causes, to be separate and distinct from those courts that had jurisdiction of civil causes. For the original charter, see 4 Co. Inst. 259; Wilkins, *Concilia*, Vol. I., pp. 368, 369; Burn, *Ecclesiastical Law*, Vol. II., p. 34.

(g) 4 Co. Inst. 260; 3 Bl. Com. 64, 65.

(h) Burn, *Ecclesiastical Law*, Vol. II., p. 36.

(i) Constitutions of Clarendon, chap. viii. (Stubbs, *Select Charters*, p. 133).

(k) Stat. (1532) 24 Hen. 8, c. 12, ss. 3, 4; stat. (1533) 25 Hen. 8, c. 19, ss. 4—6; *Parham v. Templar* (1820), 3 Phillim. 223, 241 *et seq.* The appeal in certain cases touching the King to the Upper House of the Convocation of the province given by stat. (1532) 24 Hen. 8, c. 12, s. 4, appears to have been taken

SUB-SECT. 3.—*Archidiaconal Courts.*

SECT. 1.

Origin and History.

Early jurisdiction.

954. Down to the middle of the seventeenth century the courts of the archdeacons (*l*) took a great part in the exercise of the jurisdiction of the ecclesiastical courts, and particularly as regards their disciplinary powers over the laity. In fact, down to that time it was usual to try causes in matters ecclesiastical arising within an archdeaconry in the archdeacon's court (*m*).

The archdeacons have been by custom generally entitled to appoint a person to preside for them in their courts, who is called the archdeacon's official. Where the archdeacon was not entitled to appoint an official he presided in the court himself (*n*).

Archidiaconal courts have now practically fallen into abeyance, owing in part to the withdrawal of many matters from the jurisdiction of the ecclesiastical courts during the nineteenth century (*o*), and in part to the fact that the consistory court of the diocese had concurrent jurisdiction with the archdeacon's court, and that appeals lay from the archdeacon's court to the consistory court (*p*). Consequently the promoter of a suit usually preferred to exercise his option of commencing his suit in the higher court, thereby saving the costs and delay of an appeal.

The only judicial duty which an archdeacon or his official now performs is to try a lay church clerk, chapel clerk, or parish clerk charged with neglect or misbehaviour in his office, or with misconduct unfitting him to exercise the office, and upon satisfactory evidence to suspend him, or to remove him from his office (*q*).

Present jurisdiction.

SUB-SECT. 4.—*Court of Delegates.*

955. Until 1833 the Court of Delegates was the court for hearing appeals to the King in Chancery brought from an archbishop's court for lack of justice in that court (*r*). It was so called because the judges in it sat by virtue of the King's commission under the

Appeals to the Court of Delegates.

away, at any rate in all matters now of ecclesiastical cognisance, by stat. 25 Hen. 8, c. 19 (1533), ss. 4—6 (*Gorham v. Exeter (Bishop)* (1850), 15 Q. B. 52; *Re Gorham v. Exeter (Bishop), Ex parte Exeter (Bishop)* (1850), 10 C. B. 102; *Re Gorham v. Exeter (Bishop)* (1850), 5 Exch. 630).

(*l*) As to archdeacons and their visitatorial and other functions, see Ayl. Par. 95 *et seq.*; and pp. 436 *et seq.*, *ante*.

(*m*) *Chiverton v. Trudgeon* (1620), 2 Roll. Rep. 150; 3 Bl. Com. 64; Burn, Ecclesiastical Law, Vol. I., p. 97; Vol. II., p. 30 g; Hale (Archdeacon), Precedents in Causes of Office against Churchwardens, pp. 77 *et seq.*; Hale (Archdeacon), Precedents in Criminal Causes, pp. 145 *et seq.* A faculty was granted in the court of the Archdeacon of Canterbury in 1794 (*St. John's, Margate (Churchwardens) v. Parishioners* (1794), 1 Hag. Con. 198). The jurisdiction of archdeacons was specially reserved by the Constitutions of Clarendon, chap. vi. (Stubbs, Select Charters, p. 132), and by the Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 19.

(*n*) Ayl. Par. 97, 99, 161; Burn, Ecclesiastical Law, Vol. I., p. 97.

(*o*) See p. 505, *post*. A proceeding to compel a person to take upon himself the office of churchwarden could be instituted in the archidiaconal court (*Adey v. Theobald* (1836), 1 Curt. 447).

(*p*) *Steward v. Bateman* (1842), 3 Curt. 201, *per* Sir HERBERT JENNER FUST, at p. 207.

(*q*) Lecturers and Parish Clerks Act, 1844 (7 & 8 Vict. c. 59), s. 5.

(*r*) See p. 500, *ante*.

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great seal (a). It was superseded on the 1st of February, 1888, by the present system of appealing to the King in Council (b).

SUB-SECT. 5.—Court of High Commission.

Jurisdiction
of Court
of High
Commission.

956. Between the years 1558 and 1640 there existed a Court of High Commission in causes ecclesiastical, with power to visit, reform, redress, order, correct, and amend all such errors, heresies, schisms, abuses, offences, contempts, and enormities whatsoever, as by any manner of spiritual power, authority, or jurisdiction could or might be lawfully reformed, ordered, redressed, corrected, restrained, or amended (c).

SUB-SECT. 6.—Advocates.

Advocates in
ecclesiastical
courts.

957. The bishops, as their duties increased, found it necessary to delegate their judicial and administrative powers to be executed by persons learned in the civil and canon law, under the names of

(a) Burn, *Ecclesiastical Law*, Vol. I., p. 61; Vol. II., p. 140. The Act for the Submission of the Clergy (stat. (1533) 25 Hen. 8, c. 19) provided that upon all appeals from the court of an archbishop for lack of justice, a commission should be directed under the great seal to such persons as should be named by the King, like as in case of appeal from the Admiral's Court, to hear and definitively determine such appeals and the causes and circumstances concerning the same; and that such commissioners should have full power and authority so to hear and definitively determine the same, and that such judgment or sentence, as the commissioners should make and decree, in and upon any such appeal, should be good and effectual and definitive, and no further appeals should be had or made from the commissioners for the same (*ibid.*, s. 4).

The commissioners were usually some of the lords spiritual and temporal, and one or more of the twelve judges, and one or more of the doctors of civil law (3 Bl. Com. 66). Notwithstanding the provision in the above-mentioned Act of Henry VIII., as to the finality of their judgments, a commission of review, on a petition to the King in Council, was sometimes granted under the great seal, appointing new judges, or adding more to the former judges, to revise, review, or rehear the cause where it was apprehended that they had been led into a material error (*ibid.*, 67; Burn, *Ecclesiastical Law*, Vol. I., p. 62).

(b) Privy Council Appeals Act, 1832 (2 & 3 Will. 4, c. 92); see p. 511, *post*.

(c) Stat. (1559) 1 Eliz. c. 1, s. 18 (Ruffhead's edition); 4 Co. Inst. 324 *et seq.* By stat. (1559) 1 Eliz. c. 1, s. 18 (Ruffhead's edition), the Queen and her successors were authorised to issue commissions by letters patent under the Great Seal of England to various persons, being natural born British subjects chosen by herself and her successors, as often and for so long a time as she and her successors should think meet and right for the purpose of exercising all manner of jurisdictions, privileges, and pre-eminences in any wise touching or concerning any spiritual or ecclesiastical jurisdiction, within the realms of England and Ireland or any other of the Queen's dominions, and with the powers mentioned in the text. These commissions, whether temporary, and intended only for some particular occasion, or permanent, such as that which developed into the Court of High Commission, constituted during the reigns of Elizabeth, James I., and Charles I. the regular mode in which the Royal supremacy in matters ecclesiastical was exercised, and enabled the Sovereign to govern the Church with the aid of the Privy Council alone, independently of Parliament. Stat. (1640) 16 Car. 1, c. 11, s. 3, repealed the enactment of stat. (1559) 1 Eliz. c. 1, which authorised the Court of High Commission; and s. 5 enacted that no new court should be erected or ordained within the realm with the like power, jurisdiction, or authority as the High Commission Court. These provisions, abolishing that court, were confirmed by stat. (1661) 13 Car. 2, stat. 1, c. 12, ss. 3, 4.

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official principal and vicar-general (*d*). This, and the necessity of qualifying for practice in the ecclesiastical courts, led to the formation of a society of civilians, or persons learned in the civil law, who, after having taken the degree of doctor of laws in the Universities of Oxford or Cambridge, and having studied the canon and civil law for five and latterly for three years, were admitted by the Archbishops of Canterbury to the Doctors' Commons Bar, and to practise as advocates in the ecclesiastical courts (*e*). Until 1545, chancellors, registrars, and other officials of ecclesiastical courts were obliged to be in minor orders (*f*).

In 1768 a royal charter was obtained, by which the then members of the Society of Advocates and their successors were incorporated as a college under the name and title of "The College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts." The dean of the arches for the time being was president

Doctors of
Law.

(*d*) Burn, Ecclesiastical Law, Vol. I., p. 289. The two offices have been usually combined and held by the chancellor of the diocese (*ibid.* See p. 412, *ante*).

(*e*) Ayl. Par. 53 *et seq.*; Burn, Ecclesiastical Law, Vol. I., pp. 2 *et seq.*; Phillimore, International Law, Vol. I., Preface, pp. xxv. *et seq.* It was not unusual for candidates for this Bar before their admission to study civil law at the University of Paris for two years, and afterwards the canon law at the University of Bologna for the same period. As to proctors, see note (*g*), pp. 515, 516, *post*.

(*f*) In 1545 these offices were thrown open to laymen, whether married or unmarried, provided they were doctors of civil law (stat. (1545) 37 Hen. 8, c. 17).

The fact of the advocates being the only members of the English Bar who were conversant with the civil law led to their being admitted by the judge of the Admiralty Court as advocates in that court, and to the Lord High Admiral of England selecting a civilian to preside as judge in the Admiralty Court and in the prize court in time of war, and to his appointing a civilian to be judge advocate-general for the Crown in all admiralty and prize cases (3 Bl. Com. 69, 108).

Lord Campbell, in his Lives of the Lord Chancellors (Vol. I., p. 411), observes that success at the civilian Bar frequently led to promotion in Church and State. During the seventy years prior to the reign of Henry VIII. four of the Archbishops of Canterbury—namely, Archbishop Kempe, Archbishop Stafford, Archbishop Morton, and Archbishop Warham—had been in large practice at the Doctors' Commons Bar; and the first two had been Dean of the Arches (Hook, Lives of the Archbishops of Canterbury, Vol. V., pp. 134, 135, 192, 193, 389; Campbell, Lives of the Lord Chancellors, Vol. I., pp. 411, 422). Down to the reign of Elizabeth the advocates resided and practised at Amen Corner, close to St. Paul's Churchyard; the Consistory Court of London being held in the Cathedral of St. Paul's. In 1567 some of the members of their body purchased a site on the opposite side of St. Paul's, upon which they erected, at their own cost, houses for the residence of the judges and advocates, and suitable buildings, which were known as Doctors' Commons, for the ecclesiastical and admiralty courts, in which these courts were held down to 1858. The property was vested in trustees subject to a proviso that, if their Bar was ever thrown open or dissolved, the college property was to be sold and divided equally amongst the advocates of that day (Burn, Ecclesiastical Law, Vol. I., p. 5).

In the reign of James I., about the year 1604, members of the common law Bar having proposed in the House of Commons that they should be allowed to practise in the ecclesiastical courts, the advocates petitioned the King to authorise some member of the Government to protect their interests. The King thereupon granted by royal charters to each of the Universities of Oxford and Cambridge the right of returning two members to the House of Commons, and they were admonished by those charters to select such as were skilful in the Imperial laws (Phillimore, International Law, Vol. I., Preface, pp. xxvii., xxviii.).

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of the college (*g*). On the creation of the Court of Probate and the Court for Divorce and Matrimonial Causes in 1857 (*h*), power was given to the college to dispose of their property and surrender their charter (*i*); and accordingly in 1865 the property was sold to the Metropolitan Board of Works, and the purchase-money was equally divided among the existing members of the college.

Barristers
and solicitors.

It has since been held that a barrister can practise in the ecclesiastical courts (*k*), and in 1877 solicitors were expressly empowered to do so (*l*).

SUB-SECT. 7.—*Jurisdiction.*

Early juris-
diction of
ecclesiastical
courts.

958. The ecclesiastical courts, soon after their separation from the civil tribunals, claimed exclusive jurisdiction over all offences committed by clerks (*m*). But this claim was negatived in 1164 by the Constitutions of Clarendon (*n*). The matters of ecclesiastical jurisdiction as recognised down to the nineteenth century were of two kinds, criminal and civil. Their criminal jurisdiction extended to all offences of the clergy and of churchwardens in connection with the duties of their office, and to those crimes or offences of the laity which by the laws of the realm were of ecclesiastical cognisance, such as heresy, adultery, incest, fornication, simony, brawling in church or churchyard (*o*), defamation (*p*), and some others wherein their proceedings were *Pro reformatione morum et pro salute animæ* (*q*). The civil causes committed to their cognisance, wherein the proceedings were *Ad instantiam partis*, were ordinarily causes of matrimony and divorce, testamentary causes and the incidents thereto, such as the probate of wills and testaments, and grants of administration, and controversies touching the same, and touching legacies, tithes, rights of institution and induction to ecclesiastical benefices, oblations, obventions, dilapidations,

(*g*) Burn, Ecclesiastical Law, Vol. I., p. 5.

(*h*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77); Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85).

(*i*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 116, 117.

(*k*) *Mouncey v. Robinson* (1867), 37 L. J. (ECCL.) 8.

(*l*) Solicitors Act, 1877 (40 & 41 Vict. c. 25), s. 17.

(*m*) Stubbs, Constitutional History, Vol. I., p. 463; Vol. III., p. 343.

(*n*) These Constitutions laid down, among other things (chap. i.), that disputes concerning advowsons and presentations to churches, whether between laymen, or between laymen and clerks, or between clerks, must be settled in the King's court, and (chap. iii.) that clerks accused and charged with any matter, being summoned by the King's justice, should come into his court, to answer there concerning that upon which it should seem right to the King's court that answer should be made there, and in the ecclesiastical court concerning that which should seem right to be answered there; so that the King's justice should send into the court of holy Church to see in what manner the King should be treated there; and that if the clerk should have been convicted or have confessed, the Church ought not to defend him any longer (Stubbs, Select Charters, pp. 129, 132).

(*o*) Stat. (1551) 5 & 6 Edw. 6, c. 4; Burn, Ecclesiastical Law, Vol. I., pp. 390 *et seq.*

(*p*) Stat. *Circumspecte agatis* (1285), 13 Edw. 1; Burn, Ecclesiastical Law, Vol. II., pp. 126 *et seq.*

(*q*) Stat. *Circumspecte agatis* (1285), 13 Edw. 1; Hale, O. L., 2nd ed., p. 31; Burn, Ecclesiastical Law, Vol. II., p. 39.

the reparation of churches and chancels, matters of church rates, pensions, procurations, and other matters of a spiritual or ecclesiastical nature the cognisance whereof did not belong to the common law courts of England (*a*).

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History.

959. During the nineteenth century the jurisdiction of the ecclesiastical courts was considerably curtailed. Their cognisance of cases of defamation was taken away in 1855 (*b*). Two years later their jurisdiction in testamentary matters and in cases of intestacy was transferred to the Court of Probate which was then created (*c*), and their jurisdiction in matrimonial causes was transferred to the newly-established Divorce Court (*d*). In 1860 their power of trying and punishing lay persons for brawling in a church or churchyard was abolished, without prejudice to their jurisdiction over clergymen for a similar offence (*e*). And their power of correcting lay persons who are guilty of moral offences has fallen into desuetude, and has been judicially declared to be inconsistent with modern custom and opinion (*f*).

Curtailement
of juris-
diction.

SECT. 2. *Present Constitution.*

SUB-SECT. 1.—*Diocesan Courts.*

960. Every archbishop and bishop has a court for the trial of ecclesiastical causes within his diocese, called the consistory court (*g*), or in the diocese of Canterbury the commissary court (*h*), which is held by his chancellor as his official principal (*i*) in his cathedral church, or before his commissary (*k*) in places of the diocese remote from the episcopal consistory, so that the chancellor cannot call them to the consistory without great trouble and vexation. Such commissary is called *commissarius foraneus* (*l*).

Consistory
courts.

(*a*) Stat. *Circumspecte agatis* (1285), 13 Edw. 1; stat. (1532) 24 Hen. 8, c. 12, s. 1; Hale, C. L., 2nd ed., p. 31; Burn, Ecclesiastical Law, Vol. II., p. 39; *Winchester's (Bishop) Case* (1596), 2 Co. Rep. 38 a, 45 a; *Linnell v. Gunn* (1867), 36 L. J. (ECCL.) 23.

(*b*) Ecclesiastical Courts Act, 1855 (18 & 19 Vict. c. 41).

(*c*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 3, 4.

(*d*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 2, 4. But the Act did not affect the granting of marriage licences (*ibid.*, s. 2).

(*e*) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 1. As to brawling, see p. 663, *post*; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 478.

(*f*) *Phillimore v. Machon* (1876), 1 P. D. 481, *per* Lord PENZANCE, at p. 487.

(*g*) The name is derived from the time when the bishop presided in it and had some of his clergy as assessors and assistants (Burn, Ecclesiastical Law, Vol. II., p. 12).

(*h*) Trist. 172 *et seq.*

(*i*) Ayl. Par. 160; *Thorpe v. Mansell* (1810), 1 Hag. Con. 4, n. As to diocesan chancellors generally, see p. 412, *ante*; and as to their functions as the vicars-general of the bishops in non-contentious matters, such as the granting of marriage licences, see pp. 701 *et seq.*, *post*, and the admission of churchwardens in the year of the bishop's visitation of his diocese, see p. 465, *ante*; see Ayl. Par. 160; *Thorpe v. Mansell*, *supra*. The court is held either in the cathedral church or in some other convenient place in the diocese (Burn, Ecclesiastical Law, Vol. II., p. 12).

(*k*) *R. v. Thorogood* (1840), 12 Ad. & El. 163, 196 *et seq.*

(*l*) 4 Co. Inst. 338; *Canones Ecclesiastici* (1603), 125.

SMOT. 2.
Present
Constitu-
tion.

Chancellor
of the diocese.

In some dioceses the chancellor is also entitled to hold his consistory court in any church in the diocese in which by statute or by custom there is a consistory court (*m*).

961. The chancellor acts in the court as an ordinary (*n*) or independent judge, according to ecclesiastical law, uncontrolled by the bishop, and with no special instructions from him (*o*). His powers are conferred by the letters patent of his appointment, in which the jurisdiction delegated by the bishop to him is specifically set out (*p*); and in some of the letters patent the right is reserved to the bishop to sit in the court to hear certain cases (*q*). There is no appeal from the chancellor to the bishop (*r*).

The processes of the consistory courts generally run in the name of the bishop of the diocese, but are issued under the chancellor's seal. When the processes do not run in the bishop's name, they run in the chancellor's name, as the official principal of the bishop, and are also issued under the chancellor's seal. In either case the seal must, in the Province of Canterbury, be attested by an ecclesiastical notary, which the registrar of the court always is; in the Province of York it may be attested by a notary public (*s*).

The chancellor as a judge being independent of the bishop (*t*), he may hear and determine in the consistory court a cause in which the bishop is himself interested (*u*).

Cases under
the Church

Discipline
Act, 1840.

962. Cases under the Church Discipline Act, 1840 (*a*), are generally sent by the bishop by letters of request (*b*) direct to the provincial court, to be tried there without being first tried in his consistory court (*c*).

Cases under
the Clergy
Discipline
Act, 1892.

963. Cases under the Clergy Discipline Act, 1892 (*d*), may be tried in the consistory court before the chancellor or before a

(*m*) Thus, in the diocese of Hereford, in addition to the consistory court in Hereford Cathedral, there is by custom an ecclesiastical court in the parish church at Bridgnorth, and there is by statute another consistory court. In the diocese of Chichester the consistory court for the archdeaconry of Chichester is in Chichester Cathedral, but that for the archdeaconry of Lewes is in the church of St. Michael, at Lewes. And, generally, the chancellor, for the convenience of the parties to a faculty suit, may direct a court to be held in the parish church to which it relates, and may there take the evidence of witnesses produced and hear the case argued, and may with the concurrence of all parties to the suit, on the conclusion of the case, deliver his judgment there.

(*n*) *Ex parte Medwin* (1853), 1 E. & B. 609, 616. An ordinary is so called in ecclesiastical law *quia habet ordinariam jurisdictionem in jure proprio et non per deputationem* (Co. Litt. 96 a).

(*o*) *Ex parte Medwin, supra*, at pp. 615, 616.

(*p*) *Ibid.*, at p. 614; *Davey v. Hinde*, [1901] P. 95, 122 *et seq.*; *R. v. Tristram*, [1902] 1 K. B. 816, O. A.

(*q*) *R. v. Tristram, supra*.

Ayl. Par. 163; *Ex parte Medwin, supra*, at p. 615.

Ayl. Par. 383; Gib. Cod. 986. As to notaries, see title NOTARIES.

(*t*) *Ex parte Medwin, supra*, at p. 616.

(*u*) *Lincoln (Bishop) v. Smith* (1668), 1 Vent. 3; *Ex parte Medwin, supra*.

(*a*) 3 & 4 Vict. c. 86.

(*b*) Burn, Ecclesiastical Law, Vol. III., p. 224; *Burgoyne v. Fres* (1825), 2 Add. 405.

(*c*) See Church Discipline Act, 1840 (3 & 4 Vict. c. 86), s. 13; and see p. 526, *post*.

(*d*) 55 & 56 Vict. c. 32; see p. 522, *post*.

deputy-chancellor appointed by the bishop, being a barrister of not less than seven years' standing or the holder of a judicial appointment (e). If any question of fact (other than the fact of the conviction of the defendant by a temporal court) is to be determined, and either party so requires, five assessors chosen in the prescribed manner (f) are to be members of the court, and the question of fact must be determined in the prescribed manner (g).

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Constitution.

964. The special importance of the Consistory Court of London (h) has been recognised by the express statutory authority given to the

Consistory
Court of
London.

(e) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), ss. 2 (e); 10 (5).

(f) A body of assessors are elected every three years, three by the members of the cathedral church of the diocese from their own number, four by the beneficed clergy of each archdeaconry in the diocese from their own number, and five from the justices of the county by the court of quarter sessions of each county wholly in the diocese and of such of the counties partly in the diocese as are prescribed by rules made under the Act (*ibid.*, s. 3 (1); Clergy Discipline Rules, 1892, rr. 21, 22, Schedule (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 66, 81)). The consent of an assessor to serve is obtained before he is elected, and if an assessor ceases to be one of the body from whom he is elected, or resigns or dies or becomes incapable of acting, the chancellor may declare a vacancy, and thereupon the vacancy may be filled by another election (Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 3 (2); Clergy Discipline Rules, 1892, r. 23 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, p. 66)). When the presence of assessors is required, three clergymen and two laymen are chosen by ballot out of the assessors on the list, and the assessors chosen are bound to attend when required; and if anyone fails to attend, he is disqualified from acting or being again elected as an assessor, and the chancellor is to declare a vacancy, which is to be filled by a new election. But if any assessor is objected to by either party on grounds approved by the chancellor, he is to be discharged from serving, and if for any reason the requisite number of assessors is not obtained before the trial, the chancellor, if there is time, is to cause a clergyman or layman, as the case may require, to be chosen from the list of assessors by another ballot, or, if there is not time, is to appoint some clergyman or layman, as the case may require, who is willing to serve and is not objected to by either party on a ground deemed sufficient by the chancellor, to make up the full number of five assessors. The assessors are entitled to travelling and out-of-pocket expenses (Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 3 (3), (4), (5), (6); Clergy Discipline Rules, 1892, rr. 16—24 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 64 *et seq.*)).

(g) See p. 525, *post*.

(h) The Consistory Court of London from the time of Queen Elizabeth down to January, 1858, when the exclusive jurisdiction of the ecclesiastical courts in matrimonial and divorce cases was transferred to the Divorce Court, was the only ecclesiastical court of first instance in England which was accustomed to entertain matrimonial and divorce suits from all parts of England. The origin of this jurisdiction was as follows: Prior to the reign of Henry VIII. a person might cite to appear in the ecclesiastical court of his own diocese a party residing in another diocese. By stat. (1531) 23 Hen. 8, c. 9, parties were not to cite a defendant to appear in a court out of his diocese. The common law courts, however, held that this statute was intended to be merely for the benefit of the subject, and that if both parties to a suit were willing to have it tried in a court in a diocese in which one of them did not reside, they might do so. Suitors, therefore, in heavy and important causes preferred to have their case tried in the Consistory Court of London, not only for the advantage of having it heard before an experienced judge and in a court remarkable for the rapidity of its proceedings, but also to enable them to have it conducted by the London proctors and members of the Doctors' Commons Bar, instead of its being tried in the country diocesan courts where they had no such advantages. In these cases the practice was for the petitioner in the suit to take up a residence for twenty-one days in

SECT. 2.
Present
Constitu-
tion.
 —

judges of that court to appoint new and additional court days for the transaction of business in the court, and to make orders of court for expediting and regulating the proceedings in the court (i).

The Chancellor of London can only make a final decree in contentious cases in the consistory court in St. Paul's Cathedral (k). For the convenience of counsel, cases are sometimes heard by permission in the Chapter House of St. Paul's, but the judgment is always delivered, and the decree is made, in the consistory court.

SUB-SECT. 2.—Provincial and General Courts.

Jurisdiction.

965. The provincial courts are courts of appeal of the archbishops from the diocesan courts within their provinces (l). They are also courts of first instance (1) in cases where the chancellor of a consistory court within the province applies to the judge of the provincial court by letters of request on the application of one or both of the parties to a contemplated suit in the consistory court for the cause to be heard and determined in the provincial court, on the ground of the importance of the questions to be raised in the suit, so as to save the expense of a possible appeal from the decision in the consistory court (m); and (2) where the case of a clergyman charged with having committed an offence for which he can be tried under the Church Discipline Act, 1840 (n), is sent by letters of request to the provincial court by the bishop who under the Act has, in the first instance, cognisance of the offence (o). Except in cases under that Act (p), it is in the discretion of the judge of the provincial court to act on, or to decline to accept, the letters of request (q).

the diocese of London, and then to apply to the Consistory Court to issue a citation to the proposed defendant in the suit. On the citation having been personally served on the defendant, if the defendant entered an appearance objecting under the statute of Henry VIII. to the jurisdiction of the court the suit was dropped; but if the defendant entered an appearance to the citation or took no notice of it, it was assumed that the party waived the objection to the jurisdiction, and the suit proceeded and was heard and decided in the London court in due course.

(i) Ecclesiastical Courts Act, 1829 (10 Geo. 4, c. 53), s. 9. Orders under this Act have been made in 1877, 1878, 1892 and 1893 ((1877) 2 P. D. 373 *et seq.*; (1878) 3 P. D. 191, 192; Trist. 289 *et seq.*; Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 1 *et seq.*).

(k) Formerly, causes were frequently heard, and the judgment was delivered, in the court in Doctors' Commons. But wherever it was necessary for the purpose of binding all parties interested in the case, the court after the judgment had been delivered adjourned to St. Paul's Cathedral, where the final decree was pronounced either by the judge himself or by an advocate as his deputy judge.

(l) Stat. (1532) 24 Hen. 8, c. 12, s. 3; stat. (1533) 25 Hen. 8, c. 19, s. 4; 4 Co. Inst. 339, 340.

(m) Stat. (1531) 23 Hen. 8, c. 9, s. 1; Gib. Cod. 1007; Burn, Ecclesiastical Law, Vol. III., pp. 224 *et seq.*; *Ex parte Williams* (1825), 4 B. & C. 313; *Jolly v. Baines* (1840), 12 Ad. & El. 201. Letters of request are issued, not in a pending suit, but on an allegation that the party applying for them intends to enter into litigation and wishes to go to the superior court at once *per saltum* (*Fry v. Treasure* (1865), 2 Moo. P. C. C. (N. S.) 539).

(n) 3 & 4 Vict. c. 86; see p. 526, *post*.

(o) *Ibid.*, s. 13.

Brookes v. Cresswell (1846), 10 Jur. 647; *Sheppard v. Phillimore* (1869), L. R. 2 P. C. 450.

(q) *Steward v. Bateman* (1842), 3 Curt. 201; *Sheppard v. Bennett* (1868),

966. The provincial court of the Archbishop of Canterbury is called the Arches Court of Canterbury or the Court of Arches (*r*).

SECT. 2.
Present
Constitu-
tion.

The old Court of Audience(*s*) and Court of Peculiars(*a*) of the Archbishop of Canterbury are now merged in the Court of Arches (*b*).

Court of
Arches.

The judge of the court is described in his letters patent as "the Official Principal of the Arches Court of Canterbury," but is usually styled and is addressed as "the Dean of the Arches" (*c*). He has statutory authority to appoint new and additional court days for the transaction of business in the court, and to make orders of court for expediting and regulating the proceedings in the court (*d*).

967. The provincial court of the Archbishop of York is called the Chancery Court of York, and the judge is called the official principal or auditor (*e*).

Chancery
Court of
York.

968. The judge of the provincial courts of Canterbury and York is now appointed by the two archbishops, subject to the approval of the King under his sign manual. He must be a barrister-at-law who has been in actual practice for ten years, or a person who has been a judge of the Supreme Court of Judicature. If the archbishops do not appoint the judge within six months after the

The judge.

L. R. 2 A. & E. 335 (reversed as to letters of request under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), *sub nom. Sheppard v. Phillimore* (1869), L. R. 2 P. C. 450).

(*r*) The court is so called from the fact that it was formerly held in Bow Church (*Ecclesia Beatæ Mariæ de Arcubus*) in the city of London, which derived its name from its steeple being raised on stone pillars archwise (Gib. Cod. 1004; Burn, Ecclesiastical Law, Vol. I., p. 97).

(*s*) 4 Co. Inst. 337.

(*a*) *Ibid.*, 338; 3 Bl. Com. 65; see note (*r*), *supra*.

(*b*) Burn, Ecclesiastical Law, Vol. I., p. 106.

(*c*) 3 Bl. Com. 64, 65; Gib. Cod. 1004; Burn, Ecclesiastical Law, Vol. I., pp. 97 *et seq.*; 1 Hag. Ecc. 48, n. (*a*). He was formerly called *officialis de Arcubus* (Gib. Cod. 1004). In early times the Archbishop of Canterbury had four provincial judges, two of whom held their courts in Bow Church. One of these judges was the Archbishop's Official Principal, and heard appeals from the consistory courts in the province. The jurisdiction of the other judge, who was styled the Dean of the Arches, was limited to the hearing of causes arising in thirteen parishes within the city of London, and the parishes comprised in the deaneries of Croydon in Surrey and Shoreham in Kent, all of which were peculiars of the Archbishop of Canterbury. But during the absence of the Official Principal he sat and adjudicated upon appeals as the deputy of that judge (Burn, Ecclesiastical Law, Vol. I., p. 97a; 1 Phillim. 201, n. (*a*)). In later times the two offices of the Archbishop's Official Principal and of the Dean of the Arches have generally been held by the same person, but though he bears the name of the second of these offices, his present jurisdiction depends upon his holding the first (4 Co. Inst. 337; Gib. Cod. 1004; Burn, Ecclesiastical Law, Vol. I., p. 98).

(*d*) Ecclesiastical Courts Act, 1829 (10 Geo. 4, c. 53), s. 9. Rules and Regulations under the Act, to take effect from 1st January, 1867, were made in 1866, in substitution for the then existing Rules and Regulations (36 L. J. (ECCL.) 1 *et seq.*; Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 10 *et seq.*). Additional rules as to faculties were issued in September, 1903 (*Markham v. Shirebrook Overseers*, [1906] P. 239, 262, n. (1)).

(*e*) *Voysey v. Noble* (1870), L. R. 3 P. C. 357; Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 7; *Dale's Case*, *Enraght's Case* (1881), 6 Q. B. D. 376, C. A. There was also a Court of Audience of the Archbishop of York, but it has long since become obsolete.

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Present
Constitu-
tion.
—

occurrence of a vacancy in the office, the King may by letters patent appoint to be the judge some person qualified as above mentioned (*f*).

The judge of the provincial court can hear cases under the Church Discipline Act, 1840 (*g*), and the Public Worship Regulation Act, 1874 (*h*), at a place outside the province (*i*), and can try a clergyman beneficed in the province in respect of an offence committed outside the province (*k*).

Court of
Faculties.

969. The Court of Faculties (*l*) of the Archbishop of Canterbury (*m*) has jurisdiction over the appointment and removal of notaries public (*n*), and the issuing of such faculties and licences as the Archbishop of Canterbury can grant in the province of York as well as in his own province (*o*). The officer who presides over it is called the Master of the Faculties, and is usually the same individual as the Dean of the Arches (*p*).

Archbishop's
court for
trial of
bishops and
of heretics.

970. The archbishop of the province can in any part of his province try before himself or his vicar-general, and either alone or sitting with assessors, a bishop of the province for an ecclesiastical offence, and can inflict upon him such censure or punishment as may be proper (*q*). He can also cite before him a person dwelling in any diocese within his province for a cause of heresy, if the bishop or other immediate ordinary consents, or does not do his duty in the punishment of the heresy (*r*). An appeal lies from the archbishop to the Judicial Committee of the Privy Council (*s*).

(*f*) Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 7. Previously to that Act the appointment of the judge of the appellate court in each province was vested in the archbishop of the province.

(*g*) 3 & 4 Vict. c. 86.

(*h*) 87 & 38 Vict. c. 85.

(*i*) *Dale's Case, Enraght's Case* (1881), 6 Q. B. D. 376, C. A.; *Green v. Penzance (Lord)* (1881), 6 App. Cas. 657; *Noble v. Ahier* (1886), 11 P. D. 158.

(*k*) *Noble v. Ahier, supra*.

(*l*) The word "faculty" signifies a privilege or special dispensation granted to a person by favour and indulgence to do that which by the law he cannot do (*Termes de la Ley*, p. 324). For faculties, see also pp. 540 *et seq.*, *post*.

(*m*) 4 Co. Inst. 337; Burn, Ecclesiastical Law, Vol. II., p. 261, 1; *Re Champion*, [1900] P. 86; *Bennetts v. Chilcott* (1906), *Times*, October 27th; *Hall v. Winder (ibid.)*.

(*n*) Ayl. Par. 384; Burn, Ecclesiastical Law, Vol. III., p. 2; Public Notaries Act, 1801 (41 Geo. 3, c. 79); Public Notaries Act, 1843 (6 & 7 Vict. c. 90). See also title NOTARIES.

(*o*) 4 Co. Inst. 337; *Capua (Prince) v. De Ludolf (Count)* (1836), 30 L. J. (P. M. & A.) 71 *et seq.*, n.; and see p. 701, *post*; and title HUSBAND AND WIFE.

(*p*) 4 Co. Inst. 337; Burn, Ecclesiastical Law, Vol. III., p. 2.

(*q*) *St. David's (Bishop) v. Lucy* (1699), 1 Ld. Raym. 447, *per* HOLT, C.J., at p. 447, 448; *Ex parte Read* (1888), 13 P. D. 221, P. O.; *Read v. Lincoln (Bishop)* (1889), 14 P. D. 88; see subsequent proceedings in S. C. (1889), 14 P. D. 148 [1891] P. 9; [1892] A. C. 644, P. O.

(*r*) Stat. (1531) 23 Hen. 8, c. 9, s. 2; Church Discipline Act, 1840 (3 & 4 Vict. c. 86), s. 19.

(*s*) *Ex parte Read* (1888), 13 P. D. 221, P. O.; *Read v. Lincoln (Bishop)*, [1892] A. C. 644, P. O.

SUB-SECT. 3.—*Judicial Committee of the Privy Council.*SECT. 2.
Present
Constitu-
tion.

Jurisdiction.

971. The Judicial Committee of the Privy Council (*t*) hear and determine all appeals which before 1833 might have been brought to the King in Chancery for lack of justice in either of the provincial courts (*u*), and which before that year were heard and determined by the High Court of Delegates (*a*), but which have since that year been brought to the King in Council (*b*). They also hear and determine appeals from a provincial court in cases tried under the Church Discipline Act, 1840 (*c*), and under the Public Worship Regulation Act, 1874 (*d*). In causes tried in a consistory court under the Clergy Discipline Act, 1892 (*e*), there is an alternative appeal in respect of certain matters to the Judicial Committee of the Privy Council or to the provincial court (*f*), but if the appeal is brought to the provincial court there is no further appeal to the Judicial Committee (*g*). The Judicial Committee will not rehear a case after judgment has been delivered (*h*).

At the hearing of ecclesiastical appeals by the Judicial Committee (*i*) one of the three following prelates, namely, the Archbishop of Canterbury, the Archbishop of York, or the Bishop of London, is summoned to attend, according to a fixed rota, as an *ex officio* assessor, and four other bishops are also summoned to attend as assessors according to a fixed rota; and no appeal is heard unless at least three of the five assessors are present (*j*).

Assessors.

Under the Judicial Committee Act, 1843 (*k*), rules and orders have been made regulating the procedure in appeals to the Judicial Committee of the Privy Council generally (*l*) and in ecclesiastical causes (*m*).

Rules and
orders.

(*t*) As to the Judicial Committee of the Privy Council, see title COURTS, Vol. IX., pp. 27 *et seq.*

(*u*) See pp. 508 *et seq.*, *ante*.

(*a*) See p. 501, *ante*.

(*b*) Privy Council Appeals Act, 1832 (2 & 3 Will. 4, c. 92); Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41); *Gorham v. Exeter (Bishop)* (1850), 15 Q. B. 52; *Gorham v. Exeter (Bishop)*, *Ex parte Exeter (Bishop)* (1850), 10 C. B. 102; *Re Gorham v. Exeter (Bishop)* (1850), 5 Exch. 630; *Sheppard v. Bennett* (1869), 21 L. T. 650, P. C.; and see title COURTS, Vol. IX., pp. 29, 33 *et seq.*, 48 *et seq.* An appeal against the final sentence of a provincial court is not barred by the party not having appealed from an interlocutory decree when the whole question might have been thereby raised (*Williams v. Salisbury (Bishop)* (1863), 2 Moo. P. C. O. (N. s.) 375, 395; *Jones v. Gough* (1865), 3 Moo. P. C. O. (N. s.) 1, 12).

(*c*) 3 & 4 Vict. c. 86; see s. 15.

(*d*) 37 & 38 Vict. c. 85; see s. 9.

(*e*) 55 & 56 Vict. c. 32.

(*f*) *Ibid.*, s. 4.

(*g*)

(*h*) *Hebbert v. Purchas* (1871), 7 Moo. P. C. O. (N. s.) 551.

(*i*) For the practice and procedure in these appeals, see Order in Council, 11th December, 1865 (Statutory Rules and Orders Revised, Vol. VI., pp. 98 *et seq.*), and title COURTS, Vol. IX., pp. 48, 49.

(*j*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 14; Order in Council, 28th November, 1876 (2 P. D. 384; Statutory Rules and Orders Revised, Vol. VI., Judicial Committee, p. 114).

(*k*) 6 & 7 Vict. c. 38, s. 15.

(*l*) Statutory Rules and Orders Revised, Vol. VI., Judicial Committee, pp. 1 *et seq.*

(*m*) *Ibid.*, pp. 97 *et seq.*

SECT. 2.

Present
Constitu-
tion.Presentation
cases.SUB-SECT. 4.—*Court under the Benefices Act, 1898.*

972. For the purpose of trying the right of a bishop to refuse to institute or admit a presentee to a benefice on a ground included in s. 2 of the Benefices Act, 1898 (*n*), or of unfitness or disqualification of a presentee otherwise sufficient in law, except a ground of doctrine or ritual, that Act has constituted a court consisting of the archbishop of the province and of a judge of the Supreme Court nominated by the Lord Chancellor from time to time for the purposes of the Act (*o*). If the right of an archbishop to refuse is to be tried, the other archbishop and the judge constitute the court (*p*). The court is a court of record, and is held in public (*q*).

Either the person presenting or the presentee may within one month after the refusal, with the grounds thereof, has been signified to him in the prescribed manner (*r*), require that the matter be heard by the court. The proceedings, to which the bishop must be made a party, are regulated by s. 3 of the Act and by rules made under the Act (*s*).

SECT. 3.—*Jurisdiction.*Limits of
existing
ecclesiastical
jurisdiction.

973. The present jurisdiction of the ecclesiastical courts is limited to (1) enforcing the discipline of the clergy (*t*); (2) correcting certain ecclesiastical offences or omissions on the part of lay persons holding some office or position in the church (*u*); (3) protecting buildings and ground consecrated to ecclesiastical purposes and everything placed in or upon such buildings and ground, and guarding the rights of the parishioners therein (*v*); and (4) adjudicating upon and enforcing some other civil rights in connection with ecclesiastical matters (*a*).

Discipline of
the clergy.

974. The discipline of the clergy is enforced under the Clergy Discipline Act, 1892 (*b*), the Church Discipline Act, 1840 (*c*), or the Public Worship Regulation Act, 1874 (*d*), according to the nature of the offence with which they are charged.

(*n*) 61 & 62 Vict. c. 48.

(*o*) *Ibid.*, s. 3 (1).

(*p*) *Ibid.*, s. 3 (6).

(*q*) *Ibid.*, s. 3 (1). The fees in respect of proceedings in the court are paid over to the common fund of the Ecclesiastical Commissioners, who, out of that fund defray the expenses of and incidental to the sittings of the court and the remuneration of its officers and the necessary expenses of the proceedings (*ibid.*, s. 11).

(*r*) Benefices Rules, 1898, r. 13 (Statutory Rules and Orders Revised, Vol. I., Benefice, England, p. 3).

(*s*) *Ibid.*; see pp. 589, 600, *post*.

(*t*) See pp. 520 *et seq.*, 653 *et seq.*, *post*.

See p. 516, *post*.

(*u*) *Bardin v. Calcott* (1789), 1 Hag. Con. 14, 18; *Walter v. Mountague* (1836), rt. 253, 261; *Adlam v. Colthurst* (1867), L. R. 2 A. & E. 30, *per* Sir ROBERT PHILLIMORE, at p. 38; *St. Botolph without Aldgate (Vicar and One Churchwarden) v. Parishioners of Same*, [1892] P. 161, 167; see pp. 513, 540 *et seq.*, 737, *post*.

(*a*) See pp. 513 *et seq.*, 517, 522 *et seq.*, *post*.

(*b*) 55 & 56 Vict. c. 32; see pp. 522 *et seq.*, 526 *et seq.*, *post*.

(*c*) 3 & 4 Vict. c. 86; see pp. 526 *et seq.*, 529 *et seq.*, *post*.

(*d*) 37 & 38 Vict. c. 85; see pp. 529 *et seq.*, *post*.

Ecclesiastical offences committed by a bishop are tried by a special tribunal (e).

SECT. 3.
Jurisdiction.

975. Discipline is exercised over lay rectors in respect of the non-repair of chancels (f), over churchwardens in respect of offences committed by them in connection with the duties of their office (g), and over lay persons who are guilty of an unauthorised act in connection with a church or churchyard, or anything within or upon the fabric or ground thereof (h). The jurisdiction of the ecclesiastical courts over lay persons in respect of other offences has become obsolete and is not now exercised (i).

Over lay rectors.

976. The protection of consecrated buildings and ground and of their contents is effected by the grant or refusal of faculties or licences to execute works in connection therewith (k), and by correcting persons who execute any such works without a faculty (l).

Faculties.

977. In some cases, civil rights in connection with ecclesiastical property, or with the recovery of money applicable to ecclesiastical purposes, can be tried and decided in the ecclesiastical courts (m). The recovery in a consistory court of fines and penalties under the Pluralities Act, 1838 (n), is a civil proceeding (o).

Civil rights.

978. Where an ecclesiastical court declines to exercise jurisdiction in a case in which it ought to do so, it may be compelled by mandamus to take cognisance of the case (p).

Mandamus

979. If an ecclesiastical court exceeds its jurisdiction and powers by deciding the construction of a statute (q), or by trying or deciding

Prohibition.

(e) See p. 510, *ante*.

(f) *Ely (Bishop) v. Gibbons* (1833), 4 Hag. Ecc. 156; *Morley v. Leacroft*, [1896] P. 92; *Neville v. Kirby*, [1898] P. 160.

(g) *Welcomes v. Lake* (1666), 1 Sid. 281; *Harper v. Forbes* (1859), 5 Jur. (N. ... 275; *St. Pancras (Vestry) v. St. Martin-in-the-Field (Vicar and Churchwardens)* (1860), 6 Jur. (N. s.) 540; *Adlam v. Colthurst* (1867), L. R. 2 A. & E. 30; *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113; *Evans v. Dodson* (1874), Trist. 26; *Durst v. Masters* (1875), 1 P. D. 123; S. C. on appeal (1876), *ibid.*, 373, P. C.; *Hawkes v. Jones* (1888), Trist. 222; *Howell v. Holdroyd*, [1897] P. 198; *Lee v. Hawtreay*, [1898] P. 63.

(h) *Bardin v. Calcott* (1789), 1 Hag. Con. 14; *Maidman v. Malpas* (1794), 1 Hag. Con. 205; *Seager v. Bowle* (1823), 1 Add. 541; *St. David (Bishop) v. De Rutzen (Baron)* (1861), 4 L. T. 90; *Daunt v. Crocker* (1867), L. R. 2 A. & E. 41. See also p. 516, *post*.

(i) See p. 505, *ante*.

(k) See pp. 540, 734, *post*.

(l) *Adlam v. Colthurst*, *supra*; *Ritchings v. Cordingley*, *supra*; *Evans v. Dodson*, *supra*; *Durst v. Masters*, *supra*; *Lee v. Hawtreay*, *supra*.

(m) *Butt v. Jones* (1829), 2 Hag. Ecc. 417; *Linnell v. Gunn* (1867), 36 L. J. (ECC.) 23; *Liddell v. Rainford* (1868), 38 L. J. (ECC.) 15; *Proud v. Price* (1893), 69 L. T. 664, 665, 666, C. A. A civil suit can be brought against churchwardens for a monition to them to remove ornaments from a church introduced without a faculty (*Noble v. Reast*, [1904] P. 34).

(n) 1 & 2 Vict. c. 106; see ss. 32, 114.

(o) *Bluck v. Rackham* (1846), 5 Moo. P. C. C. 305. See pp. 640, 610, *post*. As to the court under the Benefices Act, 1898 (61 & 62 Vict. c. 48), see p. 512, *ante*.

(p) *R. v. Canterbury (Archbishop)* (1856), 6 E. & B. 546; *R. v. Arches Court (Judge)* (1857), 7 E. & B. 315. See title CROWN PRACTICE, Vol. X., p. 92.

(q) *Winchester's (Bishop) Case* (1596), 2 Co. Rep. 38 a, 45 a; *Carter v. Crawley* (1683), T. Raym. 496; *Gould v. Gapper* (1804), 5 East, 345.

SECT. 8.
Jurisdiction.

a question of a freehold or other legal right (a), or any other matter which is not within its jurisdiction (b), or by trying or deciding a matter according to rules which are contrary to the common law of the realm (c), it is liable to be restrained from proceeding in the matter by a prohibition issuing out of the High Court of Justice (d). Where a rule for such a prohibition is granted the ecclesiastical judge and the other party to the suit are called upon to show cause why the rule should not be made absolute, and, if they fail to do so, the prohibition is awarded (e). It can be applied for after

(a) *Corven's Case* (1612), 12 Co. Rep. 105, 106; 3 Co. Inst. 202; *Byerley v. Windus* (1826), 5 B. & C. 1; *Re Bateman* (1870), L. R. 9 Eq. 660; *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

(b) *Fuller's Case* (circa 1607), 12 Co. Rep. 41; *Brock v. Richardson* (1786), 1 Term Rep. 427; *Francis v. Steward* (1844), 5 Q. B. 984; *R. v. Twiss* (1869), 10 B. & S. 298; *R. v. Tristram*, [1898] 2 Q. B. 371, 374, 378; *R. v. Tristram* (1899), 80 L. T. 414; *R. v. Tristram*, [1902] 1 K. B. 816, C. A. A suit cannot be maintained in the ecclesiastical courts for the abstraction of title deeds kept in a church (*Gardner v. Parker* (1791), 4 Term Rep. 351). Prohibition goes where the ecclesiastical court assumes to try the question of custom or no custom (*Rhodes v. Oliver* (1836), 2 Har. & W. 38), unless the court has decided it in accordance with the common law (*Market Bosworth (Churchwardens) v. Market Bosworth (Rector)* (1698), 1 Ld. Raym. 435). The fact constituting the excess of jurisdiction must appear on the pleadings or in the proceedings in the ecclesiastical court (*Stroud v. Hoskins* (1630), Cro. Car. 208; *Johnson v. Oldham* (1700), 1 Ld. Raym. 609; *Paxton v. Knight* (1757), 1 Burr. 314; *Blunt v. Harwood* (1838), 8 Ad. & El. 610).

(c) *Tey v. Cox* (1613), 2 Brownl. 35; *Veley v. Burder* (1841), 12 Ad. & El. 265, 312, Ex. Ch.

(d) Stat. (1289) 18 Edw. 1 (De Consultatione); *Dorwood v. Brikinden* (1611), 2 Brownl. 26; *Briggham v. Robson* (1670), 2 Keb. 719; Ayl. Par. 434 *et seq.*; *Veley v. Burden*, *supra*, at pp. 311, 312; *Mackonochie v. Penzance (Lord)* (1881), 6 App. Cas. 424; and see title CROWN PRACTICE, Vol. X., pp. 141 *et seq.* The temporal courts proceeding in prohibition to restrain excess of jurisdiction in the ecclesiastical courts, are not bound by a decision of even the highest court of appeal in ecclesiastical matters (*Mackonochie v. Penzance (Lord)*, *supra*, *per* Lord BLACKBURN, at p. 447). Prohibition does not issue where the ecclesiastical court has committed an irregularity or error in a matter of practice or a mistake in judgment in a case in which it has jurisdiction (*Ex parte Smyth* (1835), 3 Ad. & El. 719; S. C. in the Exchequer Court (1835), 2 Cr. M. & R. 784; *Jolly v. Baines* (1840), 12 Ad. & El. 201; *Rackham v. Bluck* (1846), 11 Jur. 325; *Ex parte Story* (1852), 12 C. B. 767; *Ex parte Story* (1852), 8 Exch. 195; *Mackonochie v. Penzance (Lord)*, *supra*). The grant of prohibition on the application of a stranger not personally aggrieved is discretionary and not *ex debito justitiæ* (*Re Forster v. Forster and Berridge* (1863), 4 B. & S. 187, 203; *R. v. Twiss*, *supra*, at pp. 307, 308. The head-note and report on the point in S. C., L. R. 4 Q. B. 407, 413, 414 appear to be incorrect). Prohibition is never granted where the court has clear jurisdiction, unless the court is proceeding in a manner contrary to the principles of the common law (Com. Dig. tit. Prohibition, G, 22; *Ex parte Story* (1852), 12 C. B. 767, *per* TALFOURD, J., at p. 777; *Ex parte Story* (1852), 8 Exch. 195). It will not be granted where one object of the suit is within the jurisdiction of the ecclesiastical court, since it is to be presumed that the court will not exceed its jurisdiction (*Hallack v. Cambridge University*, (1841), 1 Q. B. 593; *R. v. Twiss*, *supra*). If in a suit for a thing within the cognisance of the ecclesiastical court a temporal matter incidentally arises, the court has the right to determine it, and no prohibition goes (Com. Dig. tit. Prohibition, G, 23). Parties cannot be restrained by injunction from applying to the ecclesiastical court, since such a proceeding would virtually prohibit the ordinary from exercising jurisdiction without giving him the opportunity of being heard (*Proud v. Price* (1893), 69 L. T. 664, C. A., *per* Lord Esher, M.R., at p. 665).

(e) See title CROWN PRACTICE, Vol. X., pp. 149 *et seq.*

sentence has been passed (*f*). The Judicial Committee of the Privy Council, if it exceeds its jurisdiction in an ecclesiastical suit, is liable to prohibition, no less than the provincial and consistory courts (*g*).

SECT. 3.
Jurisdiction.

SECT. 4.—Practice.

SUB-SECT. 1.—General Procedure.

980. In the ecclesiastical courts there are two kinds of suits, criminal and civil (*h*). A civil suit may be either in the civil form or in the criminal form (*i*). Suits, criminal and civil.

A criminal suit which is the promotion of the office of the judge, that is, of the ordinary, is open to any person whom the ordinary may think fit to allow to promote his office by instituting the suit. Such a suit is *ad publicam vindictam*, and in some sense may concern every member of the church. The citation issued in it (*k*) calls upon the party cited to answer to articles touching his soul's health and the lawful correction of his manners (*l*). It is usually brought against a clergyman (*m*), but it may be instituted against a layman for violation of ecclesiastical law (*n*).

A civil suit is only open to those who have a personal interest in it (*o*).

The proceedings in the ecclesiastical courts are not governed by the rules of common law or by any analogies which those rules furnish (*p*).

981. Parties appear in the ecclesiastical courts either personally or by proctors (*q*) and argue their causes either in person or by Appearance.

(*f*) *Shotter v. Friend* (1689), 2 Salk. 547; *Gould v. Gapper* (1804), 5 East, 345. But prohibition will not be granted after sentence, unless the sentence was clearly founded on matters not within the jurisdiction of the court (*Hart v. Marsh* (1836), 2 Ad. & El. 591). It would seem that where a faculty is applied for *ex gratia*, prohibition will not lie until it has been granted (*Hallack v. Cambridge University* (1841), 1 Q. B. 593, at p. 615).

(*g*) *Ex parte Smyth* (1835), 3 Ad. & El. 719; *Chesterton v. Farrar* (1838), 7 Ad. & El. 713, also reported *sub nom. R. v. Privy Council* (Judicial Committee), 3 Nev. & P. (q. B.) 15; *Rackham v. Bluck* (1846), 11 Jur. 325; *Martin v. Mackonochie* (1879), 4 Q. B. D. 697, 741, 755, 783 *et seq.*

(*h*) *Fagg v. Lee* (1873), L. R. 4 A. & E. 135, *per* Sir ROBERT PHILLIMORE, at p. 150; *Lee v. Fagg* (1874), L. R. 6 P. O. 38, 41.

(*i*) Church Discipline Act, 1840 (3 & 4 Vict. c. 86), s. 19; *St. David* (Bishop) *v. De Rutzen* (Baron) (1861), 4 L. T. 90. Where a party has a civil right and for some technical reason cannot enforce it in a civil suit, he may resort to a criminal suit for the purpose (*Davey v. Hinde* [1901] P. 95, 125).

(*k*) See pp. 516, 517, *post*.

(*l*) *Portland* (Duke) *v. Bingham* (1792), 1 Hag. Con. 157, *per* Lord STOWELL (then Sir WILLIAM SCOTT), at p. 159; *Bluck v. Rackham* (1846), 5 Moo. P. O. C. 305, *per* Dr. LUSHINGTON, at pp. 311, 312; *Fagg v. Lee*, *supra*; *Lee v. Fagg*, *supra*.

(*m*) See pp. 520 *et seq.*, *post*.

(*n*) See p. 516, *post*.

(*o*) *Turner v. Meyers* (1808), 1 Hag. Con. 414, 415, n.; *Fagg v. Lee*, *supra*; *Lee v. Fagg*, *supra*; *Noble v. Reast*, [1904] P. 34.

(*p*) *Sherwood v. Ray* (1837), 1 Moo. P. O. C. 353, *per* PARKE, B., at p. 397; *Winchester* (Bishop) *v. Wix* (1869), L. R. 3 A. & E. 19, 21.

(*q*) Ayl. Par. 421 *et seq.*; Burn, Ecclesiastical Law, Vol. III., pp. 375 *et seq.*; *Burch v. Reid* (1873), L. R. 4 A. & E. 112. A proctor or *procurator* is one who has the management committed to him of the law concerns of another, who

SECT. 4.
Practice.

advocates (*r*). Under the present practice any solicitor may act as proctor (*s*), and causes may be argued by any barrister (*t*) or solicitor (*u*).

(i.) *Criminal Suits.*

Motion for
promotion of
office of
judge.

982. Except where a different procedure is prescribed by statute or by rules and orders made under statutory authority (*x*), the first step to be taken by the promoter in a criminal suit is to file in the registry a paper for a motion praying the judge to allow his office to be promoted against a person named therein for having committed an offence against the ecclesiastical law. He should file with the motion paper an affidavit of the facts in support of the application. The judge will thereupon make an order for the application to be made in court on motion, if he considers that it is a proper case in which his office should be used. The judge will also direct notice to be given by the promoter to the defendant of his application and of the day and time on which the motion will be made. The defendant may appear at the hearing of the motion, and may either object to the application being granted or may assent to terms to prevent its being granted (*a*).

If the judge considers it a proper case for prosecution, he will make an order to allow his office to be used, and he will decree a citation to issue against the defendant, and order the promoter to file articles stating fully the nature of the offence and to deliver a copy of the articles to the defendant (*b*).

Suits are only instituted in this manner against the lay rector of a parish for not repairing a chancel (*c*) or against churchwardens for not having efficiently performed their duties or for misfeasance in the discharge of their duties (*d*), or against any lay person for making an alteration in a church or churchyard, or removing monuments or human remains or other things from a church or churchyard, without a faculty, or erecting a tombstone in a churchyard without the consent of the incumbent (*e*).

stands to him in the relation of client or principal (Ayl. Par. 421; 3 Bl. Com. 25). A party appoints his proctor to appear and act in a cause for him by a warrant under his hand called a proxy (Burn, Ecclesiastical Law, Vol. III., p. 376; *Prankard v. Deale* (1828), 1 Hag. Ecc. 169, 185 *et seq.*; *Fry v. Treasure* (1865), 2 Moo. P. C. C. (N. S.) 539). The proctor, until his authority is withdrawn, is *dominus litis* (*Obicini v. Bligh* (1832), 8 Bing. 335, *per* TINDAL, C.J., at p. 352).

(*r*) *Canones Ecclesiastici* (1603), 130, 131; see pp. 502 *et seq.*, *ante*, and pp. 528, 531, *post*.

(*a*) Attorneys' and Solicitors' Act, 1870 (33 & 34 Vict. c. 28), s. 20; Solicitors Act, 1877 (40 & 41 Vict. c. 25), s. 17.

(*b*) *Mouncey v. Robinson* (1867), 37 L. J. (ECCL.) 8.

(*u*) Solicitors Act, 1877 (40 & 41 Vict. c. 25), s. 17. As to cases under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), see s. 11 of that Act.

(*x*) See pp. 519 *et seq.*, *post*.

(*a*) *Maidman v. Malpas* (1794), 1 Hag. Con. 205, 209, n.

(*b*) Burn, Ecclesiastical Law, Vol. III., pp. 245, 283 *et seq.* Criminal suits should be instituted and must be prosecuted without undue delay (*Dobie v. Masters* (1820), 3 Phillim. 171, 175; *St. David (Bishop) v. De Rutzen (Baron)* (1861), 4 L. T. 90; *Sheppard v. Bennett* (1870), L. R. 3 A. & E. 167, 181).

(*c*) *Morley v. Leacroft*, [1898] P. 92; but see *Neville v. Kirby*, [1898] P. 160.

(*d*) *Welcome v. Lake* (1666), 1 Sid. 281; *Walter v. Mountague* (1836), 1 Curt. 253; *Adlam v. Colthurst* (1867), L. R. 2 A. & E. 30.

(*e*) *Walter v. Mountague*, *supra*; *Brecks v. Woolfrey* (1838), 1 Curt. 880, 903; *Harper v. Forbes* (1859), 5 Jur. (N. S.) 275; *Adlam v. Colthurst*, *supra*.

983. Where the promoter of a suit dies while it is pending, another will be substituted (*f*).

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984. In some cases a person may institute, as voluntary promoter, and may prosecute a suit which, though in form criminal, has the effect of asserting, ascertaining, or establishing a civil right (*g*).

Death of promoter.
Civil suits in criminal form.

(ii.) *Civil Suits.*

985. The first step in a civil suit, other than faculty cases which are commenced by a petition, is ordinarily the issue of a citation to parties named as defendants in the suit (*h*), but such a suit can be commenced by monition, where its object is to compel the defendant to do a specific act in order to redress an injury which he has inflicted on the plaintiff's interests (*i*).

Issue of citation.

Monition.

(iii.) *Conduct of Suits under General Procedure.*

986. The citation ought to contain—(1) the name of the judge, and his commission, if he be delegated, or, if he is an ordinary judge, the style of the court of which he is judge; (2) the name of the party who is to be cited; (3) the day and place where he must appear or enter an appearance; (4) the cause for which the suit is commenced; (5) the name of the party at whose instance the citation is obtained and the nature of his interest in the case; and (6) the residence and diocese of the defendant, in order to show that he is not cited out of his diocese (*k*).

Contents of citation.

987. The citation is followed by pleadings or pleas. These are commenced in a criminal suit by articles in which the details of the offence or offences charged against the defendant are articulated and objected (*l*), and in a civil suit either by a libel in the name of

Articles and libels.

(*f*) *Elphinstone v. Purchas* (1870), L. R. 3 P. C. 245. If a bishop resigns his see while he is promoting a suit, he remains the promoter with a change in his title (*Winchester (Bishop) v. Wix* (1869), L. R. 3 A. & E. 19).

(*g*) Church Discipline Act, 1840 (3 & 4 Vict. c. 86), s. 19; *Liddell v. Rainsford* (1868), 37 L. J. (EXCH.) 83, *per* Sir T. Twiss, at p. 84; *Davey v. Hinde*, [1901] P. 95, *per* Dr. TRISTRAM, at p. 125.

(*h*) In the case of the inception of a civil suit, other than a faculty suit, by citation, the citation is prepared by the plaintiff's proctor, and is issued as a matter of right without the leave of the judge (*Fagg v. Lee* (1873), L. R. 4 A. & E. 135, *per* Dr. TRISTRAM, at p. 141).

(*i*) *Fagg v. Lee*, *supra*.

(*k*) Stat. (1531) 23 Hen. 8, c. 9, s. 1; Conset, *Practice of the Spiritual or Ecclesiastical Courts*, 3rd ed., p. 26; Burn, *Ecclesiastical Law*, Vol. III., pp. 245 *et seq.*; *Lee v. Fagg* (1874), L. R. 6 P. C. 38, 42. It is sufficient that the citation should state generally the offence with which the party is charged (*Sheppard v. Bennett* (1870), L. R. 4 P. C. 350, 360). Wrongly naming the judge is fatal (*Williams v. Bott* (1789), 1 Hag. Con. 1). But the effect of a misnomer or misdescription of the party cited depends on whether his identity is affected thereby and whether timely objection is taken to it (*Powell v. Burgh* (1758), 2 Lee, 517; *Barham v. Barham* (1789), 1 Hag. Con. 5; *Pritchard v. Dalby* (1792), *ibid.*, 186; *Griffiths v. Reed* (1828), 1 Hag. Ecc. 195, 196, 197, n.). Except in cases specially authorised by statute (see stat. (1531) 23 Hen. 8, c. 9, s. 2, and p. 524, *post*), no one can in the first instance be cited out of the diocese wherein he dwells (stat. (1531) 23 Hen. 8, c. 9).

(*l*) Burn, *Ecclesiastical Law*, Vol. III., pp. 188, 283 *et seq.*; *Schultes v. Hodgson* (1822), 1 Add. 318; *Lee v. Mathews* (1830), 3 Hag. Ecc. 169, 174. Articles must be brought in, although the party cited admits the offence (*Jones v. Jelf* (1863), 8 L. T. 399). If the articles are not sufficiently specific, they will

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Practice.

Responsive
and subse-
quent
allegations.

the party or his proctor, who alleges and propounds the facts upon which his claim is founded (*m*), or by the less formal way of an act on petition (*n*).

The defendant answers the articles or the libel by a responsive allegation (*o*), to which the promoter or plaintiff brings in a rejoinder or rejoining allegation, if he joins issue, or a counter allegation, if he desires to put forward additional facts (*p*).

All the pleadings are brought into court to be admitted (*q*), and objections may be taken to their admissibility in whole or in part (*r*).

Hearing.

The cause is heard upon the pleadings as admitted (*a*), and the facts alleged are either proved by the depositions or affidavits of witnesses taken or made out of court (*b*), or by oral evidence in court (*c*).

be ordered to be amended, or delivery of particulars of the charges will be ordered (*Heath v. Burder* (1860), 6 Jur. (N. S.) 785, P. O.; *Salisbury (Bishop) v. Ottley* (1885), 10 P. D. 20). As to what allegations are sufficiently specific, see *Coombe v. Edwards* (1875), L. R. 4 A. & E. 390. Where articles alleged the contents of an Order in Council, the *London Gazette* containing the Order was required to be pleaded and annexed (*St. David's (Bishop) v. De Rutzen (Baron)* (1861), 4 L. T. 90). A correct copy of the articles must be delivered to the defendant (*Williams v. Bott* (1789), 1 Hag. Con. 1). Additional articles may be admitted on special grounds (*Moorsom v. Moorsom* (1793), 3 Hag. Ecc. 87, 97; *Roper v. Roper* (1818), 3 Phillim. 97; *Schultes v. Hodgson* (1822), 1 Add. 318, at pp. 320, 321; *Madan v. Karr* (1850), 14 Jur. 275).

(*m*) Burn, Ecclesiastical Law, Vol. III., pp. 188, 261 *et seq.* A libel may be amended on reasonable grounds before the hearing (*Barnes v. Grant* (1865), 11 Jur. (N. S.) 395).

(*n*) *Fagg v. Lee* (1873), L. R. 4 A. & E. 135, *per* Sir ROBERT PHILLIMORE, at p. 151. An act on petition is a summary proceeding which may be resorted to (i.) for the adjudication of an incidental matter arising during a suit, such as the taxation of costs or an appearance under protest (Burn, Ecclesiastical Law, Vol. III., pp. 202 *et seq.*), or (ii.) as the initial pleading in a cause for compelling a person to take upon himself the office of churchwarden or in a faculty cause (*ibid.*; *Adey v. Theobald* (1836), 1 Curt. 447; and see p. 544, *post*). No matter can be introduced into it in opposition to an allegation in the cause (*Dysart (Earl) v. Dysart (Countess)* (1842), 2 Notes of Cases, 16, 17).

(*o*) Burn, Ecclesiastical Law, Vol. III., pp. 188, 190. The answer to a libel in a civil suit creates the *litis contestatio* (*ibid.*, p. 189). The old practice of requiring personal answers on oath in a civil suit (*ibid.*, pp. 189, 190, 289 *et seq.*) appears to be obsolete (*Martin v. Mackonochie* (1874), L. R. 4 A. & E. 279, 282, 283). Where a defendant gives an affirmative issue to articles in a criminal suit, he may file an affidavit explaining his conduct (*Kitson v. Drury* (1865), 11 Jur. (N. S.) 272). Where no pleading is entered to the articles, the case proceeds as upon a negative issue (*Lee v. Merest* (1869), 39 L. J. (ECCOL.) 53, 56). Under a negative issue, without pleadings, evidence may be given of all material facts, but not of any special circumstances which would come by surprise upon the promoter (*Moss v. Edwards* (1868), 37 L. J. (ECCOL.) 89).

(*p*) Burn, Ecclesiastical Law, Vol. III., p. 190.

(*q*) *Ibid.*, pp. 188, 189.

(*r*) *Ibid.* A notice of intention to oppose the admission of a pleading must state the grounds of objection to it (*Daunt v. Crocker* (1867), L. R. 2 A. & E. 41). Irrelevant paragraphs will be struck out (*Coombe v. Edwards* (1875), L. R. 4 A. & E. 390, 396, 397).

(*a*) Burn, Ecclesiastical Law, Vol. III., pp. 206 *et seq.*

(*b*) *Ibid.*, pp. 190, 304 *et seq.* Objection can be taken to the evidence by an exceptive allegation (*ibid.*, pp. 312 *et seq.*).

(*c*) Ecclesiastical Courts Act, 1854 (17 & 18 Vict. c. 47). Notes of the evidence are to be taken down in writing by the judge or registrar, or by such other person or persons and in such manner as the judge directs (*ibid.*). Evidence will be taken orally under the Act unless good reason is shown to the contrary (*Edwards v. Hatton* (1865), 13 L. T. 253). Where evidence is given orally in

988. An appeal lies to a higher court at every stage of the proceedings in an inferior court from an interlocutory decision as to the admissibility of pleadings or otherwise (*d*), no less than from a final sentence or decree (*e*).

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Practice.
Appeals.

989. The costs of proceedings in the ecclesiastical courts are generally in the discretion of the judge (*f*). Sometimes, in lieu of full costs, a specific sum is given *nomine expensarum* (*g*). The court can direct security for costs to be given by any or all of the parties (*h*). Where they are ordered to be paid, they are taxed by the registrar (*i*), and payment may be ordered by a monition and enforced by further proceedings (*k*). An appeal will lie in respect of costs alone, though it is not to be encouraged (*l*); and a decree in the court below may be varied in respect of costs though affirmed in other respects (*m*).

Costs.

990. Rules and orders have been made under statutory authority for regulating the procedure of the Consistory Court of

Rules and
orders.

open court, the old rule in the ecclesiastical courts that a material fact must be proved by two witnesses does not apply (*Burder v. O'Neill* (1863), 9 Jur. (N. S.) 1109, 1110). A clergyman can give evidence in a criminal suit instituted against him in an ecclesiastical court (*Norwich (Bishop) v. Pearse* (1868), 37 L. J. (ECC.) 90). For the old law as to evidence in the ecclesiastical courts, see Burn, Ecclesiastical Law, Vol. III., pp. 304 *et seq.* The court will order the production of documents (*Lee v. Merest* (1869), 39 L. J. (ECC.) 53).

(*d*) Ayl. Par. 79; Burn, Ecclesiastical Law, Vol. III., p. 217. On an appeal from an interlocutory sentence from the provincial court, the Judicial Committee of the Privy Council may, at the request of both parties, retain the suit and proceed with it as an original cause, and, upon completion of the pleadings and proofs, continue the hearing as in the court below (*Voysey v. Noble* (1870), L. R. 3 P. O. 357, 365).

(*e*) Ayl. Par. 71 *et seq.*; Burn, Ecclesiastical Law, Vol. I., pp. 57 *a et seq.*, Vol. III., pp. 217 *et seq.*, 336; stat. (1532) 24 Hen. 8, c. 12; stat. (1533) 25 Hen. 8, c. 19, ss. 4—6; Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), ss. 3—20. A party in contempt is not precluded from appealing (*Harrison v. Harrison* (1842), 4 Moo. P. O. O. 96).

(*f*) Burn, Ecclesiastical Law, Vol. III., pp. 333 *et seq.*; *Groves v. Hornary (Rector)* (1793), 1 Hag. Con. 188, 197; *Palmer v. Tijou* (1824), 2 Add. 196, 203 *et seq.*; *Woolcombe v. Ouldridge* (1825), 3 Add. 1, 5; *Bliss v. Woods* (1881), 3 Hag. Ecc. 486, 526; *Williams v. Brown* (1835), 1 Curt. 53; *S. David (Bishop) v. De Rutzen (Baron)* (1861), 4 L. T. 90; *Berney v. Norwich (Bishop)* (1867), 36 L. J. (ECC.) 10, P. O. As to costs in faculty cases, see p. 547, *post*. As to the payment of court fees, see *Pearson v. Stead, Stead v. Pearson*, [1903] P. 66, 76. From the earliest times the rules which have existed relating to the payment of the court fees in the ecclesiastical courts are (1)—that any party who sets in motion a case in an ecclesiastical court either by a petition for a faculty or as promoter of any other suit, is primarily liable for the court fees due to the judge and registrar of the court; (2) the court fees are payable by him into the registry as incurred during the continuance of the suit, and the balance on its determination, whether there is an appeal or not; (3) if the suit is contested, and the party who contested it fails, and is condemned to pay the petitioner's or promoter's costs in the case, the judge may, in his discretion, order him to pay to the successful party a part or the whole of the sums which he had paid into the registry as fees due to the court.

(*g*) Burn, Ecclesiastical Law, Vol. III., p. 334; *Bardin v. Calcott* (1789), 1 Hag. Con. 14, 20; *Palmer v. Tijou*, *supra*, at p. 206.

(*h*) Burn, Ecclesiastical Law, Vol. III., p. 335; *O'Malley v. Norwich (Bishop)*, [1892] P. 175; and see p. 531, *post*.

(*i*) Burn, Ecclesiastical Law, Vol. III., p. 333.

(*k*) *Ibid.*, p. 334; *Coates v. Brown* (1822), 1 Add. 345; and see pp. 531 *et seq.*, *post*.

(*l*) *Lloyd v. Poole* (1831), 3 Hag. Ecc. 477.

(*m*) *Nickalls v. Briscoe*, [1892] P. 269, 285.

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London, of the Court of Arches, and of the Judicial Committee of the Privy Council, and the procedure under the Church Discipline Act, 1840 (*n*), the Public Worship Regulation Act, 1874 (*o*), the Clergy Discipline Act, 1892 (*p*), and the Benefices Act, 1898 (*q*). Rules have also been made for the procedure of the consistory courts of various dioceses in faculty cases and other causes by the chancellor of the diocese with the approval of the bishop (*r*).

SUB-SECT. 2.—*Procedure in respect of Offences of the Clergy.*

(i.) *Classes of Offences.*

Classes of
offences.

991. Except where another method is expressly provided by statute (*a*), the procedure against a clergyman who has committed an ecclesiastical offence must be in accordance with one or other of the following Acts (*b*), namely, the Clergy Discipline Act, 1892 (*c*), the Church Discipline Act, 1840 (*d*), and the Public Worship Regulation Act, 1874 (*e*).

The offences for which the clergy are amenable to ecclesiastical discipline are either (1) offences in respect of moral conduct cognisable under the Clergy Discipline Act, 1892 (*f*); (2) offences in respect of doctrine (*g*); (3) offences in respect of the fabric or ornaments of a church or of ritual, cognisable in the alternative either under the Church Discipline Act, 1840 (*h*), or under the Public Worship Regulation Act, 1874 (*i*); (4) other offences cognisable under the Church Discipline Act, 1840 (*k*); or

(*n*) 3 & 4 Vict. c. 86; see s. 13, and rules of the Chancery Court of York of September 24th, 1885, and May 27th, 1886 (11 P. D. 183 *et seq.*; Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 23 *et seq.*; *Noble v. Ahier* (1886), 11 P. D. 158).

(*o*) 37 & 38 Vict. c. 85; see s. 19, and rules and orders made by Order in Council of February 22nd, 1879 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 26 *et seq.*).

(*p*) 55 & 56 Vict. c. 32; see s. 9, and Clergy Discipline Rules, 1892, as amended February 18th and March 25th, 1893, and July 11th, 1898 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 61 *et seq.*).

(*q*) 61 & 62 Vict. c. 48; see s. 11, and Benefices Rules, 1899 (Statutory Rules and Orders Revised, Vol. I., Benefices, England, pp. 8 *et seq.*).

(*r*) See Phillimore, Ecclesiastical Law, 2nd ed., Vol. II., pp. 998 *et seq.*; and the annual diocesan calendars or directories of the various dioceses. Different dioceses have their peculiar usages, which constitute the law in each particular case, unless they are contrary to the general policy of the law or to justice (*Prankard v. Deacle* (1828), 1 Hag. Ecc. 169, *per* Sir JOHN NICHOLL, at p. 189).

(*a*) See note (*i*), *infra*; and pp. 521, 540, *post*.

(*b*) *Re York (Dean)* (1841), 2 Q. B. 1; *Ex parte Denison* (1854), 4 E. & B. 292.

(*c*) 55 & 56 Vict. c. 32.

(*d*) 3 & 4 Vict. c. 86.

(*e*) 37 & 38 Vict. c. 85.

(*f*) 55 & 56 Vict. c. 32; see pp. 522 *et seq.*, *post*.

(*g*) Cognisable under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86) (see pp. 526 *et seq.*, *post*), or in the alternative, in cases of heresy, under stat. (1531) 23 Hen. 8, c. 9, s. 2.

(*h*) 3 & 4 Vict. c. 86.

(*i*) 37 & 38 Vict. c. 85; see pp. 529 *et seq.*, *post*. A clerk who offends against the law as to uniformity of divine service can also be proceeded against by indictment under the Act of Uniformity, stat. (1559) 1 Eliz. c. 2, s. 2; see note (*c*), p. 658, *post*.

(*k*) 3 & 4 Vict. c. 86. A clerk who lectures or preaches in a place of public worship without being duly approved and licensed is also punishable by three

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Practice.

(5) contumacy in disobeying or disregarding an ecclesiastical monition or order (*l*). As an alternative to proceedings in respect of heresy under the Church Discipline Act, 1840 (*m*), an archbishop may cite for heresy a clerk inhabiting any diocese within his province, if the bishop or other ordinary consents thereto or fails in his duty of punishing the heresy (*n*).

992. The proper punishment of a beneficed clerk for an offence in respect of doctrine, if persisted in and not revoked, is deprivation (*o*); and this is expressly imposed by statute where the offence is in violation of the Thirty-nine Articles (*p*). Punishment for doctrinal offence.

993. All ecclesiastical offences of the clergy which are not included in the foregoing categories are cognisable under the Church Discipline Act, 1840 (*a*). In the case of some of them the offender is to be *ipso facto* deprived of any preferment which he may hold (*b*); and for some others a definite penalty of less severity is prescribed (*c*); but in the case of the rest the censure or punishment to be inflicted is in the discretion of the courts (*d*). Other punishments.

994. The offence of brawling or violent or indecent behaviour in a church or churchyard (*e*), if committed by a clerk, is not punishable under the Clergy Discipline Act, 1892 (*f*), unless either it amounts to an offence against morality within the meaning of that Act; or he has previously been convicted of it in petty sessions (*g*). But it is punishable either in petty sessions under the Ecclesiastical Courts Jurisdiction Act, 1860 (*h*), or by proceedings under the Church Discipline Act, 1840 (*i*). Brawling

995. Generally all violations of Church order, and breaches of the canons and other laws ecclesiastical, and disobedience to the Breach of canon law

months' imprisonment (see note (*r*), p. 686, *post*). An incumbent who offends against the law as to residence on his benefice is also liable under the Pluralities Act, 1838 (1 & 2 Vict. c. 106), to penalties and forfeitures recoverable in the consistory court of the diocese (*ibid.*, ss. 32, 114; see p. 540, *post*).

(*l*) As to contumacy, see pp. 532 *et seq.*, 538, *post*.

(*m*) 3 & 4 Vict. c. 86.

(*n*) Stat. (1531) 23 Hen. 8, c. 9, s. 2; stat. (1677) 29 Car. 2, c. 9: Church Discipline Act, 1840 (3 & 4 Vict. c. 86), s. 19.

(*o*) *Caudrey's Case* (1591), 5 Co. Rep. (Of the King's Ecclesiastical Law), 1 a; Gib. Cod. 1068; *Voysey v. Noble* (1870), L. R. 3 P. C. 357; see pp. 536, 538, *post*.

(*p*) Stat. (1571) 13 Eliz. c. 12, s. 2; *King's Proctor v. Stone* (1808), 1 Hag. Con. 424. A promise not to offend again is not a revocation of past error (*ibid.*, at p. 432).

(*a*) 3 & 4 Vict. c. 86.

(*b*) See pp. 535, 635, *post*.

(*c*) See pp. 522, 655 *et seq.*, *post*.

(*d*) *Martin v. Mackonochie* (1882), 7 P. D. 94, P. O.

(*e*) As to brawling, see pp. 663 *et seq.*, *post*.

(*f*) 55 & 56 Vict. c. 32.

(*g*) *Girt v. Fillingham*, [1901] P. 176.

(*h*) 23 & 24 Vict. c. 32; see *Vallancey v. Fletcher*, [1897] 1 Q. B. 265.

(*i*) 3 & 4 Vict. c. 86. See stat. (1552) 5 & 6 Edw. 6, c. 4; *Cox v. Goodday* (1810), 2 Hag. Con. 138; *Taylor v. Morley* (1837), 1 Curt. 470; *Burder v. Langley* (1842), 1 Notes of Cases, 542; *Francis v. Steward* (1844), 5 Q. B. 984, *per* Lord DENMAN, C.J., at p. 995. The punishment is suspension (stat. (1552) 5 & 6 Edw. 6, c. 4).

SECT. 4. lawful commands of the bishop, are ecclesiastical offences and punishable as such (*k*).
Practice.

Simony. **996.** Simoniacal offences (*l*) on the part of a clerk, except those expressly made cognisable under the Clergy Discipline Act, 1892 (*m*), are cognisable under the Church Discipline Act, 1840 (*n*).

Unlawful trading. **997.** If a clerk who holds any cathedral preferment, benefice, curacy or lectureship, or is licensed or otherwise allowed to perform the duties of any ecclesiastical office, trades or deals in any manner contrary to law (*o*), he is liable for the first offence to be suspended for a period not exceeding one year, and for a second offence committed after a sentence of suspension, to be suspended for such time as the court before whom he is tried thinks fit. For a third offence he is to be deprived *ab officio et a beneficio* (*p*).

(ii.) *Procedure under the Clergy Discipline Act, 1892.*

Offences within the Act. **998.** The offences cognisable under the Clergy Discipline Act, 1892 (*a*), include crimes and acts of immorality; any act constituting an ecclesiastical offence of which a clerk is convicted by a temporal court (*b*); and any immoral act, immoral conduct or immoral habit, and an offence against the laws ecclesiastical which is also an offence against morality, including acts, conduct and habits in contravention of the 75th and 109th of the Canons Ecclesiastical of 1603 (*c*).

(*k*) Ayl. Par. 208; Godolphin, *Repertorium Canonicum*, pp. 306, 307; *Philips v. Bury* (1694), 1 Ld. Raym. 5, 9; *Rugg v. Winchester (Bishop)* (1868), L. R. 2 P. C. 223, 235, 236; *Combe v. De La Bere* (1881), 6 P. D. 157, 163—166, 169, 170. See also p. 653, *post*.

(*l*) As to these offences, see pp. 593 *et seq.*, *post*.

(*m*) 55 & 56 Vict. c. 32. See p. 593, *post*.

(*n*) 3 & 4 Vict. c. 86. See *Jackson v. Mugg* (1674), Rothery's Precedents, No. 59, p. 27; *Lee v. Merest* (1869), 39 L. J. (ECCLES.) 53; *Beneficed Clerk v. Lee*, [1897] A. C. 226, P. C.

(*o*) See p. 557, 558, *post*.

(*p*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 31.

(*a*) 55 & 56 Vict. c. 32.

(*b*) Whether it is or is not an offence against morality (*Girt v. Fillingham*, [1901] P. 176, 180, 184).

(*c*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), ss. 1, 2, 12. A clerk may be sued in an ecclesiastical court with a view to suspension or deprivation for a criminal offence without having been first convicted in a temporal court (*Townsend v. Thorpe* (1727), 2 Ld. Raym. 1507; *Free v. Burgoyne* (1828), 2 Bli. (N. S.) 65, 80, H. L.). The following acts, amongst others, are offences against the laws ecclesiastical and also against morality:—Collection of alms on false pretences (*Fitzmaurice v. Heaketh*, [1904] A. C. 266, P. C.); cruelty to a servant (*Re Montgomery* (1906), *Times*, March 12th); drunkenness (*Burder v. Speer* (1841), 1 Notes of Cases, 39; *Rochester (Bishop) v. Harris*, [1893] P. 137; *Marriner v. Bath and Wells (Bishop)* (1876), cited *ibid.*, 145); frequenting alehouses and tippling (*Gwyn v. Watkins* (1700), Rothery's Precedents, No. 106, p. 51); incest (Canones Ecclesiastici (1603), 109; and notwithstanding the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), a clerk is still punishable for marrying his deceased wife's sister (*ibid.*, s. 4)); incontinence (*Rich v. Gerard* (1690), 1 Hag. Ecc. 47, n., Appendix B, p. 7; *Dargavell v. Langdon* (1678), Rothery's Precedents, No. 68, p. 31; *Free v. Burgoyne*, *supra*; *Kitson v. Loftus* (1845), 4 Notes of Cases, 323; *Bonwell v. London (Bishop)* (1861), 14 Moo. P. C. O. 395); irreverent language in the

SMOT. 4.
Practice.Procedure in
cases of
crime or
acts of
immorality.

999. If a clergyman, on conviction either of treason or felony, or, on indictment, of a misdemeanour, is sentenced to imprisonment with hard labour or any greater punishment, or an order under the Acts relating to bastardy is made upon him, or in a matrimonial cause he is found to have committed adultery, or an order for judicial separation is made against him, the bishop is, within twenty-one days after the conviction, order, or finding becomes conclusive, to declare that the preferment, if any, held by him is vacant, or, if he holds none, that he is incapable of holding preferment; and thereupon, unless he receives a free pardon from the Crown, he is to be incapable of holding preferment. If a clergyman holding preferment receives such pardon before another is admitted to the preferment, the bishop is, within twenty-one days after receiving written notice of the pardon, to admit him

pulpit (*Burder v. Hale* (1849), 6 Notes of Cases, 611, 630, 631); solicitation of chastity (*Berney v. Norwich (Bishop)* (1867), 36 L. J. (ECCL.) 10, P. C.); swearing and ribaldry, if habitual (*Moore v. Oxford (Bishop)*, [1904] A. C. 283, P. C.). Canones Ecclesiastici (1603), 75 and 109, are as follows: "75. No ecclesiastical person shall at any time, other than for their honest necessities, resort to any taverns, or alehouses, neither shall they board or lodge in any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking or riot, spending their time idly by day or by night, playing at dice, cards, or tables, or any other unlawful games; but at all times convenient they shall hear or read somewhat of the Holy Scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the Church of God, having always in mind, that they ought to excel all others in purity of life, and should be examples to the people to live well and christianly, under pain of ecclesiastical censures, to be inflicted with severity, according to the qualities of their offences." "109. If any offend their brethren either by adultery, whoredom, incest or drunkenness, or by swearing, ribaldry, usury, and any other uncleanness and wickedness of life, the churchwardens or questmen and sidemen, in their next presentments to their ordinaries, shall faithfully present all and every of the said offenders, to the intent that they and every one of them may be punished by the severity of the laws, according to their deserts; and such notorious offenders shall not be admitted to the Holy Communion till they be reformed." Among the offences cognisable under the Act is that of which a clerk is, under s. 1 (5) of the Benefices Act, 1898 (61 & 62 Vict. c. 48), guilty by being knowingly party or privy to a transfer, presentation or agreement, which is invalid under that section (see p. 583, *post*), or by committing a breach of the promissory part of the declaration made by him under that section (see pp. 583, 594 *et seq.*, *post*); but the Act does not extend to any other form of simony (*Baker v. Rogers* (1600), Cro. Eliz. 788; *Beneficed Clerk v. Lee*, [1897] A. C. 226, P. C.). In *Rochester (Bishop) v. Harris*, [1893] P. 137, it was held that the occasioning of grave scandal and offence is not in itself an offence which can be charged under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 2; but the conduct which has occasioned it must be charged. Before that Act, however, it was held that a suit under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), was sustainable, and a clerk might be suspended or deprived, on account of scandal arising from an accusation which, if true, would constitute a criminal offence cognisable by a temporal court (*Jersey (Dean) v. — (Rector)* (1840), 3 Moo. P. O. O. 229, 245; *Burder v. —* (1844), 3 Curt. 822), or arising from a conviction for drunkenness and disorderly conduct, without taking into consideration whether the offence had actually been committed or not (*Borough v. Collins* (1890), 15 P. D. 81). Acts and conduct of the kind condemned by Canones Ecclesiastici (1603), 75 and 109, are offences chargeable under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), if, though not absolutely immoral, they are dangerous to the reputation and unworthy of the character of ministers of religion (*Beneficed Clerk v. Lee*, *supra*, at pp. 229, 230; *Sweet v. Young*, [1902] P. 37).

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Practice.

Prosecution
in consistory
court.

again to the preferment without any fees. If the bishop in either respect fails to act, action is to be taken by or under the authority of the archbishop of the province (*d*).

1000. In other cases, if a clergyman either is convicted by a temporal court of an act which is an ecclesiastical offence (*e*), or is alleged to have been guilty of any immoral act, conduct or habit, or an offence against the laws ecclesiastical as respects morality (including a breach of the 75th or 109th canon of 1603 (*f*)), he may be prosecuted in the consistory court of the diocese in which he holds preferment, or, if he holds none, in the consistory court of the diocese in which he resides or in which the offence is alleged to have been committed, by the bishop of the diocese or a person approved by him, or, if he holds preferment, by any of the parishioners of the parish in which it is situate. But the complaint must be made within five years after the offence, except where made within two years after a conviction by a temporal court becomes conclusive, and the bishop may disallow the prosecution if the complaint appears too vague or frivolous (*g*).

Certificate
of conviction
or finding of
temporal
court.

1001. Where there is a conviction, order or finding of a temporal court against a clergyman, which renders him liable to a declaration that his preferment is vacant, or that he is incapable of holding preferment, or to prosecution in the consistory court, a certificate thereof is to be sent to the bishop of the diocese in which the

(*d*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), ss. 1, 5 (2), (3), (4); Clergy Discipline Rules, 1892, r. 34 (as re-made July 11th, 1898) (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 69, 70). If the clergyman holds more than one preferment, and they are in different dioceses, the preferment in each diocese is to be declared vacant by the bishop of that diocese (*ibid.*, r. 36 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, p. 70)). The term "preferment" includes every kind of spiritual office from a deanery to a curacy, lectureship or chaplaincy (Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 10, sched.). A separation order made under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), ss. 4, 5, does not come within s. 1 of the Act (*Sweet v. Ely (Bishop)*, [1902] 2 Ch. 508). See also Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 2; and Canon Ecclesiasticus (1892).

(*e*) As to ecclesiastical offences, see note (*c*), pp. 522 *et seq.*, *ante*.

(*f*) See note (*c*), p. 523, *ante*.

(*g*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), ss. 2, 5 (1), 12; Clergy Discipline Rules, 1892, and r. 34 (as re-made July 11th, 1898) (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 61 *et seq.*). Before this Act a clergyman could not be tried in an ecclesiastical court for an offence amounting to treason or felony (Burn, Ecclesiastical Law, Vol. II., p. 50; *Burden v. O'Neill* (1863), 9 Jur. (N. S.) 1109, 1110; *Re A. B. (Clerk)* (1886), 11 P. D. 56). If a clergyman holds more than one preferment and they are in different dioceses, he may be prosecuted in the consistory court of any of such dioceses, except that, if the offence is alleged to have been committed wholly in one of such dioceses, he is to be prosecuted in the court of that diocese, unless a court in which a prosecution is commenced otherwise directs (*ibid.*, r. 35). S. 2 of the Act is by s. 1 (5) of the Benefices Act, 1898 (61 & 62 Vict. c. 48), to include the offence of which a clergyman is guilty, by being knowingly party or privy to a transfer, within the meaning of that section, or presentation or agreement, which is invalid under that section, or by committing a breach of the promissory part of the declaration made by him under that section (see pp. 583, 594, 595, *post*). As to simony before that Act, see note on p. 593, *post*.

temporal court sat, who, if the clergyman holds preferment or resides in another diocese, is to send it on to the bishop of that diocese (*h*).

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Practice.

1002. If there is a question of fact to be determined at the trial other than the fact of the conviction of the clergyman by a temporal court, either party may require that there shall be five assessors, chosen out of a standing list, to assist in deciding the question. The chancellor of the diocese, or a deputy chancellor, presides at the trial, and in the absence of assessors is the sole judge. Where assessors are added, the chancellor alone decides questions of law and of costs; and questions of fact are decided by him and at least a majority of the assessors, or by all the assessors unanimously. If no decision is so arrived at, a re-trial, with different assessors, is to take place at the desire of either party as soon as possible (*i*). Assessors.

1003. An appeal either to the provincial court, whose decision will in that case be final, or, in the alternative, to the Judicial Committee of the Privy Council, may be made by either party on a question of law within twenty-eight days, and by the defendants, with the leave of the court to which the appeal is made, obtained on a petition lodged within fifteen days, on a question of fact (*k*). Appeal.

1004. The sentence is to have regard to the interests of the parish concerned; and the clergyman may be sentenced to be deprived, or, if he is unbeneficed, to be incapable of holding preferment. In either case the sentence is pronounced by the bishop, and the clergyman becomes thenceforth incapable of holding preferment, unless he receives a free pardon from the Crown, or unless, after public notice, he is allowed to hold some preferment by the bishop of the diocese and the archbishop of the province in which it is situate. If he is sentenced to suspension for a term of years, he cannot during the term act in connection with his preferment without the leave of the court, nor reside within such distance thereof as is specified in the sentence, nor can he be readmitted until he has satisfied the court of his good conduct during the term (*l*). Sentence

(*h*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 5 (4); Clergy Discipline Rules, 1892, r. 33 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, p. 69).

(*i*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), ss. 2, 3, 10; Clergy Discipline Rules, 1892, rr. 16—24, 32—41 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 64 *et seq.*, 68 *et seq.*).

(*k*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 4; Clergy Discipline Rules, 1892, rr. 60—74 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 74 *et seq.*). Leave to appeal in respect of the facts will be refused where no *prima facie* case is made out (*Evans v. Wood*, [1900] A. C. 338, P. C.). The time for appealing will not be enlarged, unless a satisfactory reason is given for the delay (*Lee v. Atherton*, [1904] A. C. 865, P. C.). On an appeal as to facts the appellate court may summon any witness heard at the trial, and any new witness not heard at the trial, to give evidence with respect to the case (Clergy Discipline Rules, 1892, r. 69 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, p. 75); *Oheaney v. Newsholme*, *Newsholme v. Chesney* (2), [1908] P. 301).

(*l*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 6; Clergy Discipline

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Practice.

Further sentence in case of disobedience.

Deposition from holy orders.

Summary sentence.

1005. Wilful disobedience to a sentence, or to any requirement or direction contained in it, is punishable by a further sentence, including, where proper, deprivation, subject to the like appeal as if it had been pronounced on a trial (*m*).

1006. Where a sentence of deprivation or incapacity to hold preferment is pronounced, the bishop may, if he thinks fit, also pronounce sentence of deposition from holy orders, subject to an appeal within one month to the archbishop of the province, whose decision is final (*n*).

1007. Where proceedings have been commenced under the Act, the bishop of any diocese within which the clerk holds preferment may, with the written consent of the clerk and the accusing party (if any), pronounce, without further proceedings, such sentence as may seem fit not exceeding the sentence which might be pronounced in due course of law; and the sentence may be enforced by the like means as if pronounced after a hearing under the Act (*o*).

(iii.) *Procedure under the Church Discipline Act, 1840.*

Initiation of proceedings.

1008. Where a charge is made against a clerk, or scandal or evil report exists concerning him in respect of his having committed an offence against the laws ecclesiastical which is not within the provisions of the Clergy Discipline Act, 1892 (*p*), proceedings may be taken under the Church Discipline Act, 1840 (*q*). The bishop of the diocese within which the offence is alleged to have been committed is empowered (*r*), on the application of a complaining party (*s*), or, if he thinks fit, of his own motion, to issue a commission to five persons, one of whom must be the chancellor or an archdeacon or rural dean of the diocese, to inquire as to the grounds of the charge or report (*t*). The commissioners have power to examine witnesses on oath, and are to report to the

Commission of inquiry.

Rules, 1892, r. 31 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, p. 68).

(*m*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 7; Clergy Discipline Rules, 1892, rr. 28–39 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 67, 68).

(*n*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 8. There may be an interval of time before sentence of deposition is pronounced (*R. v. Durham (Bishop)*, [1897] 2 Q. B. 414, C. A.).

(*o*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 10, sched.

(*p*) 55 & 56 Vict. c. 32; see pp. 522 *et seq.*, *ante*.

(*q*) 3 & 4 Vict. c. 86. For offences against the laws ecclesiastical cognisable under this Act, see p. 654, *post*. Criminal proceedings against a clerk can only be taken under this Act (*ibid.*, s. 23) except in cases falling within the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), or the alternative procedure provided by the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85) (*Re York (Dean)* (1841), 2 Q. B. 1; *Ex parte Denison* (1854), 4 E. & B. 292).

(*r*) The bishop is not obliged to take action if he deems it inexpedient to do so (*R. v. Chichester (Bishop)* (1859), 2 E. & E. 209; *Jylus v. Oxford (Bishop)* (1880), 5 App. Cas. 214).

(*s*) The status of the complaining party is immaterial (*Ex parte Edwards* (1873), 9 Ch. App. 138).

(*t*) Church Discipline Act, 1840 (3 & 4 Vict. c. 86), s. 3. At least fourteen days' previous notice of intention to issue the commission must be sent to the accused clerk (*ibid.*).

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Practice.

bishop whether there is sufficient *prima facie* ground for instituting proceedings against the accused clerk, who, on payment of a reasonable sum, is entitled to a copy of the report and depositions of witnesses (*u*). A copy is also to be transmitted to the bishop of every other diocese, if any, in which the accused clerk holds preferment (*a*).

The proceedings must be commenced within two years after the commission of the offence (*b*). Time limit.

1009. Where proceedings have been commenced under the Act, the bishop of any diocese within which the clerk holds preferment may, with the written consents of the clerk and of the accusing party (if any), pronounce, without further proceedings, such sentence as may seem fit, not exceeding the sentence which might be pronounced in due course of law; and the sentence may be enforced by the like means as if pronounced after a hearing under the Act (*c*). Summary sentence.

1010. Where the commissioners report that there is sufficient *prima facie* ground for proceedings, and the bishop of any diocese within which the accused clerk holds preferment, or the accusing party (if any), thinks fit to proceed (*d*), articles are to be drawn up (*e*). Proceedings before bishop.

(*u*) But he is not entitled to see any letter or document not produced before the commissioners (*Farnall v. Craig* (1847), 11 Jur. 71).

(*a*) Church Discipline Act, 1840 (3 & 4 Vict. c. 86), ss. 4, 5. The term "preferment" means every kind of spiritual office from a deanery to a curacy, lectureship, or chaplaincy (*ibid.*, s. 2). It includes the post of minister of an unconsecrated chapel (*Barnes v. Shore* (1846), 1 Rob. Eccl. 382; S. C. (on rule for prohibition), 8 Q. B. 640; *Freeland v. Neale* (1848), 1 Rob. Eccl. 643). As to the form of the inquiry before the commissioners, see *Re Monckton* (1845), 3 Notes of Cases, Supplement, p. lv.; and as to the evidence, see *Lincoln (Bishop) v. Day* (1845), 4 Notes of Cases, 299. The commissioners cannot inquire into an offence committed outside the diocese (*Homer v. Jones* (1845), 9 Jur. 167), but can inquire into facts outside connected with an offence committed within it (*London (Bishop) v. Bonwell* (1860), 6 Jur. (N. S.) 709). Their function is simply to advise the bishop on the matters alleged. He is at liberty to take his own course afterwards, and can bring the matter by letters of request before the provincial court in such form as he thinks fit (*Sheppard v. Bennett* (1870), L. R. 4 P. O. 350, 359). There is no appeal from the procedure before the commissioners or from their report (*Simpson v. Flamank* (1867), L. R. 1 P. O. 463).

(*b*) Church Discipline Act, 1840 (3 & 4 Vict. c. 86), s. 20. Proceedings are commenced by service of a citation to appear, and not by the issue of a commission or the report of the commissioners, or the filing of articles (*Brookes v. Cresswell* (1847), 1 Rob. Eccl. 606; *Hereford (Bishop) v. T——n* (1853), 2 Rob. Eccl. 595; *Ditcher v. Denison* (1857), 11 Moo. P. O. C. 324). The fact of the offence having occurred within two years need not be stated in the commission, nor in the citation (*Simpson v. Flamank*, *supra*). Where an offence is repeated or continued, proceedings may be commenced within two years from the time of its repetition or continuance (*Titchmarsh v. Chapman* (1843), 3 Curt. 703); and where the offence was committed within the two years, evidence may be given of matters in relation thereto which occurred before the two years (*Edwards v. Moss* (1869), 20 L. T. 834, P. C.).

(*c*) Church Discipline Act, 1840 (3 & 4 Vict. c. 86), s. 6.

(*d*) If an accusing party thinks fit to proceed, the bishop must allow the case to go on (*R. v. Canterbury (Archbishop)* (1856), 6 E. & B. 546).

(*e*) The articles must be confined to offences within the diocese (*Homer v. Jones*, *supra*; *Edwards v. Moss*, *supra*), but may allege facts connected within them which have occurred outside it (*London (Bishop) v. Bonwell*, *supra*). Fresh

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Practice.

and signed by a practising barrister (*f*) and filed in the registry of the diocese; and a copy thereof is to be served on the clerk, who is to be required to appear and answer them. If the clerk appears and admits their truth, the bishop or his commissary is to pronounce the proper sentence. But if he fails to appear and answer the articles, or appears and contests them, the bishop is to hear the cause with three assessors, qualified as in the Act mentioned, and to determine it and pronounce the proper sentence (*g*).

Transmission
of case to
provincial
court by
letters of
request.

1011. As an alternative course, which, if the charge is not admitted, is, in practice, almost always adopted, the bishop of any diocese in which the clerk holds preferment, or, if he holds no preferment, the bishop of the diocese within which the offence is alleged to have been committed, may either in the first instance, or after the commissioners have reported that there is sufficient *prima facie* ground for instituting proceedings, and before articles are filed but not afterwards, send the case by letters of request to the provincial court to be there heard and determined (*h*).

Inhibition
pending
proceedings.

1012. Where from the nature of the offence charged any bishop within whose diocese the accused clerk holds preferment considers that great scandal is likely to arise from his continuing to officiate while the charge is under investigation, or that his ministration will be useless while it is pending, the bishop may, by a notice served on him, with a copy of the articles, or at any time pending any proceedings before the bishop or in any ecclesiastical court, inhibit him from officiating within the diocese after fourteen days from service of the notice until sentence is given in the cause. But if the clerk is the incumbent of a benefice, he may within such fourteen days nominate to the bishop any fit person or persons to officiate during his inhibition; and the bishop, if such person or persons appear fit, is to grant to him or them a licence to officiate accordingly, or, if no fit person is so nominated, is to make the necessary provision for the service of the church. In all such cases the bishop may assign to the person or persons officiating such stipend as he thinks fit, not exceeding the stipend required by law

articles charging subsequent offences are inadmissible (*Craig v. Farnell* (1849), 6 Moo. P. C. C. 446).

(*f*) *Mouncey v. Robinson* (1867), 37 L. J. (ECCL.) 8. The Act prescribed signature by an advocate practising in Doctors' Commons.

(*g*) Church Discipline Act, 1840 (3 & 4 Vict. c. 86), ss. 7—12. Where the bishop directs his secretary to promote the suit, he is not thereby disqualified from hearing and determining the cause with the statutory assessors (*R. v. St. Albans (Bishop)* (1882), 9 Q. B. D. 454).

(*h*) Church Discipline Act, 1840 (3 & 4 Vict. c. 86), s. 13. The bishop may send the letters of request without issuing a commission, notwithstanding that notice has been served on the accused clerk of his intention to issue it (*Head v. Sanders* (1842), 4 Moo. P. C. C. 186). In that case the clerk may be charged with offences committed in another diocese (*Edwards v. Moss* (1869), 20 L. T. 834, P. C.). The judge of the provincial court is bound to entertain the cause (*Sheppard v. Phillimore* (1869), L. R. 2 P. C. 450), and the letters of request need not contain any reason for their being sent (*ibid.*), nor state on whose application they were granted (*Head v. Sanders, supra*, at p. 193). Where the bishop himself promotes the suit, it does not abate on his resignation (*Winchester (Bishop) v. Wix* (1869), L. R. 3 A. & E. 19).

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for the curacy of the church (i) nor exceeding a moiety of the net annual value of the benefice, and may, if necessary, provide for the payment of the stipend by sequestration of the benefice. But the inhibition and the licence may at any time be revoked by the bishop (j).

1013. Except by permission of the judge of the provincial court, there is no appeal from any interlocutory order of that court which has not the effect of a definitive sentence ending the suit in that court. But an appeal lies to the archbishop, which is to be heard before the judge of the provincial court, from a judgment pronounced in the first instance by the bishop; and an appeal lies to the King in Council, which is to be heard before the Judicial Committee of the Privy Council, from a judgment of the provincial court, whether pronounced on an appeal from the judgment of a bishop, or, in the first instance, on a case sent to that court by letters of request (k). Appeal.

1014. A monition not to commit the offence in future may be attached to the definitive sentence; and the clerk may be punished for disobeying it without a fresh suit (l). Monition.

1015. Where the bishop who under the Act would do any act or exercise any authority other than sending a case by letters of request to the provincial court (m) is the patron of any preferment held by the accused clerk, the act or authority is to be done or exercised by the archbishop of the province (n). Where bishop is patron of preferment.

(iv.) *Procedure under the Public Worship Regulation Act, 1874.*

1016. As an alternative to proceedings under the Church Discipline Act, 1840 (o), proceedings may be taken under the Public Worship Regulation Act, 1874 (p), where in a cathedral or collegiate church, or in a parish or other church or churchyard or consecrated burial ground, (1) an alteration in or addition to the fabric ornaments or furniture has been made without lawful authority, or a decoration forbidden by law has been introduced, or (2) the person or persons in holy orders responsible for the performance of divine service in the church or of the burial service in the churchyard or burial ground have, within the preceding twelve months, used or permitted to be used an unlawful ornament of the minister or neglected to use a prescribed ornament or vesture, or (3) such person or persons have, within the preceding twelve months, failed to observe, or cause to be observed, the directions of the Book of Common Prayer as to Offences cognisable.

(i) See note (p), pp. 641 *et seq.*, *post*.

(j) Church Discipline Act, 1840 (3 & 4 Vict. c. 86), s. 14.

(k) *Ibid.*, ss. 13, 15; *Martin v. Mackonochie* (1867), 36 L. J. (ECCL.) 25, 28.

(l) *Martin v. Mackonochie* (1879), 4 Q. B. D. 697, C. A.; affirmed (1881) 6 App. Cas. 424, H. L.

(m) *Cooper v. Dodd* (1850), 2 Rob. Eccl. 270.

(n) Church Discipline Act, 1840 (3 & 4 Vict. c. 86), s. 24; *Ex parte Denison* (1854), 4 E. & B. 292; *R. v. Canterbury (Archbishop)* (1856), 6 E. & B. 546. Under s. 15 of the Act an appeal lies from the archbishop's decision to the provincial court (*R. v. Arches Court (Judge)* (1857), 7 E. & B. 315).

(o) 3 & 4 Vict. c. 86; see pp. 526 *et seq.*, *ante*.

(p) 37 & 38 Vict. c. 85; see s. 18, and Rules and Orders made by Order in Council of February 22nd, 1879 (Statutory Rules and Orders Revised, Vol. Ecclesiastical Court, England, pp. 27 *et seq.*).

SECT. 4.
Practice.

the performance of the services, rites and ceremonies thereby ordered, or have made or permitted to be made an unlawful addition to, alteration of, or omission from such services, rites and ceremonies (q).

Proceedings
before the
bishop.

1017. Proceedings are commenced by a representation to the bishop of the diocese in the form of a statutory declaration that the offence has been committed. It can be made by the archdeacon of the archdeaconry, or a churchwarden or three parishioners (r) of the parish, or, in the case of a cathedral or collegiate church, three inhabitants of the diocese of the male sex and of full age who have signed and transmitted to the bishop the prescribed declaration that they are members of the Church of England and have for the last year had their usual place of abode in the diocese (s). If the bishop, after considering the whole circumstances of the case, is of opinion that proceedings should not be taken on the representation (t), he states in writing the reason of his opinion, and the statement is deposited in the diocesan registry, and a copy is sent to the person or one of the persons who made the representation and to the accused person. Otherwise, within twenty-one days (u) after receiving the representation, the bishop transmits a copy to the accused person, and requires him and the person or persons making the representation to state in writing within twenty-one days whether they are willing to submit to the directions of the bishop in the matter without appeal. If both parties state their willingness so to do, the bishop proceeds to hear the matter in such manner as he thinks fit, and pronounces such judgment and issues any such monition as he thinks proper, without an appeal therefrom; but the judgment does not finally decide any question of law so as to prevent its being again raised by other parties (x). If the parties require the bishop to transmit to the judge of the provincial court for his opinion a special case stating questions arising in the proceedings and signed by them and by a barrister, the judge hears and determines the questions, and the judgment pronounced by the bishop is in conformity with his determination (y). If, on the other hand, either party does not, within the twenty-one days, express willingness to submit to the directions of the bishop in the matter, he is to transmit the representation in the prescribed mode to the archbishop of the province, who is to require the judge of the

(q) Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), ss. 4—6, 8. In the case of an alteration in or addition to the fabric of a church, it must have been completed within the preceding five years (*ibid.*, s. 8).

(r) The parishioners must be persons of the male sex and of full age, who before making the representation have signed and transmitted to the bishop the prescribed declaration that they are members of the Church of England and have for the last year had their usual place of abode in the parish (Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 6, Sched. A).

(s) Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 8, Sched. B.

(t) If the bishop has come to this conclusion, his opinion cannot be overruled by mandamus (*Allcroft v. London (Bishop)*, [1891] A. C. 666).

(u) If this time is exceeded, the proceedings are void (*Howard v. Bodington* (1877), 2 P. D. 203).

(x) Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 9.
Ibid.

provincial court to hear the matter at any place within the diocese or province or in London or Westminster (*a*).

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1018. The judge is to require security for costs from the accuser, and is to give not less than twenty-eight days' notice of the time and place of hearing. Within twenty-one days after the notice, the accused person is to transmit to the judge a succinct answer to the representation, and, in default of so doing, is deemed to have denied the truth or relevancy of the representation. The evidence is to be given orally on oath in open court; and the judge has the powers of a court of record, and may enforce the attendance of witnesses and the production of documents. The parties may appear in person, or by counsel, proctor, or solicitor. Unless the parties agree to the contrary, the judge must state the facts proved before him in the form of a special case; and, after pronouncing judgment, including such monition, if any, and such order as to costs as may be requisite, he must deliver to the parties on application a copy of the special case, and judgment, and send a copy to the bishop (*b*).

Proceedings
before the
judge.

1019. An appeal from the judgment or monition lies to the King in Council (*c*). Appeal.

1020. Where a bishop is the patron of the preferment held by the accused person or is disabled by illness, the archbishop of the province is to act in his place; and if an archbishop is such patron, or is so disabled, the King may appoint an archbishop or bishop to act in his place (*d*).

Where
bishop is
unable to act.

1021. In the case of a cathedral or collegiate church, the visitor takes the place of the bishop. The complaint is brought against the dean and chapter, if it is in respect of the fabric, ornaments or furniture, and against the clerk who has actually offended, if it is in respect of an ornament or vesture of the minister, or the conduct of the service (*e*).

Colleges and
collegiate
churches.

SUB-SECT. 3.—*Enforcement of Sentences, Decrees, and Orders.*

1022. A decree or order in a suit in favour of the promoter or plaintiff frequently contains or consists of a monition, admonishing the person charged or complained of not to continue or repeat the offence complained of, or to do some act making good the omission or the wrongful act in respect of proceedings in case of contempt (*f*).

Monition.

(*a*) Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), ss. 9—15, 19; *Hudson v. Tooth* (1877), 3 Q. B. D. 46.

(*b*) *Ibid.*; Public Worship Regulation Act, Rules and Orders, rr. 14—81, and Appendix (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 30 *et seq.*).

(*c*) Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), ss. 9, 11, 12; Rules and Orders, rr. 34—36 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 33, 34); and see pp. 500, 511, *ante*.

(*d*) Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 16.

(*e*) *Ibid.*, s. 17; Rules and Orders, rr. 43, 44 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, p. 35).

(*f*) Burn, Ecclesiastical Law, Vol. III., pp. 191, 337; *St. Pancras (Vestry) v. St. Martin-in-the-Fields (Rector)* (1860), 6 Jur. (N. S.) 540; *Fagg v. Lee* (1873), L. R. 4 A. & E. 135, 141 *et seq.*, 151; affirmed *sub nom. Lee v. Fagg* (1874), L. R. 6 P. O. 38.

SECT. 4.
Practice.
Contempt.

1023. If a person who is duly cited to appear in an ecclesiastical court or is required to comply with a lawful order or decree of the court, whether interlocutory or final, neglects or refuses to appear or to obey the order or decree, or if a person commits a contempt in the face of the court, the judge who issued the citation, or whose order or decree is being disobeyed, or before whom the contempt is committed, may pronounce him contumacious and in contempt, and may within ten days signify the same in the prescribed form (g) to the Lord Chancellor of England or Ireland, according to the domicile or residence of the person (h). Thereupon a writ *de contumace capiendo* in the prescribed form (i) issues out of the High Court in England or Ireland, as the case may be (k), directed to the sheriff or other officer to whom the serving and execution thereof appertains, or his deputy, returnable in the King's Bench Division in the term next after the teste of the writ, in the same manner and under the same regulations with respect to the proceedings thereon as was formerly the case in connection with the writ *de excommunicato capiendo* (l), and the sheriff, gaoler, or other officer thereupon executes the writ by taking and detaining the body of the person (m). On his due appearance or obedience to the decree or order, or submission in the case of having committed a contempt in the face of the court, the judge pronounces him absolved from the contumacy and contempt, and orders him to be discharged out of custody; and he is accordingly so discharged when he has paid the costs incurred by his custody and contempt (n). The Judicial Committee of the Privy Council or a judge of an ecclesiastical court, with the consent of the other parties to the proceedings, may at any time, if it seems

(g) Ecclesiastical Courts Act, 1813 (53 Geo. 3, c. 127), s. 1, Sched. A.; *R. v. Thorogood* (1840), 12 Ad. & El. 183; *R. v. Baines* (1840), 12 Ad. & El. 210. A surrogate cannot signify the contempt (*R. v. Jones* (1839), 10 Ad. & El. 576).

(h) Ecclesiastical Courts Act, 1813 (53 Geo. 3 c. 127), s. 1; Ecclesiastical Courts (Contempt) Act, 1832 (2 & 3 Will. 4, c. 93), s. 1; *Hudson v. Tooth* (1877), 2 P. D. 125. An order must be served on a party personally before he can be charged with contempt for disobeying it (*Durant v. Durant* (1822), 1 Add. 114).

(i) Ecclesiastical Courts Act, 1813 (53 Geo. 3, c. 127), s. 1, Sched. B; Ecclesiastical Courts (Contempt) Act, 1832 (2 & 3 Will. 4, c. 93), s. 1; *R. v. Baines*, *supra*.

(k) Or out of the Chancery Court of Lancaster if the offender is within the County Palatine of Lancaster (*Green v. Penzance (Lord)* (1881), 6 App. Cas. 657).

(l) See stat. (1563) 5 Eliz. c. 23; Burn, Ecclesiastical Law, Vol. II., pp. 250 *et seq.*; *Dale's Case*, *Enraght's Case* (1881), 6 Q. B. D. 376, C. A.; *Green v. Penzance (Lord)*, *supra*.

(m) Ecclesiastical Courts Act, 1813 (53 Geo. 3, c. 127), s. 1; Ecclesiastical Courts (Contempt) Act, 1832 (2 & 3 Will. 4, c. 93), s. 1.

(n) Ecclesiastical Courts Act, 1813 (53 Geo. 3, c. 127), s. 1, Sched. C; Ecclesiastical Courts (Contempt) Act, 1832 (2 & 3 Will. 4, c. 93), ss. 1, 3; *Baker v. Thorogood* (1840), 2 Curt. 632, *per* Dr. LUSHINGTON, at p. 635; *Dean v. Green* (1882), 8 P. D. 79; *Ex parte Cox* (1887), 19 Q. B. D. 307. Where a beneficed clerk is in custody for contempt in disobeying an order made upon him in that capacity under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), and his benefice becomes vacant under s. 23 of the Act, the fact of his having vacated it purges his contempt and entitles him to his discharge without any submission on his part (*Dean v. Green*, *supra*). Where an incumbent was in custody for contempt in disobeying an order under the Act as to the mode of performing divine service, and the bishop appointed a curate who duly performed the service, the object of the punishment was held to be

fit so to do, order the release of a person in custody under a writ *de contumace capiendo* issued in proceedings before them or him (o).

SECT. 4.
Practice.

1024. If a person is pronounced contumacious and in contempt for not paying money which he has been ordered by an ecclesiastical court to pay, sequestration may be issued out of the High Court of England or Ireland against his real and personal estate in England and Ireland respectively to enforce payment of the money (p). Sequestration.

1025. Disobedience on the part of a clergyman to a decree or order of an ecclesiastical court is punishable by sequestration (q), suspension (r), and in some cases by deprivation (s). Disobedience of clergyman.

Special provisions have been made by statute for cases of disobedience on the part of a clergyman to a monition or order of a bishop or the judge under the Public Worship Regulation Act, 1874 (t), or to a sentence or any requirement or direction in a sentence under the Clergy Discipline Act, 1892 (u).

If a clerk wilfully disobeys a sentence under the Clergy Discipline Act, 1892 (a), or any requirement or direction contained in the sentence, he may be cited before the consistory court in which the sentence was pronounced, instead of a writ *de contumace capiendo* being issued against him, and, subject to the like appeal as in the case of a judgment on a trial under the Act, he may be adjudged guilty and sentenced to such punishment as the gravity of the offence requires, including, where requisite, deprivation (b).

A clerk who has been suspended for a term and until after its expiration he produces a certificate of good conduct, and who resumes duty without producing such certificate, is guilty of contempt (c). Resumption of duty during suspension.

SUB-SECT. 4.—Censures or Punishments.

1026. Ecclesiastical censures or punishments to which the clergy are liable consist of (1) monition (d); (2) inhibition under the Public Classes of punishment.

attained, and the incumbent was released without submission and without payment of costs, but without prejudice to any other remedy for recovering the costs (*Hudson v. Tooth* (1877), 2 P. D. 125). As to discharge from custody, see also Ecclesiastical Courts Act, 1840 (3 & 4 Vict. c. 93).

(o) Ecclesiastical Courts Act, 1840 (3 & 4 Vict. c. 93); *Baker v. Thorogood* (1840), 2 Curt. 632; *Hudson v. Tooth*, *supra*, at pp. 137 *et seq.*

(p) Ecclesiastical Courts (Contempt) Act, 1832 (2 & 3 Will. 4, c. 93), ss. 2, 3.

(q) See pp. 616 *et seq.*, *post*.

(r) *Martin v. Mackonochie* (1870), L. R. 3 P. O. 409; *Helbert v. Purchas* (1872), L. R. 4 P. C. 301; see p. 535, *post*.

(s) *Combe v. De La Bere* (1881), 6 P. D. 157; S. C. on prohibition (1882) 22 Ch. D. 316, O. A., *per* CHITTY, J., at pp. 319—323; *Oxford (Bishop) v. Henly*, [1909] P. 319, 330 *et seq.* But deprivation, deposition or excommunication cannot be inflicted by an interlocutory order for mere contumacy or contempt (*Martin v. Mackonochie* (1882), 7 P. D. 94, 101, P. C.).

(t) 37 & 38 Vict. c. 85, s. 13; see p. 531, *ante*.

(u) 55 & 56 Vict. c. 32, s. 7.

a) 55 & 56 Vict. c. 32.

b) *Ibid.*, s. 7; see p. 526, *ante*.

c) *Lincoln (Bishop) v. Day* (1849), 1 Rob. Eccl. 724.

d) See pp. 529, 531, *ante*, and p. 534, *post*.

**SECT. 4.
Practice.**

Worship Regulation Act, 1874 (a); (3) suspension; (4) sequestration (f); (5) deprivation and incapacity to hold preferment; (6) deposition from holy orders; (7) excommunication; and (8) penalties and forfeitures. They are inflicted as the result of proceedings duly taken for the purpose (g) and in consequence of the commission of some crime or ecclesiastical offence (h).

(i.) *Monition.*

Monition.

1027. Monition is a command or warning to a clerk to do or abstain from doing some act, the omission or commission of which constitutes an ecclesiastical offence, or to rectify some previous act, the commission of which was an ecclesiastical offence. It is usually accompanied by a condemnation of the offender to pay the costs of the proceedings (i).

(ii.) *Inhibition under the Public Worship Regulation Act, 1874.*

Inhibition.

1028. Obedience to a monition or order of a bishop or the judge in proceedings under the Public Worship Regulation Act, 1874 (j), for an offence cognisable under that Act, is enforced, if necessary by inhibition, in the prescribed manner (k).

(e) 37 & 38 Vict. c. 85, s. 13.

(f) See pp. 616 *et seq.*, *post*.

(g) Ayl. Par. 209; Watson, Clergyman's Law, 4th ed., p. 50.

(h) Where a clerk is found guilty of an ecclesiastical offence, the court is bound to pass some sentence of censure or punishment upon him, but has, generally speaking, and in the absence of express enactment on the subject, a discretion as to its leniency or severity (*Martin v. Mackonochie* (1882), 7 P. D. 94, 99, P. O.). The sentence to be pronounced for publishing and maintaining doctrines contrary to the teaching of the Church is in the discretion of the court (*Salisbury (Bishop) v. Williams* (1862), 7 L. T. 472).

(i) Burn, Ecclesiastical Law, Vol. III., pp. 191, 357. Monition is described in the books as of a preparatory nature, that is to say, as a warning or command to be followed in case of disobedience by some coercive sanction. It appears to have been a general, though not an invariable, rule of the canon law that monition ought to precede suspension or excommunication. It may be, and in practice it often is, issued for various purposes at the beginning or during the progress of an ecclesiastical cause; and it may be, and sometimes is, the sentence or part of a sentence upon the merits pronounced at the end of the cause (*Oughton, Ordo Judiciorum*, Vol. I., tit. 137, observat. 3; *Gib. Cod.* 1046, 1048; *Mackonochie v. Pensance (Lord)* (1881), 6 App. Cas. 424, *per* Lord SELBORNE, L.O., at p. 433; *Enraght v. Pensance (Lord)* (1882), 7 App. Cas. 240, *per* Lord BLACKBURN, at p. 247). The ecclesiastical courts being organs of the Church for enforcing discipline, the power to make orders to do or abstain from doing something ascertained respectively to be right or wrong is part of their very essence; and without such power their use in many cases would be gone (*Martin v. Mackonochie* (1879), 4 Q. B. D. 697, O. A., *per* Lord COLERIDGE, O.J., at p. 770). Disobedience to a monition can be punished by proceedings in the same suit on the footing of contumacy or contempt by further monition or inhibition and by suspension or excommunication (*Hamerton v. Hamerton* (1827), 1 Hag. Ecc. 23; *Mackonochie v. Pensance (Lord)*, *supra*). A monition may prohibit not only the continuance or repetition of the same offence, but also the commission of offences of the same or a like nature (*Cox v. Goodday* (1811), 2 Hag. Con. 138, 142; *Enraght v. Pensance (Lord)*, *supra*).

(j) 37 & 38 Vict. c. 85. An inhibition on the ground of several acts of disobedience to a monition is good if it is justified by any one of the acts, although the others were not in fact breaches of the monition (*Enraght v. Pensance (Lord)*, *supra*).

(k) Public Worship Regulation Act Amended Rules and Orders of 22nd February, 1879, rr. 37—42 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 34, 35, 49, 50).

(iii.) *Suspension.*SECT. 4.
Practice.Procedure in
case of
suspension.

1029. Suspension may be *ab officio* only, or in the case of a beneficed clerk *ab officio et a beneficio* (l). In the former case it is an inhibition from performing clerical duties for a limited period (m). In the latter case, besides this inhibition from performing duties, it is for a limited period a deprivation of the enjoyment of the profits of the benefice (n), and during that period it virtually renders the benefice vacant (o). It is usually accompanied by a direction that at the end of the period a certificate from clergymen in the vicinity as to the offender's good behaviour during the period shall be produced before the suspension is taken off or relaxed (p). It is generally followed by the issue of sequestration to provide for the receipt and application of the profits of the benefice and the performance of the duties during the suspension (q). A sentence of suspension conditional on an affidavit being filed may be followed after the filing of the affidavit by an unconditional sentence of suspension (r). If a suspension is annulled upon appeal, the successful appellant is entitled to the profits of the benefice during the whole period of the suspension (a).

(iv.) *Deprivation and Incapacity to hold Preferment.*

1030. The punishment of deprivation of preferment (b) is imposed by statute in the case of certain offences or conduct either *ipso facto* or upon a declaration of deprivation which the statute requires to be made, and is decreed in the case of other grave offences by a definitive sentence in proceedings instituted for the purpose.

When
imposed.

(l) Ayl. Par. 501—503; Burn, Ecclesiastical Law, Vol. III., pp. 667—669.

(m) Ayl. Par. 502, 503.

(n) Gib. Cod. 1047; *Bunter v. Cresswell* (1850), 14 Q. B. 825. Suspension deprives the incumbent of the profits although no sequestration has issued (*Morris v. Ogden* (1869), L. R. 4 C. P. 687). They belong, during the suspension, to the bishop, as paramount incumbent of all the parishes in his diocese, subject to proper provision being made thereout for the duties of the cure (*Re Thakeham Sequestration Moneys* (1871), L. R. 12 Eq. 494). If at the time of the suspension the benefice is already under sequestration upon a judgment against the incumbent or for some other cause, the sequestration upon the suspension takes precedence, and the previous sequestration remains in abeyance during the suspension (*Bunter v. Cresswell*, *supra*).

(o) Gib. Cod. 1047; *Pinder v. Barr* (1854), 4 E. & B. 105, 114; *Re Thakeham Sequestration Moneys*, *supra*, at p. 499.

(p) *Dickes v. Huddesford* (1794), cited 1 Phillim. 278, n. (a); *Watson v. Thorp* (1811), *ibid.*, 269, 271, 279, n. (a); *Saunders v. Davies* (1822), 1 Add. 291, 298—300; *Lincoln (Bishop) v. Day* (1849), 1 Rob. Eccl. 724; *Ex parte Rose* (1852), 18 Q. B. 751.

(q) *Bunter v. Cresswell*, *supra*; *Morris v. Ogden*, *supra*, at p. 702. Where suspension is inflicted in proceedings under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), the offender cannot during the period of suspension exercise or perform, without the leave of the court which inflicted the sentence, any right or duty belonging or incidental to the preferment, nor reside in the house of residence or within such distance therefrom as is specified in the sentence; and he is not readmitted at the end of the period until he has satisfied the court of his good conduct during the period (*ibid.*, s. 6 (1) (c)).

(r) *Combe v. De La Bere* (1882), 22 Ch. D. 316, C. A.

(a) Burn, Ecclesiastical Law, Vol. III., p. 669.

(b) See also p. 533, *ante*.

SECT. 4.
Practice.

Where a statute imposes deprivation *ipso facto* as the punishment for an offence or misconduct, it is nevertheless necessary that the offence or conduct should be judicially proved (c).

Refusing to
use Book of
Common
Prayer.

1031. If an incumbent is convicted more than once in a temporal court of refusing to use the Book of Common Prayer and the forms therein prescribed, or of using any other form, or of preaching or speaking anything in derogation or deprivation of that book, he is, upon every or any such conviction after the first, deprived *ipso facto* of any preferment which he at the time holds (d).

In cases of
inhibition.

1032. If for the purpose of enforcing obedience to a monition or order under the Public Worship Regulation Act, 1874 (e), either (1) an inhibition (f) is issued against the holder of a benefice or preferment and remains in force for more than three years from the date of the monition or the final determination of an appeal therefrom, or (2) a second inhibition is issued within three years after the relaxation of an inhibition, the benefice or preferment held by him in the parish in respect of which the inhibition is issued thereupon becomes void; but the bishop, for a special reason stated in writing, may postpone for not more than three months the date at which, unless the inhibition is relaxed, the benefice or preferment is to become void (g).

In cases of
sequestration
for non-
residence.

1033. Where in proceedings under the Pluralities Act, 1838 (h), on account of the non-residence of an incumbent, a sequestration is issued against his benefice and continues for one whole year, or two sequestrations, from neither of which he is relieved on appeal, are issued within the space of two years, the benefice becomes void, and the incumbent cannot upon such avoidance be presented or nominated afresh to the benefice (i). "One whole year" does not mean one calendar year, but twelve calendar months from the date of the issuing of the sequestration (j).

Where on bankruptcy, or in aid of a writ of execution against property, a sequestration is issued against the benefice of an incumbent within twelve months after his institution, or a sequestration issued after that period continues for a whole year, or two

(c) Ayl. Par. 206—209. But a declaratory sentence of deprivation is not necessary (*Green's Case* (1602), 6 Co. Rep. 29 a, where the benefice was avoided, under stat. (1671) 13 Eliz. c. 12, for not reading the Thirty-nine Articles as thereby prescribed).

(d) Stat. (1648) 2 & 3 Edw. 6, c. 1, s. 2; stat. (1559) 1 Eliz. c. 2, s. 2; Act of Uniformity, stat. (1662) 14 Car. 2, c. 4, s. 20. As to forfeiting a benefice by wilful failure to read the Thirty-nine Articles, and make the declaration of assent in the church of the benefice as required by law after institution or admission thereto, see p. 603, *post*.

(e) 37 & 38 Vict. c. 85.

(f) See p. 534, *ante*.

(g) Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 13. The provisions of the Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 58, as to notice to the patron and as to lapse (see pp. 590 *et seq.*, *post*) apply to any benefice or preferment so avoided; and the same person cannot again be promoted to it (Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 13).

(h) 1 & 2 Vict. c. 106, ss. 54—58.

(i) *Ibid.*, s. 58.

(j) *Re Bartlett* (1848), 3 Exch. 28; *Bartlett v. Kirwood* (1853), 2 E. & B. 771.

SECT. 4.
Practice.

sequestrations are issued within the space of two years, the benefice becomes void; unless the bishop, within two months, by a notice by registered letter to the patron and incumbent of the benefice and the churchwardens of the parish, which is to be published in the London Gazette, directs that it shall not become void (*k*).

1034. If an incumbent is found guilty for a third time of unlawful trading or dealing he is to be deprived of his office and benefice (*l*). In cases of unlawful trading.

1035. The preferment of a clerk must be declared vacant under the Clergy Discipline Act, 1892 (*m*), in certain cases enumerated above (*n*). Declaration of vacancy.

1036. In other cases an incumbent, if the interests of the parish or place in which he holds preferment appear so to require, may be sentenced to deprivation in proceedings against him in the consistory court of the diocese under the Clergy Discipline Act, 1892 (*o*), when he is adjudged either to have been convicted by a temporal court of having committed an act constituting an ecclesiastical offence, or to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality, and not being a question of doctrine or ritual (*p*). For offences against morality etc.

1037. Where a sentence not amounting to deprivation is pronounced in the first instance, disobedience to it may be punished by a sentence of deprivation (*q*). For disobedience to sentence.

1038. A sentence of deprivation under the Clergy Discipline Act, 1892 (*r*), is pronounced by the bishop (*s*). Sentence.

1039. Where under the Clergy Discipline Act, 1892 (*t*), the preferment of an offender is declared vacant, or he is deprived thereof by sentence, he becomes incapable of holding preferment unless he receives a free pardon from the Crown, or except so far as his Incapacity to hold preferment.

(*k*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 10; Benefices Rules, 1898, r. 14, Form No. 10 (Statutory Rules and Orders Revised, Vol. I., Benefice, England, pp. 3, 7). This does not apply to incumbents presented or collated before 1st January, 1899 (Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 10).

(*l*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 31.

(*m*) 55 & 56 Vict. c. 32.

(*n*) See p. 523, *ante*.

(*o*) 55 & 56 Vict. c. 32.

(*p*) *Ibid.*, ss. 2, 6 (1) (*a*), (*b*). By s. 1 (5) of the Benefices Act, 1898 (61 & 62 Vict. c. 48), these offences include the offence of having been knowingly party or privy to any transfer within the meaning of that section (see p. 583, *post*), or to a presentation or agreement which is invalid under that section, or of committing any breach of the promissory part of the declaration made under that section (see p. 594, *post*). In sentencing a clerk to deprivation or otherwise under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), regard is to be had to the interests of the ecclesiastical parish or place concerned and not to precedents of punishments (*ibid.*, s. 6 (1) (*a*)).

(*q*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 7.

(*r*) 55 & 56 Vict. c. 32.

(*s*) Clergy Discipline Rules, 1892, r. 31 (2) (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, p. 68); *Canones Ecclesiastici* (1603), 122; *Canon Ecclesiasticus* (1892).

(*t*) 55 & 56 Vict. c. 32.

4.
Practice.

holding of some particular preferment is specially permitted by the bishop of the diocese and the archbishop of the province in which it is situate (a). If after he has been convicted by a temporal court and his preferment has been declared vacant he receives a free pardon from the Crown before another clerk is instituted to the preferment, he is to be again instituted and inducted into it without payment of any fee (b). In the case of an offending clerk who holds no preferment, a declaration that he is incapable of holding preferment is substituted for the declaration that his preferment is vacant, or he is sentenced to be incapable of holding preferment instead of being sentenced to deprivation (c).

Offences
other than
against
morality.

1040. In proceedings under the Church Discipline Act, 1840 (d), for an offence in respect of doctrine or ritual, or for a breach of the laws ecclesiastical not being an offence against morality, the offender may be sentenced to deprivation (e) if adjudged guilty of any offences above mentioned as affording grounds for *ipso facto* deprivation on a second or subsequent conviction in a temporal court (f); or of any other breach of express ecclesiastical law (g); or of atheism, blasphemy, heresy, schism, or other false doctrine (h); or of assuming to exercise the episcopal function of ordination (i); or of flagrant and continued neglect of duty (k); or of waste or dilapidations (l). In proceedings either under that Act or under the Public Worship Regulation Act, 1874 (m), an offender may be sentenced to deprivation for incorrigible contumacy or disobedience to the orders of the bishop (n). The sentence may be pronounced either by the bishop or by the Dean of the Arches (o).

(a) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 6 (2).

(b) *Ibid.*, s. 1 (2).

(c) *Ibid.*, s. 9 (1); Clergy Discipline Rules, 1898, r. 34 (in substitution for the previous r. 34 of the Clergy Discipline Rules, 1892) (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 69, 70).

(d) 3 & 4 Vict. c. 86.

(e) Ayl. Par. 208, 209. A sentence of deprivation need not be preceded by a previous suspension or monition (*Burgoynes v. Free* (1829), 2 Hag. Ecc. 456, 459, 662).

(f) Stat. (1559) 1 Eliz. c. 2, s. 11 (see note (d), p. 655, *post*); *Caudrey's Case* (1591), 5 Co. Rep. (Of the King's Ecclesiastical Law) 1 a; *Martin v. Mackonochie* (1880), 6 P. D. 87; (1883) 8 P. D. 191; *Combe v. De La Bere* (1881), 6 P. D. 157; *Heywood v. Manchester (Bishop)* (1884), 12 Q. B. D. 404, 418—420.

(g) Cro. Jac. 37; *Heywood v. Manchester (Bishop)*, *supra*.

(h) *Specot's Case* (1590), 5 Co. Rep. 57 a; stat. (1677) 29 Car. 2, c. 9; Gib. Cod. 1068; *Heath v. Burder* (1862), 15 Moo. P. C. C. 1; *Voysey v. Noble* (1871), L. R. 3 P. C. 357.

(i) *St Albans (Bishop) v. Fillingham*, [1906] P. 163.

(k) *Pullen v. Clewer* (1884), 1 Hag. Ecc. 354, Appendix B.

(l) 3 Co. Inst. 204; *Salisbury's (Bishop) Case* (1614), Godb. 259; *Ross v. Adcock* (1868), L. R. 3 O. P. 655, 664. But there is no recorded instance of deprivation inflicted on this ground (Gib. Cod. 1068).

(m) 37 & 38 Vict. c. 85.

(n) *Combe v. De la Bere* (1881), 6 P. D. 157, 163—166, 169, 170; *Oxford (Bishop) v. Henly*, [1909] P. 319, 330 *et seq.*

(o) *Canones Ecclesiastici* (1603), 122; *Pullen v. Clewer*, *supra*, at p. 4; *Rich v. Gerard* (1690), 1 Hag. Ecc. 354, Appendix B, p. 7; *Burgoynes v. Free* (1829), 2 Hag. Ecc. 456, 494; *Kitson v. Loftus* (1845), 4 Notes of Cases, 323, 350; *Donwell v. London (Bishop)* (1861), 14 Moo. P. C. C. 395, 412, 413; *Norwich (Bishop) v. Pearce* (1868), 37 L. J. (EccL.) 90; *Combe v. De la Bere*, *supra*.

1041. The form of a sentence of deprivation by an ecclesiastical court extends to all ecclesiastical preferments within the jurisdiction of the court held by the offending clerk at the date of the sentence (*p*).

SECT. 4.
Practice.

Form of
sentence.

(v.) *Deposition*

1042. Where, under the Clergy Discipline Act, 1892 (*g*), the preferment of a clerk is declared vacant or becomes vacant by virtue of a sentence of deprivation, or a clerk holding no preferment is either declared or sentenced to be incapable of holding preferment, and it appears to the bishop of the diocese that the clerk ought also to be deposed from holy orders, the bishop may, by sentence and without any further formality, depose him therefrom. But the clerk may within one month appeal against the sentence of deposition to the archbishop of the province, whose decision in the matter is final (*r*).

Deposition.

(vi.) *Excommunication.*

1043. An ecclesiastical court may pronounce or declare a person to be excommunicate in a definitive sentence or in an interlocutory decree having the effect of a definitive sentence, as a spiritual censure for an offence of ecclesiastical cognisance (*s*). A person so pronounced or declared excommunicate does not incur any civil penalty or incapacity in consequence of the excommunication, except such imprisonment, not exceeding six months, as the court pronouncing or declaring the excommunication directs (*a*).

Excommuni-
cation.

(*p*) *Woodward v. Atwood* (1666), *Rothery's Precedents*, No. 48, pp. 20, 21; *Burgoyne v. Free* (1829), 2 Hag. Ecc. 456; *Voysey v. Noble* (1871), L. R. 3 P. C. 357, 408; *Martin v. Muckonochie* (1883), 8 P. D. 191.

(*g*) 55 & 56 Vict. c. 32.

(*r*) *Ibid.*, ss. 8, 9; Clergy Discipline Rules, 1898, r. 34 (Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 69, 70). The sentence of deposition is to be recorded in the registry of the diocese (Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 8). It need not be pronounced concurrently with the declaration or sentence of deprivation or of incapacity to hold preferment, but may be delivered after an interval has elapsed (*R. v. Durham (Lord Bishop)*, [1897] 2 Q. B. 414), and may be pronounced by the bishop, after the archbishop has, in his absence or illness, declared the clerk to be deprived of his preferment, or to be incapable of holding preferment, under s. 1 (3) of the Act or the Clergy Discipline Rules, 1898 (*ibid.*, per RIGBY, L.J., at p. 423). For deposition or degradation from holy orders, prior to and independently of the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), see *Canones Ecclesiastici* (1603), 122; *Ayl. Par.* 206—209; Burn, *Ecclesiastical Law*, Vol. II., pp. 139, 140; *Clarke v. H*— (1846), 1 Rob. Eccl. 377, 380, n.

(*s*) *Articles of Religion* (1562), 33; *Kemp v. Wickes* (1809), 3 Phillim. 204, per Sir JOHN NICHOLL, at pp. 271, 272; Ecclesiastical Courts Act, 1813 (53 Geo. 3, c. 127), s. 2. Excommunication is the punishment prescribed for a violent assault in a church or churchyard (stat. (1552) 5 & 6 Edw. 6, c. 4, s. 2). By the Canons of 1603 excommunication *ipso facto*, or by condemnatory sentence, is prescribed as the penalty for impugning the position or constitution or the rites and ceremonies of the Church (*Canones Ecclesiastici* (1603), 2—12, 139—141). *Ipso facto* excommunication does not take effect without a declaratory sentence (*Titchmarsh v. Chapman* (1844), 3 Notes of Cases, 370, at pp. 396, 397).

(*a*) Ecclesiastical Courts Act, 1813 (53 Geo. 3, c. 127), s. 3. If a term of imprisonment is directed, the excommunication and the term are signified or certified to the King in Chancery; and thereupon a writ *de excommunicato capiendo* issues, and the person being taken into custody remains in prison for the term or until he is absolved by the ecclesiastical court (*ibid.*). The punishment of excommunication has practically become obsolete.

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Penalties and forfeitures.

(vii.) Penalties and Forfeitures.

1044. Specific penalties or forfeitures are incurred by certain breaches of the provisions of the Pluralities Act, 1838 (*b*). If incurred by beneficed clerks they are recoverable in the consistory court of the diocese by a person authorised by the bishop, and the payment thereof may be enforced by monition and sequestration (*c*). If they are incurred by an unbeneficed clerk, or, under s. 59 of the Act, by a lay person, they may be recovered by any person by action in the High Court of Justice (*d*).

SUB-SECT. 5.—Faculty Cases.

(i.) Objects of Faculties.

When faculty is necessary.

1045. A faculty is generally necessary at law, and can in proper cases be obtained, to sanction an addition to, alteration in, or subtraction from a consecrated building (*e*) other than a cathedral (*f*) or the contents thereof, or a churchyard or other consecrated burial ground or the contents thereof (*g*). It is not

(*b*) 1 & 2 Vict. c. 106, ss. 114, 117—119; see pp. 557, 610, *post*. They can only be recovered in the same year in which they have been incurred, or in the following year (*ibid.*, s. 118).

(*c*) *Ibid.*, s. 114. The proceedings for their recovery from a beneficed clerk in the consistory court are in the nature of a civil suit and are not taken under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86) (*Bluck v. Rackham* (1846), 5 Moo. P. C. C. 305; *Rackham v. Bluck* (1846), 9 Q. B. 691). The bishop is empowered to direct that, so far as not remitted, the penalties shall be applied towards augmenting or improving the benefice or the house of residence or any other buildings or property thereof (Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 114). In other cases the penalties recovered are to be paid over to the Governors of Queen Anne's Bounty to be applied to the purposes of the Bounty (*ibid.*, s. 119).

(*d*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 117.

(*e*) Including a building on consecrated ground (*Steven v. St. Martin Orgare (Rector)* (1824), 2 Add. 255; *Campbell v. Paddington (Parishioners)* (1852), 2 Rob. Eccl. 558; *Hansard v. St. Matthew, Bethnal Green (Parishioners)* (1878), 4 P. D. 46).

(*f*) *Phillipotts v. Boyd* (1875), L. R. 6 P. C. 435, 456. The dean is the ordinary of a cathedral, and the bishop's only control over it is as visitor (*ibid.*, at pp. 453, 454).

(*g*) *Dewdney v. Good* (1861), 7 Jur. (N. S.) 637, 638; *Sievehing v. Kingsford* (1866), 36 L. J. (Eccl.) 1. Where anything has been added or altered without a faculty, what has been added or altered cannot legally be removed or restored without a faculty (*Walker v. Clyde* (1861), 10 C. B. (N. S.) 381; *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113, 122; *Vincent v. Eyton*, [1897] P. 1, 12); but this does not affect the right of property in an article so added (*Walker v. Clyde, supra*).

When ground has once been consecrated, it cannot be definitely converted to secular purposes without an Act of Parliament (*Campbell v. Paddington (Parishioners)*, *supra*, per Dr. LUSHINGTON, at p. 559; *Harper v. Forbes* (1859), 5 Jur. (N. S.) 275; *R. v. Twiss* (1869), L. R. 4 Q. B. 407, per COCKBURN, C.J., at p. 412). But faculties have in suitable cases been granted for the erection or construction on consecrated ground, in which no burials have taken place or can in future take place, of buildings or chambers for parochial or public purposes not of a purely ecclesiastical character (*Campbell v. Paddington (Parishioners)*, *supra*; *Russell v. St. Botolph, Bishopsgate (Parishioners)* (1859), 5 Jur. (N. S.) 300; *Re Bettison* (1874), L. R. 4 A. & E. 294; *Hansard v. St. Matthew, Bethnal Green (Parishioners)*, *supra*; *St. George's, Hanover Square (Burial Board) v. Hall* (1879), 5 P. D. 42; *Re St. Nicholas, Cole Abbey, Re*

necessary in the case of such trifling matters as hassocks and book-boxes (*h*). Burials can take place in churchyards and consecrated burial grounds without a faculty, and as regards churchyards the incumbent has the right, without a faculty, to sanction the erection of tombstones and monuments of an ordinary character and approve the inscriptions thereon (*i*), and as regards the consecrated portions of cemeteries established by cemetery companies and of burial grounds provided by local burial authorities, the control and management thereof respectively is in the companies (*k*) and the burial authorities (*l*). But an incumbent has no power to sanction the construction in a churchyard of monuments of an unusual size or character or of a vault or brick grave without a faculty (*m*), and his control over tombstones and ordinary monuments and the inscriptions thereon may be overridden by a faculty (*n*). Neither he nor the churchwardens nor a lay rector, where there is one, can erect or sanction the erection of any monuments or tablets on the walls of the church,

St. Benet Fink Churchyard, [1893] P. 58), for a new footpath in a churchyard (*Walter v. Mountague* (1836), 1 Curt. 253), or the diversion of an old footpath therein (*Tottenham (Vicar) v. Venn* (1874), L. R. 4 A. & E. 221, 224, 225), for the laying out of consecrated ground as a public garden or otherwise for a non-ecclesiastical public purpose (*Re St. George in the East (Rector)* (1876), 1 P. D. 311), or for adding part of it to a public road for the sake of widening the road and rendering access to the rest of the ground more safe or convenient (*St. Botolph without Aldgate (Vicar and One Churchwarden) v. Parishioners of Same*, [1892] P. 161; *St. Nicholas, Leicester (Vicar) v. Langton*, [1899] P. 19; *Re Bideford Parish, Ex parte Bideford (Rector and One Churchwarden)*, [1900] P. 314). In such cases orders have been made dealing with private vaults (*St. Botolph without Aldgate (Vicar etc.) v. Parishioners of Same*, [1892] P. 173). See also title BURIAL AND CREMATION, Vol. III., pp. 415 *et seq.*

(*h*) *Parham v. Templar* (1821), 3 Phillim. 515, *per* Sir JOHN NICHOLL, at p. 527.

(*i*) *Maidman v. Malpas* (1794), 1 Hag. Con. 205, *per* Lord STOWELL (then Sir WILLIAM SCOTT), at p. 208; *Brecks v. Woolfrey* (1838), 1 Curt. 880, 903; *Keet v. Smith* (1875), L. R. 4 A. & E. 398, *per* Sir ROBERT PHILLIMORE, at pp. 413, 414; *Pearson v. Stead, Stead v. Pearson*, [1903] P. 66.

An incumbent may level the ground above a grave without a faculty (*Bennett v. Bonaker* (1829), 3 Hag. Ecc. 17, 51, 52).

(*k*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65); *R. v. Tristram* (1899), 80 L. T. 414. But the bishop of the diocese and all persons acting under his authority have the same right and power to object to and to procure the removal of a monumental inscription within the consecrated part of the cemetery as he has by law to object to and procure the removal of a monumental inscription in a church or the burial ground belonging thereto or in any other consecrated ground (Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 51). And a body buried in the consecrated part of the cemetery is not removable from its place of burial without the like authority as is by law required for the removal of a body buried in the churchyard of a parish church (*ibid.*, s. 26). See, generally, title BURIAL AND CREMATION, Vol. III., pp. 520 *et seq.*

(*l*) Burial Act, 1852 (15 & 16 Vict. c. 86), s. 38. Any question as to the fitness of a monumental inscription placed in the consecrated part of the burial ground is to be determined by the bishop of the diocese (*ibid.*). See, generally, title BURIAL AND CREMATION, Vol. III., pp. 465, 511.

(*m*) *Bardin v. Calcott* (1789), 1 Hag. Con. 14; *Rugg v. Kingsmill* (1868), L. R. 2 P. O. 59; and as to brick graves see *Gilbert v. Buzzard* (1821), 2 Hag. Con. 333, *per* Lord STOWELL (then Sir WILLIAM SCOTT), at p. 353.

(*n*) *Rugg v. Kingsmill*, *supra*; *Keet v. Smith*, *supra*, reversed on appeal (1876) 1 P. D. 73, P. O.; *Pearson v. Stead, Stead v. Pearson*, *supra*. The interment in church of cremated ashes has been sanctioned by a faculty (*Re Kerr*, [1894] P. 284).

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whether inside or outside, without a faculty (o). And human remains, after having been once committed to consecrated ground, whether in a vault beneath a church or in a churchyard, or in the cemetery of a company, or in the burial ground of a local authority, cannot be disinterred for the purpose of reinterment elsewhere, or for any other purpose, without a faculty (p).

Faculties have been granted for appropriating a pew or seat in a church to a man and his family while continuing to inhabit the parish or a certain house in the parish, or to the occupiers for the time being of a certain house in the parish (q); and for conferring on an individual the perpetual and exclusive right of interment of himself and his family in a vault beneath a church or in a churchyard, or the right to construct a brick grave with or without the exclusive right of burial therein (r); but such faculties are not granted at the present day except under very special circumstances (a).

Faculties will be granted for the pulling down and rebuilding of a church (b), or the removal of a church to another site (c), or the pulling down of an old church on the erection of a new one elsewhere (d).

Faculties have been granted, in consideration of a specific sum of money or annual rent, for the construction and use of a private pathway, enclosed by railings, across a churchyard closed for

(o) *Maidman v. Malpas* (1794), 1 Hag. Con. 205; *Seager v. Bowle* (1823), 1 Add. 541.

(p) *Gib. Cod.* 454; *St. Pancras (Vestry) v. St. Martin in the Fields (Vicar)* (1860), 6 Jur. (N. S.) 540; *Adlam v. Colthurst* (1867), L. R. 2 A. & E. 30; *St. Botolph without Aldgate (Vicar and One Churchwarden) v. Parishioners of Same*, [1892] P. 161; *St. Helen's, Bishopsgate with St. Mary, Outwich (Rector etc.) v. Parishioners of Same*, [1892] P. 259; *R. v. Tristram*, [1898] 2 Q. B. 371; *Lee v. Hawtrey*, [1898] P. 63; *St. Nicholas, Leicester (Vicar) v. Langton*, [1899] P. 19; even though the removal has been directed by an Order in Council (*St. Mary-at-Hill with St. Andrew Hubbard (Rector etc.) v. Parishioners of Same*, [1892] P. 394; *St. Michael Bassishaw (Rector etc.) v. Parishioners of Same*, [1893] P. 233). In certain circumstances a faculty will be granted for the removal of the remains to unconsecrated ground (*Re Talbot*, [1901] P. 1). But in that case the licence of the Home Secretary is also necessary (*ibid.*, at p. 6), though unnecessary for a removal to consecrated ground (Burial Act, 1857 (20 & 21 Vict. c. 81), s. 25; *Druce v. Young*, [1899] P. 84). A faculty may be granted for the exhumation of remains for the purpose of inspection (*Re Pope* (1861), 15 Jur. 614; *Druce v. Young*, *supra*), but not for the purpose of cremation (*Re Dixon*, [1892] P. 386). See also title BURIAL AND CREMATION, Vol. III., pp. 553 *et seq.*

(q) *Fuller v. Lane* (1825), 2 Add. 419, 426, 427; *West Peckham (Vicar) v. Geary* (1889), Trist. 189, 207, 208; *Lightfoot v. Eastwood* (1889), Trist. 248. A grant of a pew to a man and his heirs simply would be illegal (*Brubin and Tradum's Case* (1618), Poph. 140).

(r) *Rosher v. Northfleet (Vicar)* (1825), 3 Add. 14; *Pitcher v. Northfleet (Vicar)* (1825), 3 Add. 15; *The Perivale Faculty, De Romana v. Roberts*, [1906] P. 332.

(a) *Fuller v. Lane*, *supra*; *Woollocombe v. Ouldrige* (1825), 3 Add. 1; *Rosher v. Northfleet (Vicar)*, *supra*; *Pitcher v. Northfleet (Vicar)*, *supra*; *West Peckham (Vicar) v. Geary*, *supra*, at p. 207.

(b) *Holy Trinity, Kingsway* (1909), *Times*, August 6th.

(c) *Clayton v. Dean* (1849), 7 Notes of Cases, 46.

(d) *Steven v. St. Martin Orgars (Rector etc.)* (1824), 2 Add. 255; Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 1; *St. Mary, Bishopstoke* (1909), 21 T. L. R. 86; S. O., on appeal *sub nom. Paddington v. Sedgwick* (1909), *Times*, December 17th, P. C.

burials (e), and for an easement of light and air over consecrated ground (f), and for interference with the ancient lights of a consecrated building (g). SECT. 4.
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1046. Where a monition is issued under the Public Worship Regulation Act, 1874 (h), to do an act which in the absence of a monition could not be lawfully done without a faculty, it is not necessary to obtain a faculty from the ordinary in order lawfully to obey the monition (i). If the monition directs that a faculty shall be applied for, such fees only are to be paid for it as are directed by the rules and orders (k). After
monition.

1047. Where an addition, alteration or subtraction, which in law required a faculty, has been made without one, a confirmatory faculty will, in suitable cases, be granted to legalise what has been done (l). On the other hand, where ornaments have been improperly removed from a church without a faculty, and a faculty to confirm the removal is applied for, a faculty authorising and ordering their replacement will, in a proper case, be issued (m). Confirmatory
faculty.

1048. The repair of tombs or monuments does not require a faculty, but the leave of the churchwardens, which they are bound to grant, should be previously obtained (n); and generally mere repairs do not require the sanction of a faculty (o). Repairs.

1049. Except where the bishop with the consent of the patron gives a written authority for the removal of an unnecessary building belonging to or forming part of the house of residence (p), a faculty Glebe
buildings.

(e) *St. Gabriel, Fenchurch Street (Rector) v. City of London Real Property Co.*, [1896] P. 95.

(f) *St. Stephen, Walbrook (Rector) v. Sun Fire Office (Trustees)* (1883), Trist. 103; *St. Martin Orgars* (1890), Trist. 145.

(g) *St. Mark's, Old Street* (1900), *Times*, August 6th; *Christ Church, Newgate Street* (1909), *Times*, November 27th.

(h) 37 & 38 Vict. c. 85.

(i) *Ibid.*, s. 14.

(k) *Ibid.* Nothing in the Act is to be construed to limit or control the discretion vested by law in the ordinary as to the grant or refusal of a faculty; and a faculty is on application to be granted if unopposed on payment of such fee (not exceeding two guineas) as is prescribed by the Rules and Orders, in respect of any alteration in or addition to the fabric of any church or in respect of any ornaments or furniture, not being contrary to law, made or existing in any church at the time of the passing of the Act (*ibid.*). As to the fees payable for faculties generally, see p. 548, *post*.

(l) *Sieveking v. Kingsford* (1866), 36 L. J. (ECCL.) 1; *Gardner v. Ellis* (1874), L. R. 4 A. & E. 265; *Bradford v. Fry* (1878), 4 P. D. 93. Where a petition has been presented for a faculty for the removal of additions introduced without a faculty and citation has issued thereon and a petition is presented for a confirmatory faculty legalising the additions, a fresh citation is not necessary (*Sieveking v. Kingsford*, *supra*; *Gardner v. Ellis*, *supra*).

(m) *Tetbury (Vicar) v. Churchwardens etc. of Same* (1885), cited [1892] P. 271, n. (2).

(n) *Bardin v. Calcott* (1789), 1 Hag. Con. 14, *per* Lord STOWELL (then Sir WILLIAM SCOTT), at p. 16.

(o) *St. Stephen, Walbrook (Rector) v. Sun Fire Office (Trustees)*, *supra*, at p. 108.

(p) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 71.

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(ii.) *Procedure to obtain Faculties.*

Petition. **1050.** Proceedings on an application for a faculty are instituted in the consistory court of the diocese, and are commenced by a petition, which is usually presented by the incumbent and churchwardens, with or without the addition of other parishioners (*r*) ; but it may be presented by any parishioner (*s*).

Consent of vestry. **1051.** The whole body of parishioners are interested in the church and churchyard (*t*), and, therefore, except in the case of an application for a faculty for the placing of a monument or tablet in the church or churchyard (*u*), or for the removal of an illegal ornament or structure in respect of which no option is permissible (*x*), the petition must ordinarily show that the application has been approved by the parishioners in vestry assembled (*a*).

Intervention of bishop. **1052.** The bishop cannot personally intervene in a matter requiring a faculty, and his doing so may lead to misapprehension and mistake (*b*).

Citation. **1053.** On presentation of the petition, unless the faculty prayed for would be manifestly illegal or otherwise objectionable, a citation is issued in general terms to all persons interested, and, if the incumbent or churchwardens are not parties to the petition, to those individuals personally, requiring them to appear and show cause if they oppose the faculty. If any illegality or other objection appears on the face of the petition, the applicants will be heard upon it *ex parte*, and the citation will only issue if they justify the petition. But if the petition appears *prima facie* to be in order, the citation will at once issue. Where parties are cited individually, it is served upon them personally, but a general citation is published by being affixed at or near the church door and remaining so affixed for the time prescribed by the rules in force in the diocese.

(*q*) *Huntley v. Russell* (1849), 13 Q. B. 572, 589.

(*r*) The concurrence of both churchwardens is not essential (*Bradford v. Fry* (1878), 4 P. D. 93, *per* Dr. ROBERTSON, at p. 99; *St. Botolph without Aldgate (Vicar and One Churchwarden) v. Parishioners of Same*, [1892] P. 161); and in a proper case a faculty will be granted in spite of the opposition of both churchwardens (*St. Anne's, Limehouse (Rector) v. Parishioners of Same*, [1901] P. 73).

(*s*) *Kensit v. St. Ethelburga, Bishopsgate Within (Rector)*, [1900] P. 80; *Davey v. Hinde*, [1901] P. 95; S. O., on second hearing, [1903] P. 221. In the case of *St. Margaret's, Westminster*, a member of Parliament may petition (*Vincent v. Eytton*, [1897] P. 1, 10).

(*t*) *St. Botolph without Aldgate (Vicar and One Churchwarden) v. Parishioners of Same*, [1892] P. 161, 167.

(*u*) *Maidman v. Malpas* (1794), 1 Hag. Con. 205.

(*x*) See cases cited in note (*g*), p. 545, *post*.

(*a*) *Groves v. Hornsey (Rector)* (1793), 1 Hag. Con. 188; *St. John's, Margate (Churchwardens) v. Parishioners* (1794), 1 Hag. Con. 198; *Clayton v. Dean* (1849), 7 Notes of Cases, 46, 53; *Jackson v. Singer* (1868), 37 L. J. (ECCL.) 9; *Evans v. Slack* (1869), 38 L. J. (ECCL.) 38. See pp. 545 *et seq.*, *post*.

(*b*) *Harper v. Forbes* (1859), 5 Jur. (N. S.) 275, *per* Dr. LUSHINGTON, at p. 276.

The citation is then returned with a certificate indorsed thereon of due service or publication, as the case may be (c).

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1054. A faculty is opposed by the entry of an appearance and subsequent proceedings according to the practice of the different consistory courts (d). It can only be opposed by persons having the same interest as would entitle them to apply for a faculty (e). Parishioners who do not appear in response to the application must be taken to assent to the application (f). Opposition.

(iii.) *Grant of Faculties.*

1055. A faculty will not be granted to sanction illegal ornaments or furniture (g), but will be granted as a matter of course to remove illegal furniture or ornaments, even though they were in the church at the time of its consecration (h). Where it is doubtful whether the grant of the faculty would contravene a statute, time should be given for proceedings in prohibition to be instituted (i). Principles governing grant or refusal of faculty.

Where no question of illegality is involved, the grant or refusal of a faculty is in the discretion of the court; but it must be a sound discretion, having due regard to times and circumstances and to the rights and interests of all parties concerned (k). If it is applied for by the incumbent and churchwardens, with the consent of the vestry, and is not opposed, it will ordinarily be granted in the absence of any serious objection (l). If it is opposed, the case will be tried and decided according to the merits (m). The attitude of the vestry, though it must always be ascertained, except with regard to monuments and tablets (n), and great weight is always attached

(c) Rules of the Consistory Court of London (Trist. 289 *et seq.*; Statutory Rules and Orders Revised, Vol. IV., Ecclesiastical Court, England, pp. 1 *et seq.*); Rules of the consistory courts of the different dioceses (Phillimore, Ecclesiastical Law, 2nd ed., Vol. II., pp. 998 *et seq.*; and the annual Diocesan Calendars or Directories of the various dioceses; see p. 520, *ante*).

(d) See note (u), p. 520, *ante*.

(e) See p. 544, *ante*; *Hansard v. St. Matthew, Bethnal Green (Parishioners)* (1878), 4 P. D. 46, 54, 55. A person on behalf of the bishop has no *locus standi* to oppose a faculty (*Lee v. Fagg* (1874), L. R. 6 P. C. 38).

(f) *St. John's, Margate (Churchwardens) v. Parishioners* (1794), 1 Hag. Con. 198, per Lord STOWELL (then Sir W. SCOTT), at p. 200.

(g) *St. Barnabas, Pimlico (Vicar) v. Bowron* (1873), Trist. 1, 16; *St. Ethelburga Faculty Case* (1878), Trist. 69, 71; *Re St. James the Great, Buxton, St. John the Baptist, Buxton (Vicar) v. Parishioners of Same*, [1907] P. 368, 376. As to what furniture and ornaments are illegal, see pp. 667 *et seq.*, *post*.

(h) *Westerton v. Liddell, Beal v. Liddell* (1855), Moore's Special Report, per Dr. LUSHINGTON, at p. 77; *Davey v. Hinde*, [1901] P. 95, 116.

(i) *Re Kerr*, [1894] P. 284, 293.

(k) *Woollocombe v. Ouldridge* (1825), 3 Add. 1, 5; *Butt v. Jones* (1829), 2 Hag. Ecc. 417, per Sir JOHN NICHOLL, at p. 424; *Sergeant v. Dale* (1875), Trist. 33, per Dr. TRISTRAM, at p. 37; *Egerton v. Odd Rode (All)*, [1894] P. 15; *St. James, Norland (Vicar) v. Parishioners of Same*, [1894] P. 256, 257, 258.

(l) *St. Augustine, Haggerstone, Faculty Case* (1877), Trist. 60, 63; *St. Ethelburga Faculty Case* (1878), Trist. 69; *Woodward v. Folkestone (Parishioners)* (1880), Trist. 177. A faculty for an object which, though not actually illegal, is inexpedient and likely to produce trouble, should be refused (*Rugg v. Kingsmill* (1863), 3 Moo. P. C. C. 78, 88).

(m) *Peck v. Trower* (1881), 7 P. D. 21.

(n) *Maidman v. Malpas* (1794), 1 Hag. Con. 205.

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to it, is not an absolutely determining factor in the case (o). The absence of strict legal form in the summoning or holding of the vestry will not be regarded as absolutely essential (p); and a faculty may be granted in spite of the disapproval of the vestry or of the majority of the parishioners (q), or may be refused in spite of their approval (r). Under special circumstances the votes of Church members and non-Church members of the vestry will be discriminated (s). Memorials of parishioners for or against the faculty may be taken into account, though they do not ordinarily weigh against the resolution of the vestry on the subject (t). A faculty has been granted without the consent of the select vestry of the civil parish (a) and for the church of a new ecclesiastical parish without the consent of the vestry of the civil parish of which it forms part (b).

Consents of
rector and
vicar.

1056. The consent of a vicar, where he is not the freeholder of the fabric or soil which will be affected by the faculty, is not essential to the grant of it (c), but the rights of a rector over the fabric of the chancel and other common law rights cannot be overridden by a faculty (d).

Miscellaneous
matters.

1057. A faculty will be granted, in a proper case, notwithstanding the opposition of persons interested in graves which will be affected by the proposed work (e).

On the hearing of an application for a faculty it may be necessary to decide whether any freehold rights will be affected by granting it (f).

(o) *Groves v. Hornsey (Rector)* (1793), 1 Hag. Con. 188, per Lord STOWELL (then Sir WILLIAM SCOTT), at p. 189; *Clayton v. Dean* (1849), 7 Notes of Cases, 46, 53.

(p) *Thomas v. Morris* (1823), 1 Add. 470.

(q) *Groves v. Hornsey (Rector)*, *supra*; *St. John's, Margate (Churchwardens) v. Parishioners* (1794), 1 Hag. Con. 198, 200; *Butterworth v. Walker* (1765), 3 Burr. 1689, 1692; *Nickalls v. Briscoe*, [1892] P. 269; *St. Anne's, Limehouse (Rector) v. Parishioners of Same*, [1901] P. 73.

(r) *Woodward v. Folkestone (Parishioners)* (1880), Trist. 177; *Peck v. Trower* (1881), 7 P. D. 21.

(s) *Tottenham (Vicar) v. Venn* (1874), L. R. 4 A. & E. 221.

(t) *Tetbury (Vicar) v. Churchwardens of Same* (1865), cited [1892] P. 271, n. (2); but see *Nickalls v. Briscoe*, *supra*, at p. 273, and per Lord PENZANCE, at p. 279.

(a) *Richmond (Vicar) and St. Matthias, Richmond (Chapelwardens) v. All Persons having Interest*, [1897] P. 70, 76; *St. Anne's, Limehouse (Rector) v. Parishioners of Same*, *supra*.

(b) *Re St. Mark's, Wimbledon, Wimbledon (Vicar and Churchwardens) v. Eden*, [1908] P. 167, 170.

(c) *Rich v. Bushnell* (1827), 4 Hag. Eco. 164, 173.

(d) *St. George, Hanover Square (Rector) v. Stenari* (1739), 2 Stra. 1126; *Maidman v. Malpas* (1794), 1 Hag. Con. 205, 211; *Rich v. Bushnell*, *supra*, at p. 172. But a rector cannot claim, as a matter of right, to make a vault under a chancel or affix a tablet on the walls (*ibid.*, at p. 171). If a faculty for work in the chancel, for which the rector's consent is necessary in law, is granted without that consent, the remedy lies not in prohibition, but in appeal (*Bulmer v. Hase* (1803), 3 East, 217). If the work is carried on without his consent, he can, in spite of the faculty, maintain an action of trespass against the party executing it (*ibid.*, at p. 220).

(e) *St. Botolph without Aldgate (Vicar and One Churchwarden) v. Parishioners of Same*, [1892] P. 161, 166 *et seq.*; *St. Andrew's, Hove (Vicar and Churchwardens) v. Mawn* (1894), cited [1895] P. 228 *et seq.*, n. (4).

(f) *Shotton v. Friend* (1689), 2 Salk. 547; *Waller v. Mountague* (1836), 1 Curt.

Where a faculty is granted, the work authorised must be done within a reasonable time (*g*).

A faculty for the erection of bells will not be granted where there is a risk of annoyance being caused by their being rung with unnecessary frequency or for an unnecessary length of time (*h*); and an agreement restricting the ringing of the bells will be sanctioned by a faculty (*i*).

A faculty may be granted subject to a reservation as to ordering the removal of the furniture for which it is granted if ornaments are afterwards introduced without a faculty or unlawful services are performed in the church (*j*).

A faculty has been granted to a corporation (*k*).

1058. Applicants for a faculty for alterations in a church or churchyard, except where it is applied for to redress a previous unauthorised alteration, pay the costs incurred by them in order to obtain it (*l*); but a party who unreasonably opposes the application is condemned in the costs occasioned by his opposition. Where, however, the opposition is reasonable, both parties are left to bear their own costs of the proceedings (*m*). Where the opposition of a party is partially successful, a proportion of his costs will be allowed against the applicants (*n*). Costs.

(iv.) *Appeals.*

1059. An appeal in a faculty case, as in other cases (*o*), lies from the consistory court to the provincial court (*p*), and thence to the Judicial Committee of the Privy Council (*q*). On an appeal to the provincial court an inhibition and citation will issue to the chancellor of the consistory court and the respondents to the appeal in the suit, inhibiting them from doing anything to the prejudice of the appellant pending the appeal (*r*). By the leave of the court and with the consent of all parties, additional parishioners may be allowed to intervene in the appeal for the purpose of praying for and obtaining a confirmatory faculty in connection with the matters in Procedure on appeal.

253, 260; *Knapp v. St. Mary, Willesden (Parishioners)* (1851), 2 Rob. Eccl. 358; *West Peckham (Vicar) v. Geary* (1889), Trist. 189, 215; and see note (*d*), p. 514, ante.

(*g*) *St. Jude, South Kensington (Vicar) v. Parishioners* (1877), Trist. 267, 270.

(*h*) *Ibid.*

(*i*) *St. Jude's, Hampstead* (1909), *Times*, August 6th.

(*j*) *St. Anne's, Limehouse (Rector) v. Parishioners of Same*, [1901] P. 73.

(*k*) *St. Nicholas, Leicester (Vicar) v. Langton*, [1899] P. 19, 35, 36; *St. Mary-le-Strand Churchyard* (1901), *Times*, March 5th.

(*l*) *Lightfoot v. Eastwood* (1889), Trist. 248, 263, 266.

(*m*) *St. Sepulchre (Vicar) v. St. Sepulchre (Churchwardens)* (1879), Trist. 92, 102; *Lightfoot v. Eastwood*, *supra*, at p. 266; *Davey v. Hinde*, [1901] P. 95, 125.

(*n*) *Tottenham (Vicar) v. Venn* (1874), Trist. 20, 32, 33.

(*o*) See pp. 500, 508, 511, ante.

(*p*) *Carl v. Marsh* (1737), 2 Stra. 1080; *Butt v. Jones* (1829), 2 Hag. Ecc. 417, 424; *Bradford v. Fry* (1878), 4 P. D. 93. For the Archdeacon Court Rules of September, 1903, as to appeals in faculty cases, see *Markham v. Shirebrook Overseers*, [1906] P. 262, n. (1).

(*q*) *Kest v. Smith* (1875), 1 P. D. 73. If the appeal is allowed, the suit is remitted to the Archdeacon Court to give effect to the decision (*ibid.*, at p. 80).

(*r*) *Bradford v. Fry*, *supra*, at p. 101.

SECT. 4.
Practice.

dispute in the suit (*s*). Fresh evidence may be admitted on the appeal (*t*). But after a decision has been given on the appeal, the case cannot be reopened on fresh facts being adduced (*a*). If a faculty has been refused in the consistory court, and that decision is reversed either by the provincial court or in the Judicial Committee of the Privy Council, the faculty may issue out of the provincial court (*b*), or the cause may be remitted to the consistory court in order that the faculty may issue thence (*c*).

(v.) *Enforcement of Faculties.*

Injunction. **1060.** An injunction can be obtained from the High Court of Justice against making an alteration in a church or churchyard without a faculty (*d*).

Disobedience. **1061.** Disobedience to a faculty, or action in excess of a faculty, will be censured by a monition requiring obedience or abstinence from the excess in future, and by an order to pay the costs of the proceedings instituted to remedy it (*e*). Deviations from the terms of a faculty are a contempt of court; but if innocently perpetrated they may be condoned on payment of the costs of proceedings taken to rectify them (*f*).

Default. **1062.** A faculty to a vicar and churchwardens to remove certain ornaments may provide that, in the event of their failing to do so within a specified time, the petitioners shall be at liberty to remove them (*g*).

(vi.) *Fees for Faculties.*

Fees. **1063.** The fee payable for a faculty, if unopposed, for such minor alterations as the chancellor of the diocese enumerates (*h*), or for the removal of glebe buildings (*i*), is £2 2s., and for other alterations in churches and churchyards £4 14s. 6d. (*j*). The fee for a

(*s*) *Bradford v. Fry* (1878), 4 P. D. 93, 102.

(*t*) *Re St. Anselm, Pinner*, [1901] P. 202, 211.

(*a*) *Bradford v. Fry*, *supra*, at pp. 111, 112.

(*b*) *Keet v. Smith* (1875), 1 P. D. 73, at p. 80; *Bradford v. Fry*, *supra*, at p. 111.

(*c*) *Re St. James the Great, Buxton, St. John the Baptist, Buxton (Vicar) v. Parishioners of Same*, [1907] P. 368, 381.

(*d*) *Marriott v. Tarpley* (1838), 9 Sim. 279; *Cardinall v. Molyneux* (1861), 4 De G. F. & J. 117, O. A. For remedies under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), see *ibid.*, ss. 8, 9, 13, 14; and pp. 529 *et seq.*, *ante*.

(*e*) *St. Pancras (Vestry) v. St. Martin-in-the-Fields (Vicar)* (1860), 6 Jur. (N. S.) 540; *Lee v. Herne (Vicar)* (1892), Trist. 217.

(*f*) *Lee v. Herne (Vicar)*, *supra*.

(*g*) *Davey v. Hinde*, [1903] P. 221, 237, 238; *Markham v. Shirebrook Overseers*, [1906] P. 239, 262.

(*h*) For the enumeration of these in the various dioceses, see the annual Diocesan Calendars or Directories.

See p. 543, *ante*.

Table of Ecclesiastical Fees settled pursuant to the provisions of the Pluralities Act (1 & 2 Vict. c. 106) and the Ecclesiastical Fees Act, 1867 (30 & 31 Vict. c. 136), and published in the *London Gazette*, June 2nd, 1906. As to the fee for a faculty directed to be applied for in a monition under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), see note (*h*), p. 543, *ante*.

faculty for the disinterment and removal of human remains varies in different dioceses (*k*).

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Practice.

(vii.) *Revocation and Modification of Faculties.*

1064. The grant of a pew to a parishioner and his family by faculty, if duly made, is irrevocable (*l*), unless it is of undue extent, or has been obtained fraudulently and surreptitiously (*m*). And generally, a faculty cannot be revoked even though it has been granted in error (*n*). But where a faculty is granted for movable seats, their position can afterwards be altered in case of complaint (*o*). And a faculty for furniture may reserve power to the court to order the removal of the furniture in the event of ornaments being introduced without a faculty or of any unlawful service being performed (*p*). Revocation etc.

A cause of faculty will not be reopened on new facts being adduced after the order in it has been made, except for very strong reasons (*q*).

An article of furniture or ornament introduced under a faculty may be removed under another faculty (*r*).

Part IV.—Clergy.

SECT. 1.—Orders.

SUB-SECT. 1.—Ordination.

1065. There are three orders of ministers (*a*) in the Church of England—bishops, priests, and deacons. Before they can execute the functions of those orders they must, unless they have already had episcopal consecration or ordination, be called, tried, examined Orders of the ministry and admission thereto.

(*k*) See note (*n*), p. 520, *ante*.

(*l*) *Fuller v. Lane* (1825), 2 Add. 419, *per* Sir JOHN NICHOLL, at p. 431. But in the case of the erection of a new church or other change of circumstances the position of a faculty pew or vault may be changed, or the right to the faculty pew may be transferred to the new church (*West Peckham (Vicar) v. Geary* (1889), Trist. 189, *per* Dr. TRISTRAM, at pp. 207, 208; *Lightfoot v. Eastwood* (1889), Trist. 248; *St. Botolph without Aldgate (Vicar and One Churchwarden) v. Parishioners of Same*, [1892] P. 161, *per* Dr. TRISTRAM, at pp. 167, 168).

(*m*) *Butt v. Jones* (1829), 2 Hag. Eco. 417.

(*n*) *London County Council v. Dundas*, [1904] P. 1.

(*o*) *Eld v. Perry* (1865), 11 Jur. (N. S.) 228, 229.

(*p*) *St. Anne's, Limehouse (Rector) v. Parishioners of Same*, [1901] P. 73.

(*q*) *Bradford v. Fry* (1878), 4 P. D. 93, *per* Lord PENZANCE, at p. 110.

(*r*) *St. John's, Margate (Churchwardens) v. Parishioners of Same* (1794), 1 Hag. Con. 198, *per* Lord STOWELL (then Sir WILLIAM SCOTT), at p. 202.

(*a*) In stat. (1571) 13 Eliz. c. 12, s. 4, and *Canones Ecclesiastici* (1603), 31, 32, the word "minister" means a priest, in contrast to a deacon. But it may be applied to a person in any order of the ministry (*Canones Ecclesiastici* (1603), 33; *Read v. Lincoln (Bishop)* (1889), 14 P. D. 148). The word *sacerdotium* may include the diaconate, though it more properly refers to the priesthood (*De University College, Oxford* (1848), 2 Ph. 521, *per* Lord COTTENHAM, L.O., at

SECT. 1. Orders. — Ages of admission.	and admitted thereto according to the Form and Manner of Making, Ordaining, and Consecrating of Bishops, Priests, and Deacons authorised by the Act of Uniformity, 1662 (b). The minimum age for a bishop is thirty years; for a priest, twenty-four years; and for a deacon, unless he have a faculty from the Archbishop of Canterbury, twenty-three years (c).
Time and place of ordination.	1066. The proper times for ordination are the Sundays immediately following the four Ember weeks (d), but on urgent occasions it may take place on some other Sunday or holy day (e). It should be held in the cathedral or parish church in the place where the bishop resides, in the time of divine service, in the presence of the archdeacon, and of the dean and two prebendaries, or of four other beneficed or licensed clergymen being masters of arts (f).
Title to orders.	1067. A person desiring ordination either (1) must produce to the bishop a presentation of himself to some ecclesiastical preferment then void in the diocese, or a certificate that he is provided with a church in the diocese where he may attend the cure of souls, or a vacant minister's place in the cathedral church of the diocese or some other collegiate church situate therein, or that he is a fellow or about to be a fellow or conduct or chaplain in some college in Oxford or Cambridge; or (2) must be a master of arts of five years' standing living of his own charge in either of those universities; or (3) must be about to be admitted by the bishop to some benefice or curacy then void. A bishop who ordains a person having none of these titles is liable to maintain him until he is preferred to some benefice, on pain of suspension from conferring orders for the space of one year (g).
Examination and letters testimonial.	1068. Before a person is ordained he must be examined and give proof as to his faith and learning, and must produce letters testimonial of his good life and character under the seal of some college in Oxford or Cambridge where he has resided, or from three or four responsible clergymen with the corroboration of other credible persons who have known his life and behaviour during the preceding three years (h).

(b) 14 Car. 2, c. 4. See the Preface to the Form of Ordination and Consecration. The term "holy orders" implies episcopal ordination (*A.-G. v. Glasgow College* (1846), 10 Jur. 676); *St. Albans (Bishop) v. Fillingham*, [1906] P. 163).

(c) Preface to the Form of Ordination and Consecration; stat. (1571) 13 Eliz. c. 12, s. 4; *Canones Ecclesiastici* (1603), 34; *Roberts v. Pain* (1685), 3 Mod. Rep. 67; *Gib. Cod.* 145, 146; Clergy Ordination Act, 1804 (44 Geo. 3. c. 43). For bishops, see pp. 396 *et seq.*, *ante*.

(d) Namely, the weeks containing the Wednesday, Friday and Saturday, after the First Sunday in Lent, the Feast of Pentecost, September 14, and December 13 (*Canones Ecclesiastici* (1603), 31; *Gib. Cod.* 139, 252).

(e) Preface to the Form of Ordination and Consecration; Rubric at the end of the Form and Manner of Making of Deacons; *Gib. Cod.* 139.

(f) *Canones Ecclesiastici* (1603), 31; *Gib. Cod.* 139, 140.

(g) *Canones Ecclesiastici* (1603), 33; *Gib. Cod.* 140, 141; *Martyn v. Hind* (1776), 2 Cowp. 437, *per Lord Mansfield*, O.J., at pp. 442, 443.

(h) Stat. (1571) 13 Eliz. c. 12, s. 4; *Canones Ecclesiastici* (1603), 34, 35; Preface to the Form of Ordination and Consecration; *Gib. Cod.* 140, 147. A notice, called, from its opening words, a *si quis*, is also published in the

1069. If the person desiring to be ordained by a bishop is not of the bishop's own diocese or of one of the two Universities of Oxford and Cambridge, he must bring from the bishop of his own diocese letters dimissory authorising his ordination (*i*).

SECT. I.
Orders.

Letters
dimissory.

1070. A bastard was formerly incapable of being ordained, except under a dispensation; and if he was so ordained, his illegitimacy was a good ground for refusing to admit him to a benefice. But these disqualifications are now to a certain extent obsolete (*j*).

Illegitimacy
of candidate.

1071. A bishop has an absolute discretion as to whether he will ordain a person or examine him for ordination, and need not assign any reason for refusing to do so (*k*).

Ordination
at discretion
of bishop.

1072. Every person about to be ordained priest or deacon must, before ordination, in the presence of the bishop by whom he is to be ordained, make and subscribe, in the prescribed form, a declaration of assent to the Thirty-nine Articles and Book of Common Prayer, and of the Ordering of Bishops, Priests and Deacons, and of belief that the doctrine of the Church, as therein set forth, is agreeable to the Word of God, and of intention to use the form prescribed in that book in public prayer and administering the sacraments, and also take and subscribe the oath of allegiance, and in some dioceses the oath of canonical obedience to the bishop (*l*).

Declaration
and oaths.

1073. If any person directly or indirectly receives or agrees to receive any money or profit for effecting or promising the ordination of any clerk, beyond the lawful fees (*m*), he is to forfeit the sum

Penalties for
corrupt
ordination.

church of the parish where the person to be ordained resides, that if anyone knows of any just cause for which the person ought not to be admitted to holy orders, he is to declare the same or signify the same to the bishop (Gib. Cod. 147; Burn, Ecclesiastical Law, Vol. III., p. 49). The fact of a person having taken part in excessive ritual beyond what is sanctioned by law is no just cause against his being ordained (*Kensit v. St. Paul's (Dean and Chapter)*, [1905] 2 K. B. 249).

(*i*) Canones Ecclesiastici (1603), 34; Gib. Cod. 142—144.

(*j*) *Specut's Case* (1590), 5 Co. Rep. 57 a, 58 a; Watson, Clergyman's Law, 4th ed., p. 145; 1 Bl. Com. 459; *Re Griffith* (1884), 9 P. D. 63; *Kensit v. St. Paul's (Dean and Chapter)*, [1905] 2 K. B. 249, 257. In practice, a dispensation from the Archbishop of Canterbury is still usually obtained for the ordination of a bastard.

(*k*) Burn, Ecclesiastical Law, Vol. III., pp. 49, 50; *R. v. Dublin (Archbishop)* (1833), Alc. & N. 244.

(*l*) Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), ss. 1, 4, 11, 12; Canon Ecclesiasticus (1865); Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), ss. 2, 8, 9. As to the oath of canonical obedience, see *Long v. Cape Town (Bishop)* (1863), 1 Moo. P. O. O. (N. S.) 411, 448, 465. In some dioceses this oath is only taken on admission to a benefice or curacy. Where it is taken on an ordination under letters dimissory, it should be of obedience to the bishop who has issued the letters.

(*m*) The fees for ordination are 5s. to the registrar or other officer by usage performing the duty, and £2 2s. to the bishop's secretary, being a total of £2 7s. See Table of Ecclesiastical Fees settled by the Archbishop of Canterbury, the Lord Chancellor, and the Archbishop of York, and submitted to the Privy Council on June 2, 1908, pursuant to the Pluralities Act, 1838 (1 & 2 Vict. c. 196), and the Ecclesiastical Fees Act, 1867 (30 & 31 Vict. c. 135); see *London Gazette*, June 2, 1908. In all cases the tables of fees have to be submitted to His Majesty's Privy Council, who may disallow the same or any part thereof.

SECT. 1.
Orders.

of £40. The clerk so corruptly ordained is to forfeit the sum of £10; and if within seven years after his corrupt ordination he takes any benefice or other ecclesiastical preferment, such benefice or preferment will, immediately after his admission thereto, become void as if he were dead (*n*). A bishop who takes money for admitting to holy orders is guilty of simony and is liable to deprivation (*o*).

Letters of
orders.

1074. After ordination, letters of orders, under the seal of the bishop, are issued to the person ordained as a record of the transaction. He may be required to produce them at the visitation of the bishop or archdeacon in whose diocese or archdeaconry he is officiating (*p*). But they are not a deed, and confer nothing, since the ordination is complete without them (*q*).

Indelibility
of orders.

1075. A clerk cannot divest himself of his orders, except under the provisions of the Clerical Disabilities Act, 1870, but he may be deposed therefrom by a bishop on sufficiently grave cause (*r*).

SUB-SECT. 2.—*Deacons.*

Functions.

1076. The functions of a deacon in the church where he is appointed to serve are to assist the priest in divine service, and specially when he administers the Holy Communion, and to help him in the distribution thereof, and to read the Holy Scriptures and homilies in the church; to instruct the youth in the Catechism; to baptize infants in the absence of the priest, and to preach, if he be admitted thereto by the bishop; and, where provision is so made, to search for the sick, poor, and impotent people of the parish, and report them to the incumbent with a view to their being relieved by the alms of the parishioners and otherwise (*s*). A deacon may also perform the burial service and solemnise marriage, although marriage by a priest is more canonically correct (*t*).

Duration,
and admission
to priest's
orders.

1077. A deacon must continue in that office for a whole year, unless the bishop for reasonable causes decides otherwise, in order that he may become perfect and expert in matters of ecclesiastical administration; and if he is found faithful and diligent in the

Such submission to the Privy Council is to be gazetted, and if within three months the same is not disallowed, such fees will be lawful fees, and thenceforward such fees and none other (subject to subsequent alterations) may be demanded or received by the respective officers becoming entitled thereto. The statutes also contain certain restrictions on the amount of the fees. The fees payable to apparitors, sealers, or record keepers cease on the death or resignation of the persons who held the office on 10th December, 1895.

(*n*) Stat. (1589) 31 Eliz. c. 6, s. 9.

(*o*) *St. David's (Bishop) v. Lucy* (1699), Carth. 484.

(*p*) *Canones Ecclesiastici* (1603), 137; *Gib. Cod.* 959.

(*q*) *R. v. Morton* (1873), L. R. 2 O. C. R. 22. Forging them is not a felony (*ibid.*).

(*r*) *Canones Ecclesiastici* (1603), 76; *Barnes v. Shore* (1846), 1 Rob. Eccl. 382; S. C. on rule for prohibition, 8 Q. B. 640. For deposition from holy orders, see p. 539, *ante*. As to relinquishment of the privileges and disabilities of a clerk under the Clerical Disabilities Act, 1870 (33 & 34 Vict. c. 91), see p. 558, *post*.

(*s*) *Form and Manner of Making of Deacons.*

(*t*) *Watson, Clergyman's Law*, 4th ed., p. 146; *R. v. Millis* (1844), 10 Cl. & Fin. 534, 717, 746, 750, 786, 810, 859, 860, H. L.

office, he may then be admitted to the priesthood. But in no case can a person be ordained both deacon and priest on the same day (a).

SECT. 1.
Orders.

SUB-SECT. 3.—*Priests.*

1078. A priest by his ordination receives authority to preach the Word of God, and to administer the holy sacraments in the congregation where he is lawfully appointed to discharge those functions (b). No person is capable of being admitted to any benefice or other ecclesiastical preferment or dignity, nor may he presume to consecrate and administer the sacrament of the Lord's Supper, before he has been episcopally ordained priest, under a penalty of £100 for every offence, and of being disabled for one whole year from being admitted into priest's orders (c).

Functions.

SUB-SECT. 4.—*Colonial and Extraneous Orders.*

1079. For the purpose of ministering to subjects or citizens of countries outside the King's dominions inhabiting and residing in those countries, who profess the public worship of Almighty God according to the liturgy of the Church of England, and desire that the Word of God and the sacraments should continue to be ministered to them according to that liturgy, persons who are subjects or citizens of those countries may be admitted to the order of deacon or priest by the Bishop of London, or any bishop appointed by him, without being required to take the oath of allegiance (d). The letters of orders in such cases must state the name of the person ordained, with the country of which he is a

Ordination of
aliens for
ministrations
out of the
King's
dominions.

(a) *Canones Ecclesiastici* (1603), 32; Rubric at the end of the Form and Manner of Making of Deacons.

(b) *Form and Manner of Ordering of Priests*; Watson, *Clergyman's Law*, 4th ed., p. 147. At his ordination as priest a clergyman solemnly promises (1) to instruct the people committed to his charge out of the Holy Scriptures and to teach nothing, as required of necessity to eternal salvation but that which he is persuaded may be concluded and proved by them; (2) to give his faithful diligence always so to minister the doctrine and sacraments and the discipline of Christ as the Lord has commanded, and as this Church and realm has received the same, according to the commandments of God, and to teach the people committed to his cure and charge with all diligence to keep and observe the same; (3) to be ready with all faithful diligence to banish and drive away all erroneous and strange doctrines contrary to God's Word and to use both public and private monitions and exhortations as well to the sick as to the whole within his care, as need requires and occasion is given; (4) to be diligent in prayers and in reading of the Holy Scriptures, and in such studies as help to the knowledge thereof, laying aside the study of the world and the flesh; (5) to be diligent in framing and fashioning himself and his family according to the doctrine of Christ, and in making both himself and them, as much as in him lies, wholesome examples and patterns to the flock of Christ; (6) to maintain and set forward, as much as in him lies, quietness, peace and love among all Christian people and especially among those committed to his charge; and (7) reverently to obey his ordinary and other chief ministers unto whom is committed the charge and government over him; following with a glad mind and will their godly admonitions and submitting himself to their godly judgments (*Form and Manner of Ordering of Priests*).

(c) *Act of Uniformity*, 1662 (14 Car. 2, c. 4), ss. 10, 11.

(d) *Ordination of Aliens Act*, 1784 (24 Geo. 3, sess. 2, c. 35), s.

**SMOT. 1.
Orders.**

subject or citizen, and the fact of his not having taken the oath of allegiance (*e*).

Ordination
for service
in the
colonies etc.

1080. Either of the two archbishops or the Bishop of London, or any bishop specially authorised by any one of them, may ordain as deacon or priest a person whom upon examination he deems qualified, specially for the purpose of undertaking the cure of souls or officiating in any spiritual capacity in the King's colonies or foreign possessions and residing therein. A declaration of such purpose and a written engagement to perform it is to be a sufficient title for the ordination; and the letters of orders must state that the person has been ordained for the cure of souls in the King's foreign possessions (*f*).

Restrictions
on colonial
and foreign
clergy.

1081. Until he obtains the archiepiscopal licence hereafter mentioned, a person who has been ordained deacon or priest for ministrations out of the King's dominions, or in the King's colonies or foreign possessions, or who has been ordained deacon or priest by any bishop other than a bishop of a diocese in the Church of England or the Church of Ireland, except in pursuance of a request and commission under the Colonial Bishops Act, 1852 (*g*), as amended by the Colonial Bishops Act, 1853 (*h*), (*i*) cannot, unless he holds or has previously held preferment or a curacy in England, officiate as deacon or priest in any church or chapel in England without the written permission of the archbishop of the province, and without also making and subscribing a declaration of assent similar to that contained in the Clerical Subscription Act, 1865 (*i*), but as to his intention to use the form prescribed in the Prayer Book, limited to the time of his ministering in England; and (*ii*) is not entitled to be admitted to a benefice or other ecclesiastical preferment in England or to act as curate therein without the previous written consent of the bishop of the diocese (*j*). But any such person so holding ecclesiastical preferment, or acting as curate in any diocese in England, may, with the written consent of the bishop, after having held ecclesiastical preferment or acted as curate for a period or periods exceeding in the aggregate two years, request the archbishop of the province to give him a licence in the prescribed form to exercise his office of priest or deacon, as the case may be; and, if the archbishop thinks fit to issue the licence, it is to be registered in the registry of the province, and the person receiving it will thereafter be in the same position as to rights and

e) Ordination of Aliens Act, 1784 (24 Geo. 3, sess. 2, c. 35), s. 3.

f) Ordinations for Colonies Act, 1819 (59 Geo. 3, c. 60), s. 1.

g) 15 & 16 Vict. c. 52.

h) 16 & 17 Vict. c. 49.

i) 28 & 29 Vict. c. 122, s. 1; see p. 551, *ante*.

j) Colonial Clergy Act, 1874 (37 & 38 Vict. c. 77), ss. 3, 4, 6—9. A person who commits the offence of officiating in any church or chapel in England contrary to the provisions of the Act, and the incumbent or curate of any church or chapel who knowingly allows such offence to be committed therein, is liable to forfeit, in respect of each offence, £10 to the Governors of Queen Anne's Bounty, recoverable by action brought within six months by the treasurer of the Bounty in the High Court of Justice (*ibid.*, s. 7).

advantages and duties and liabilities as if he had been ordained for ministering in England (*k*).

SECT. 1.
Orders.

Restrictions
on Scottish
clergy.

1082. A person ordained by a bishop of the Protestant Episcopal Church in Scotland, not holding or having held a benefice or other ecclesiastical preferment in England or Ireland, (i.) is liable to forfeit £10 to the Governors of Queen Anne's Bounty if he knowingly officiates on more than one day within three months in any church or chapel in any diocese in England without notifying the same to the bishop of the diocese, or officiates contrary to any injunction under the hand and seal of the bishop (*l*); (ii.) is not entitled to be admitted to any benefice or other ecclesiastical preferment in England without the consent and approbation of the bishop of the diocese in which it is situated, which the bishop may refuse without assigning any reason; and (iii.) if he seeks to be admitted to any such benefice or preferment, or to be licensed to any curacy, must, before being admitted or licensed, make and subscribe before the bishop the declaration and subscription required by law on ordination by a bishop of the Church of England (*m*).

SECT. 2.—*Status*.

SUB-SECT. 1.—*Privileges*.

1083. The clergy as such have always had certain privileges, recognised by law (*n*).

General
privileges.

They are privileged from arrest on civil process while going to and attending and returning from an episcopal visitation (*o*); and the clergy summoned to Convocation have the same liberty and immunity in coming, attending, and returning as the peers and commons summoned to Parliament (*p*).

Personal
protection.

1084. A person obstructing or attempting to obstruct by threats or force, or striking or offering violence to, or, under pretence of a civil process, arresting a clergyman who is officiating in a church, chapel or other place of divine worship, or is performing his duty in a burial in a churchyard or burial place or, to the knowledge of the offender, is either about so to do or is on his way so to do or is returning from so doing, is guilty of a misdemeanour punishable with imprisonment for not exceeding two years with or without hard labour (*q*).

In perform-
ing clerical
duties.

(*k*) Colonial Clergy Act, 1874 (37 & 38 Vict. c. 77), s. 5.

(*l*) Episcopal Church (Scotland) Act, 1864 (27 & 28 Vict. c. 94), s. 6. The penalty is recoverable by action of debt brought in the name of the treasurer of the Bounty in the High Court of Justice in England or in the Court of Session in Scotland at the suit of the public prosecutor (*ibid.*).

(*m*) *Ibid.*, s. 5.

(*n*) Stat. (1351) 25 Edw. 3, stat. 6. The title "reverend" is not by law confined to persons in holy orders (*Keet v. Smith* (1875), 1 P. D. 73, P. C.). As to "holy orders," see note (*b*), p. 550, *ante*.

(*o*) *McGeath v. Geraghty* (1866), 15 W. R. 127; *Blane v. Geraghty* (1866), *ibid.* 133.

(*p*) Stat. (1429) 8 Hen. 6, c. 1.

(*q*) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 36; see also pp. 663 *et seq.*, *post*, and title CRIMINAL LAW AND PROCEDURE, Vol. IX.,

SECT. 2.

Status.

Exemption
from tolls.

1085. No toll is to be taken on any turnpike road from any person going to or returning from his usual place of religious worship tolerated by law on Sunday or any day on which divine service is by authority ordered to be celebrated; nor from any inhabitant of a parish, township, or place going to or returning from attending the funeral of a person who dies and is buried in the parish, township, or hamlet in which the turnpike road lies; nor from any rector, vicar, or curate going to or returning from visiting any sick parishioner or on other parochial duty within his parish (r).

Extent of
liability for
parochial
action and
sermons.

1086. The conduct of a clerk with reference to a special charity in his parish is not a matter of public interest on which fair public discussion and criticism are permissible under the law of libel (s). But a sermon by him is so, if printed and published, and probably without being printed or published (t). So, too, is a dispute between an incumbent and his churchwarden as to what he allows to be done during divine service and the uses to which he puts the church or vestry (a).

Privileges as
to execution
and distress.

1087. Although a clerk may be made bankrupt or have a judgment entered against him for debt, possession of the property and profits of any benefice which he holds can only be obtained under a warrant of sequestration issued by the bishop (b). The beasts of a beneficed clerk are not to be taken in distress in the highway nor upon the ancient glebe lands of his benefice (c).

Exemption
from secular

1088. Clerks are exempt from serving on juries (d) or in the militia (e), and generally from the obligation to serve in any secular office or capacity (f).

SUB-SECT. 2.—Disabilities.

Incapacity
to sit in
House of
Commons.

1089. A priest or deacon cannot be elected or sit as a member of the House of Commons, and is liable to forfeit the sum

p. 478. As to privilege from arrest, see 12 Co. Rep. 100; and as to priests in ordinary of the chapels royal, see p. 652, *post*.

(r) Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), s. 32. A temporary curate serving during a vacancy in the benefice is within this enactment (*Temple v. Dickinson* (1858), 1 E. & E. 34). The enactment extends to a turnpike gate outside the parish in which the duty is performed (*ibid.*), and the privilege is not lost by there being other persons in the carriage (*Layard v. Ovey* (1868), L. R. 3 Q. B. 415). But a curate of one parish was held not to be exempt from toll while going to officiate temporarily, without the licence or permission of the bishop, in another neighbouring parish during the absence of the incumbent (*Brunskill v. Watson* (1868), L. R. 3 Q. B. 418).

(s) *Gathercole v. Miall* (1846), 15 M. & W. 319.

(t) *Ibid.*, at pp. 333, 337—339, 342, 345; *Kelly v. Sherlock* (1866), L. R. 1 Q. B. 686.

(a) *Kelly v. Tintling* (1865), L. R. 1 Q. B. 699.

(b) 2 Co. Inst. 4; see pp. 616 *et seq.*, *post*.

(c) Stat. (1315) 9 Edw. 2, stat. 1 (*Articuli Cleri*), c. 9; 2 Co. Inst. 4.

(d) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9, Sched. In *Deecher's Case* (1577), 4 Leon. 190, a person who was ordained after being impanelled as a jurymen was compelled to serve on the jury.

(e) Militia Act, 1802 (42 Geo. 3, c. 90), s. 43.

(f) Co. Litt. 96 a; 2 Co. Inst. 3.

of £500 for every day during which he presumes to sit or vote in that House (*g*).

SECT. 2.
Status.

1090. A person in holy orders cannot be a mayor, alderman or councillor of a municipal borough under the Municipal Corporations Acts (*h*). But he may be an alderman or councillor of a county council (*i*), and a mayor, alderman or councillor of a metropolitan borough (*k*), and a member of the education committee of a local education authority (*l*).

Municipal boroughs and metropolitan and county councils.

1091. A clerk is prohibited from resorting to taverns or ale-houses, except for his own honest necessities, and from boarding or lodging therein. He must not give himself to any base or servile labour or to drinking or riot, or to spending his time idly by day or by night, or to playing at dice, cards, or tables, or any other unlawful game; but at all convenient times he is to hear or read the Holy Scriptures, or occupy himself with some other honest study or exercise, always doing things which appertain to honesty and endeavouring to profit the Church of God (*m*).

Restrictions as to general mode of life.

1092. A clerk who holds any cathedral preferment, benefice, curacy, or lectureship, or who is licensed or otherwise allowed to perform the duties of any ecclesiastical office, is subject to certain further restrictions as to engaging in secular pursuits. He must not take to farm for life, or for a term of years, or at will, more than eighty acres of land for the purpose of his own occupation, user, or cultivation, without a special written permission from the bishop, specifying the number of years, not exceeding seven, for which the permission is given; and will forfeit for every acre so taken to farm without permission, above eighty acres, the sum of 40s. for every year in which the same is so occupied, used, or cultivated by him (*n*).

Further restrictions.

As to farming.

With the exceptions hereafter stated he must not either by himself or by any other person for him, or to his use, engage in or carry on any trade or dealing for gain or profit, or deal in any goods or merchandise, unless such trading or dealing has been or is carried on by or on behalf of more than six partners (*o*), or such

As to trading or dealing.

(*g*) House of Commons (Clergy Disqualification) Act, 1801 (41 Geo. 3, c. 63). But see p. 558, *post*, as to relinquishment of orders.

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 12 (1) (b), 14 (3), 15 (1).

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2 (2) (a).

(*k*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (4) (5).

(*l*) Education Act, 1902 (2 Edw. 7, c. 42), s. 17.

(*m*) *Canones Ecclesiastici* (1603), 75; Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 12.

(*n*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 28. As to enforcing the forfeiture, see p. 540, *ante*.

(*o*) No association or co-partnership consisting of more than six members or shareholders formed for the purpose of being engaged in and carrying on the business of banking or any other trade or dealing for profit, by means of boards of directors or managers, committees or other officers, acting on behalf of all the members or shareholders thereof or persons otherwise interested therein, is illegal or void or occasions any forfeiture by reason only of its having, as a member, partner or shareholder thereof, or as a person otherwise interested

SECT. 2.
Status.

Exceptions.

trade or dealing, or a share therein, has devolved upon him or upon some other person for him or for his use under a will, or by inheritance, intestacy, settlement, marriage, or bankruptcy; but in no such case may he act as a director or managing partner, or carry on the trade or dealing in person (*p*). By way of exceptions, however, to the foregoing prohibition:—(1) He may keep a school or seminary, and act as schoolmaster or tutor or instructor, and be concerned or engaged in giving instruction or education for profit or reward; and may buy and sell and do any other thing in relation to the management of any such school, seminary, or employment. (2) He may buy any goods or articles to be used for his family or in his household, and after so buying them may, even at an advanced price, sell the same or any parts thereof which he does not want or choose to keep. (3) He may dispose of books or other works to or by means of a bookseller or publisher. (4) He may be a manager, director, partner, or shareholder in any benefit society, or fire or life assurance society. (5) He may buy and sell again, for gain or profit, cattle, corn, and other articles necessary or convenient to be bought, sold, or kept by or for him, or to his use for the occupation, manuring, improving, pasturage, or profit of any glebe, demesne or other lands which may be lawfully held, occupied, possessed, or enjoyed by or for him or to his use; but he must not buy or sell any such cattle, corn, or other articles in person in any market, fair, or place of public sale. (6) He may sell minerals which are the produce of mines situated on his own lands (*q*).

**Contracts
not invali-
dated by
illegal trading
or dealing.**

1093. A contract is not invalidated by reason only of its having been entered into by a clerk illegally trading or dealing, either solely or jointly with others; and it may be enforced by or against such clerk, either solely or jointly with others, as the case may be, in the same way as if no clerk had been party to it (*r*).

SUB-SECT. 3.—Relinquishment of Status.

**Deed of
relinquish-
ment.**

1094. A priest or deacon, after he has resigned every or any ecclesiastical preferment held by him, may execute a deed in the form set out in the Second Schedule to the Clerical Disabilities Act, 1870 (*s*), relinquishing all rights, privileges, advantages, and exemptions by law belonging to his office, and may cause the same to be enrolled in the Central Office of the Supreme Court of Judicature, and deliver an office copy of the enrolment, with a statement of his place of residence, to the bishop of the diocese in which he last held a preferment, or, if he has not held any preferment, to the bishop of the diocese in which he is resident; and he is to give notice of his having done so to the archbishop of the province in which the

therein, a clerk who holds such preferment or post or is licensed or otherwise allowed to perform such duties as above mentioned; but no such clerk may act as a director or managing partner or carry on the trade or dealing in person (Trading Partnerships Act, 1841 (4 & 5 Vict. c. 14), s. 1).

(*p*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 29.

(*q*) *Ibid.*, s. 30.

(*r*) *Ibid.*, s. 31; *Ex parte Meymot* (1747), 1 Atk. 196; *Lewis v. Bright* (1856), 4 E. & B. 917.

(*s*) 33 & 34 Vict. c. 91.

SECT. 2.
Status.
—

bishop's diocese is situated (*t*). At the expiration of six months after the office copy of the enrolment has been delivered to the bishop, he or his successor in office, on the application of the relinquishing clerk, is to cause the deed to be recorded in the registry of the diocese (*a*). But if within such six months the bishop, or his successor, has notice of proceedings against the relinquishing clerk as a person who has been admitted to the office of minister in the Church of England, the deed, on the application of the clerk, is to be so recorded upon the termination of the proceedings by a definitive sentence or an interlocutory decree having the effect of definitive sentence and execution thereof, and no sooner (*b*).

1095. On the deed being so recorded, the clerk who has executed it becomes incapable of officiating or acting as a minister of the Church of England and of holding any preferment therein, and ceases to enjoy the rights, privileges, and exemptions attached to the office of such minister; and every licence, office, and place held by him, which must by law be held by a minister of the Church of England, becomes *ipso facto* void; and he also becomes discharged and free from all disabilities, disqualifications, and restraints to which he would otherwise by force of the House of Commons (Clergy Disqualification) Act, 1801 (*c*), the 12th section of the Municipal Corporations Act, 1882 (*d*), and the Church Discipline Act, 1840 (*e*), or of any other law, have been subject as a person admitted to the office of minister in the Church of England, and from all jurisdiction, penalties, censures, and proceedings to which he would or might otherwise, under any of the same three enactments or any other law, have been amenable or liable in consequence of his having been so admitted, or of anything done or omitted by him after such admission (*f*). But he and his estate are not relieved from any liability in respect of dilapidations or from any debt or other pecuniary liability incurred or accrued before or after his execution of the deed of relinquishment (*g*).

Effect of
relinquish-
ment.SECT. 3.—*Beneficed Clergy.*SUB-SECT. 1.—*Nature and Tenure of Benefices.*

1096. The term "benefice" is in common practice confined to (1) rectories (or parsonages) with cure of souls; (2) vicarages;

Classification
of benefices.

(*t*) Clerical Disabilities Act, 1870 (33 & 34 Vict. c. 91), s. 3. Before delivering the copy to the bishop the clerk is at liberty to abandon the proceedings and to have the enrolment of the deed vacated (*Ex parte A Clergyman* (1873), L. R. 15 Eq. 154).

(*a*) *Ibid.*, s. 4. A copy of the record is to be given to the clerk on payment of a fee not exceeding 10s. for the recording and a copy; and a copy of the record, certified by the registrar, is evidence of the due execution, enrolment and recording of the deed, and of the fulfilment of the requirements of the Act in relation thereto (*ibid.*, s. 7).

(*b*) *Ibid.*, s. 5. For the purpose of any such proceedings the service of a citation, notice, or other document at the place stated by the clerk to the bishop as his place of residence is a good service (*ibid.*, s. 6).

(*c*) 41 Geo. 3, c. 63.

(*d*) 45 & 46 Vict. c. 50.

(*e*) 3 & 4 Vict. c. 86.

(*f*) Clerical Disabilities Act, 1870 (33 & 34 Vict. c. 91), s. 4.

(*g*) *Ibid.*, s. 8.

SECT. 8.
Beneficed
Clergy.

(3) perpetual curacies; (4) chapelries or districts belonging or reputed to belong, or annexed or reputed to be annexed, to any church or chapel, and districts formed for ecclesiastical purposes under statutory authority; (5) independent churches or chapels without districts; and (6) sinecure benefices (*h*). The holder of a benefice is called the incumbent, or minister (*i*); and, according to the nature of his benefice, he is also styled rector or parson (*k*), vicar, or perpetual curate.

Rectories.

1097. Where the whole of the tithe and glebe land of a parish has been always attached to the benefice for the maintenance of the minister or governor, the benefice is a rectory or parsonage with cure (or care) of souls (*l*). Other benefices have at different times been made rectories by statute (*m*).

(*h*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 13 (1); Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 124; Pluralities Act, 1850 (13 & 14 Vict. c. 98), s. 3; Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 3; Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44), s. 2; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 15 (4). "Benefice" was originally a lay term and was applied to grants of land made to soldiers or feudal vassals (Watson, *Clergyman's Law*, 4th ed., p. 1). In its wider sense it includes cathedral and capitular and other ecclesiastical dignities and preferments (3 Co. Inst. 155); as to which see pp. 416 *et seq.*, *ante*. An office is not rendered a spiritual or ecclesiastical benefice by the mere fact of its being only tenable by a person in holy orders. It is a spiritual or lay office according to the object for which it was established (*A.-G. v. St. Cross Hospital* (1853), 17 Beav. 435, *per* Lord (then Sir JOHN) ROMILLY, at p. 465).

(*i*) The term "minister" is used of all incumbents in *Canones Ecclesiastici* (1603), and in the Acts of Uniformity (stat. (1559) 1 Eliz. c. 2, stat. (1662) 14 Car. 2, c. 4. As to the term "incumbent," see note (*b*) p. 451, *ante*. The term "curate" is sometimes, in the Book of Common Prayer and elsewhere, used of any incumbent having the cure of souls; but it more frequently signifies a clerk who serves in a parish under the incumbent, or who, as in the case of a perpetual curate, has an independent cure of souls without the status of a rector or vicar (Burn, *Ecclesiastical Law*, Vol. II., p. 54). The terms "benefice" and "perpetual curacy" and "incumbent" do not in themselves necessarily imply a distinct and separate cure of souls or the status of a complete incumbent (*Dowdall v. Hewitt* (1863), 10 L. T. 823, 825).

(*k*) A rector is called "parson" or *persona ecclesiæ* because he is the local impersonification of the Church. When in complete possession of the benefice, he is also called *persona impersonata*, parson impersones (Co. Litt. 300 a, b). A rectory may be referred to as a "church"; and so also may a vicarage, where the rectory is inappropriate (*Reynoldson v. London (Bishop)* (1696), 3 Lev. 435, 436).

(*l*) Spelman, *De Non Temerandis Ecclesiis*, p. 1. A rectory must have some land belonging to it, but the church and churchyard are sufficient (*Berry v. Wheeler* (1662), 1 Sid. 91). In *Boulton v. Richards* (1819), 6 Price, 483, the existence of an ecclesiastical rectory was held to have been proved, although there was no church or burying ground, but only a room in a mansion-house fitted up as a chapel, in which divine service was performed and marriages and baptisms were solemnised.

(*m*) For instance, the Parish of Manchester Division Act, 1850 (13 & 14 Vict. c. 41), s. 2, provided that the churches of new parishes from time to time formed within the limits of the ancient parish of Manchester should be rectories. A distinct and separate parish formed under the Church Building Act, 1818 (58 Geo. 3, c. 45), is a rectory, vicarage, or perpetual curacy, according to the nature of the parish out of which it was formed (*ibid.*, s. 19); and by the Church Building Act, 1822 (3 Geo. 4, c. 72), ss. 13, 14, in any case where the owner of an inappropriate rectory or the patron and incumbent of a sinecure rectory surrender the tithe, glebe, and other rectorial emoluments, or the tithe with or without a portion of the glebe, to the incumbent of a vicarage in

SECT. 3.
Beneficed
Clergy.
Vicarages.

1098. Where the rectory of a parish is appropriate or inappropriate, and the cure of souls has been intrusted to a vicar, for whose maintenance an endowment has been provided out of the emoluments of the rectory, the benefice is a vicarage(n). A distinct and separate parish formed under the Church Building Act, 1818, out of a parish which is a vicarage, is itself a vicarage; and for a short time between 1865 and 1868 the Ecclesiastical Commissioners had statutory power to declare certain new district churches to be vicarages(o). Since 1868, in the case of every new ecclesiastical or other parish where the incumbent is not a rector but is authorised to publish banns and solemnise marriages, churchings, and baptisms in his church, and is entitled to receive for his own use the entire

perpetuity, the Ecclesiastical Commissioners, as the successors of the Church Building Commissioners (see note (i), p. 444, *ante*), are authorised and directed to convert the benefice into a rectory. Upon the suppression of the sinecure rectory of a parish under the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 48, the emoluments thereof could, by an Order in Council ratifying a scheme of the Commissioners, be annexed to the vicarage or perpetual curacy of the parish, which thereupon became a rectory (*ibid.*, s. 55). Where a new parish or district has been constituted and endowed, an apportionment may be made of the endowments belonging to it and to any parish out of which it has been formed; and the new parish or district becomes a rectory, if, upon such apportionment, the whole of the prædial or rectorial tithe within its area is made payable to the incumbent thereof (New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 26).

(n) *Smith v. Waller* (1700), 3 Salk. 378. In old days the rectory of a parish with its emoluments (see note (h), p. 743, *post*), was frequently appropriated to or by a religious house or collegiate church. In such cases provision was made by ecclesiastical constitutions or ordinances, and afterwards by stat. (1391) 15 Ric. 2, c. 6, and stat. (1402) 4 Hen. 4, c. 12, for the adequate endowment in perpetuity of a vicar to serve the parish. Since the dissolution of the monasteries in Henry VIII.'s reign, many of these rectories have been in the hands of laymen, and are in that case strictly called "impropriate" to distinguish them from those in the hands of a bishop, or college, or in other ecclesiastical hands, which properly retain the title of "appropriate." But the two terms are frequently used interchangeably (Ayl. Par. 86—90, 509—513; *Portland (Duke) v. Bingham* (1792), 1 Hag. Con. 157, *per* Lord Stowell (then Sir W. Scott), at pp. 163—165). In 1882 the rectory of Somersham in Huntingdonshire, which had previously been a benefice with cure of souls, was made a rectory appropriate, and a vicarage of Somersham was constituted and endowed with a portion of the tithes and emoluments of the rectory (Somersham Rectory Act, 1882 (45 & 46 Vict. c. 81)).

A vicarage may be reunited to the rectory or parsonage where this is in spiritual hands, but not when it is in lay hands (*Robinson v. Bedel* (1602), Cro. Eliz. 873; *Britton v. Wade* (1618), Cro. Jac. 515; Watson, Clergyman's Law, 4th ed., pp. 198—202). If a parson, being patron of the vicarage, presents a clerk to the church by the name of the parsonage or rectory and not of the vicarage, this will disappropriate the parsonage and make the benefice a parsonage or rectory in future (*The Queen and Lumley's (Lord) Case* (1584), 2 Leon. 80; Watson, Clergyman's Law, 4th ed., pp. 199, 200).

Where the rector is not the incumbent, he has no control over the cure of souls or the performance of ministerial duties in the parish (*Herbert v. Westminster (Dean and Chapter)* (1721), 1 P. Wms. 773; *A.-G. v. Brereton* (1752), 2 Ves. Sen. 425, 429; *Portland (Duke) v. Bingham, supra*).

(o) Where tithe or an annuity in respect of tithe was granted to the incumbent of a district church in perpetuity under the District Church Tithes Act, 1865 (28 & 29 Vict. c. 42), the Ecclesiastical Commissioners were empowered by s. 9 (until that section was repealed by the Incumbents Act, 1868 (31 & 32 Vict. c. 117), s. 1), to declare that the church should be deemed a rectory or vicarage, as might under the circumstances seem proper.

SECT. 8.
Beneficed
Clergy.

fees for the performance of those offices, he and his benefice are, for the purpose of style and designation only, to be deemed and styled the vicar and vicarage of the parish (*p*).

Perpetual
curacies.

1099. Where the rectory of a parish is appropriate or inappropriate and there has been no endowment of a vicarage, the benefice is a perpetual curacy (*q*). The benefices of new ecclesiastical parishes, except where otherwise expressly provided by statute, are, in law, perpetual curacies, in spite of their being now styled vicarages (*r*).

Chapels with
districts or
chapelries
attached.

1100. Where a chapel has from time immemorial had a district or chapelry attached to it, and the inhabitants thereof have had rights of baptism and burial and other spiritual services in the chapel and not in the parish church, and fees and dues for these services have been received by the minister of the chapel as of right and custom, the chapelry is called a parochial chapelry, and is a perpetual curacy whether there is an endowment attached to it or not (*s*). A church or chapel to which a consolidated or district chapelry has been assigned is a perpetual curacy and benefice (*t*).

Churches or
chapels
without
districts.

1101. A church or chapel without a district may in some cases be a benefice independent of the incumbent of the parish in which it is situate (*a*).

(*p*) Incumbents Act, 1868 (31 & 32 Vict. c. 117), s. 2.

(*q*) *Arthington v. Chester (Bishop)* (1790), 1 Hy. Bl. 419. In such cases the appropriator or impropiator is bound to nominate a curate to serve the parish, and has no power to remove him after he has been licensed by the bishop; whence he is called a perpetual curate (Gib. Cod. 819; *Portland (Duke) v. Bingham* (1792), 1 Hag. Con. 157, per Lord STOWELL (then Sir W. SCOTT), at p. 166). A perpetual curate has a freehold interest in the buildings and lands belonging to the curacy, and holds them to himself and his successor as a corporation sole (*Mason v. Lambert* (1848), 12 Q. B. 795; *Wallis v. Birks* (1870), L. R. 5 Q. B. 222). Under Canones Ecclesiastici (1603), 89, and general custom, he has the rights of a minister as to the appointment of churchwardens (*R. v. Allen* (1872), L. R. 8 Q. B. 69).

(*r*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 25; Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 12; Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 8; Church Building Act, 1845 (8 & 9 Vict. c. 70), ss. 9, 17. A perpetual curacy is not necessarily a separate and distinct cure of souls; see note (*i*), p. 560, ante.

(*s*) *A.-G. v. Brereton* (1752), 2 Vea. Sen. 425; *R. v. Bloore* (1760), 2 Burr. 1043; *Dent v. Rob* (1834), 1 Y. & C. (EX.) 1; *Carr v. Mostyn* (1850), 5 Exch. 69.

(*t*) See p. 446, ante; and Church Building Act, 1845 (8 & 9 Vict. c. 70), ss. 9, 17. The perpetual curate of a district chapelry has the freehold of the site of the church, but does not thereby acquire a parliamentary vote for the county (*Kirton v. Dear*) (1869), L. R. 5 Q. B. 217).

(*a*) All churches, curacies, or chapels augmented by the Governors of Queen Anne's Bounty become thereupon perpetual cures and benefices, and their ministers are corporations sole (Queen Anne's Bounty Act, 1714 (1 Geo. 1, stat. 2, c. 10), s. 4; *R. v. Chester (Bishop)* (1786), 1 Term Rep. 396; Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 5). But the cure of souls in the parishes in which they are situate remains, as before, in the incumbents of the parish churches (Queen Anne's Bounty Act, 1714 (1 Geo. 1, stat. 2, c. 10), s. 5). The right of nomination of the ministers is subject to lapse and is recoverable by legal proceedings, and the incumbency is liable to be terminated, in the same manner as in the case of presentative benefices (*ibid.*, s. 6). Provision has also been made by the Church Building Acts for the erection of independent churches and chapels (Church Building Act, 1824 (5 Geo. 4, c. 103), ss. 5—18;

1102. In some parishes the rector acquired the right to obtain institution both of himself and a vicar to the church and benefice, so that both together had the cure of souls and the duty of officiating (*b*). But in course of time these functions were left to the vicar alone and the rectory became a sinecure (*c*).

SECT. 8.
Beneficed
Clergy.
Sinecure
rectories.

1103. There may be two or more benefices in the same church and parish held by different incumbents (*d*). In that case each benefice or portion of the whole benefice is called a mediety (*e*). The bishop, after a formal inquiry, may apportion the spiritual duties of the parish between the several incumbents (*f*). He may also, with the consent of the patrons of the medieties, frame plans to be carried into effect by a scheme of the Ecclesiastical Commissioners ratified by an Order in Council for constituting the medieties separate benefices, or consolidating them into one benefice to be held by one incumbent, or for making other expedient arrangements for the pastoral duties of the parish (*g*).

Medieties.

1104. A benefice is a freehold office (*h*). The incumbent is a corporation sole (*i*) and has a freehold interest in the emoluments of the benefice until his death or until the benefice is otherwise legally vacated by him (*k*). He is entitled to be registered as a freehold voter in respect of tithe rentcharge which has been apportioned to his benefice under the Tithe Acts (*l*), and in respect of the pew rents of a church of which the freehold is vested in him (*m*).

Freehold
tenure.

Church Building Act, 1831 (1 & 2 Will. 4, c. 38), ss. 2—10; Church Building Act, 1845 (8 & 9 Vict. c. 70), ss. 7, 18).

(*b*) *Britton v. Wade* (1618), Cro. Jac. 515, at p. 518; *Clarke v. Pryn* (1669), 1 Sid. 426.

(*c*) Gib. Cod. 719. Provision was made by the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), for suppressing sinecure rectories and vesting their emoluments in the Ecclesiastical Commissioners, and endowing therewith, in suitable cases, the vicarages or perpetual curacies previously dependent on such rectories (*ibid.*, ss. 48, 54, 55). Where, however, a sinecure rectory had for the last twenty years been held together with the vicarage dependent thereon, it was not to be so dealt with, but the rectory and vicarage were to continue permanently united and be a rectory with cure of souls (*ibid.*, s. 55). And where a benefice with cure of souls was held with, or was in the patronage of the holder of, a prebend or other sinecure preferment belonging to a college in either of the Universities of Oxford or Cambridge or to any private patron, an arrangement might be made by a scheme ratified by an Order in Council, with the consent of the patrons, for permanently uniting the preferment with the benefice (*ibid.*, s. 71).

(*d*) *Stoughton v. Palmer* (1639), W. Jo. 446.

(*e*) *Welsh v. Peterborough (Bishop)* (1885), 15 Q. B. D. 432.

(*f*) Spiritual Duties Act, 1839 (2 & 3 Vict. c. 30).

(*g*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), ss. 72, 83—87; New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), s. 9.

(*h*) *Kirton v. Dear* (1869), L. R. 5 O. P. 217, 220.

(*i*) Co. Litt. 250 a; and as to perpetual curates, see the enactments referred to in note (*r*), p. 562, *ante*.

(*k*) *A.-G. v. Brereton* (1752), 2 Ves. Sen. 425, 429; *Mason v. Lambert* (1848), 12 Q. B. 795, 807; *Wallis v. Birks* (1870), L. R. 5 O. P. 222.

(*l*) Representation of the People Act, 1884 (48 & 49 Vict. c. 3), s. 4 (1); see pp. 627 *et seq.*, *post*, and title ELECTIONS.

(*m*) *Benwich v. Alker* (1872), L. R. 8 O. P. 265; *Vickers v. Selwyn* (1903), 52

SMOT. 3.

Beneficed
Clergy.Advowson
and right of
patronage.SUB-SECT. 2.—*Patronage of*(i.) *Advowsons and Rights of Patronage.*

1105. The initial right of a clerk to hold a church and benefice is acquired by presentation, or, if the benefice is in the gift of the bishop of the diocese in which it is situate, by collation (n). The right to fill a church and benefice by presentation or collation is called an advowson or right of patronage, and the owner of it is called the patron (o). An advowson is an incorporeal hereditament (p). It may be either appendant or in gross (q). An advowson

W. R. 153; *Wolfe v. Surrey County Council (Clerk)*, [1905] 1 K. B. 439. See title ELECTIONS.

(n) Co. Litt. 119 b. It is there stated that every church is either presentative, collative, donative, or elective. Before 1st January, 1899, certain churches and benefices were donative and were filled by a donation thereof to a clerk by the patron without recourse to the bishop (Co. Litt. 344 a; 2 Bl. Com. 22, 23, 24); but since that date they have all become presentative (Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 12). In the case of elective churches the elected clerk is presented to the bishop (*A.-G. v. Rutter* (1770), 2 Russ. 101 (n.), 104 (n.); *Faulkner v. Elger* (1823), 4 B. & C. 449, 450; *Edenborough v. Canterbury (Archbishop)* (1826), 2 Russ. 93, 104; *Carter v. Copley* (1857), 8 De G. M. & G. 680, 690, C. A.).

(o) Co. Litt. 119 b. The *advocatio* or *jus patronatus* of a church was first acquired by the founders, benefactors or maintainers of the church, who were called *advocati* or *patroni* (*ibid.*; 2 Bl. Com. 21; Watson, Clergyman's Law, pp. 57—59). A patron, as such, has no control over the cure of souls or the performance of ministerial duties in the parish (*Herbert v. Westminster (Dean and Chapter)* (1721), 1 P. Wms. 773; *Portland (Duke) v. Bingham* (1792), 1 Hag. Con. 157).

(p) 2 Bl. Com. 21; *Pannell v. Hodgson* (1576), Cary, 74; *Stafford (Earl) v. Buckley* (1750), 2 Ves. Sen. 171, 178; *Mirehouse v. Rennell* (1833), 7 Bl. (N. S.), 241, H. L., *per* Lord LYNDHURST, at p. 317. It will pass under a conveyance or devise of hereditaments (*Anon.* (1573), 3 Dyer, 323 b.; *London v. Southwell (Chapter)* (1618), Hob. 303; *Albemarle (Earl) v. Rogers* (1794), 2 Ves. 477); or tenements (*London v. Southwell (Chapter)*, *supra*; *Gully v. Exeter (Bishop)* (1827), 4 Bing. 290, 295, 296); or real estate (*Re Hodgson, Taylor v. Hodgson*, [1898] 2 Ch. 545); but not under a conveyance or devise of lands (*Westfaling v. Westfaling* (1746), 3 Atk. 460, 464). It is not "land" under the Statutes of Limitations (*Brooks v. Muckleston*, [1909] 2 Ch. 519). Whether it will pass under a conveyance or devise of hereditaments, tenements, or real estate, situate and being in the parish or county in which the church and benefice are situate depends upon circumstances (*Anon.* (1573), 3 Dyer, 323 b.; *London v. Southwell (Chapter)*, *supra*; *Kensey v. Langham* (1735), Cas. temp. Talb. 143; *Crompton v. Jarratt* (1835), 30 Ch. D. 298, C. A.; *Re Hodgson, Taylor v. Hodgson*, *supra*). It will pass by the word "church" (*Ashegell v. Dennis* (1589), 1 Leon. 191, *per* WALMESLEY, J.; Co. Litt. 17 b), or by the word "living," though this word may mean only a single presentation (*Webb v. Dyng* (1856), 2 K. & J. 369). But where two benefices have been united, the advowson of the united benefice does not pass by the name of the advowson of one of them (*Robinson v. Bristol (Marquis)* (1851), 20 L. J. (C. P.) 208). On the death of the owner it is assets for payment of his debts (*London v. Southwell (Chapter)*, *supra*, 303, 304; *Tong v. Robinson* (1730), 1 Bro. Parl. Cas. 114; *Westfaling v. Westfaling*, *supra*). But it does not pass under the words "commodities, emoluments, profits and advantages" (*London v. Southwell (Chapter)*, *supra*); and where a testator, who was both patron and incumbent of a benefice, devised the advowson of the benefice and other real estate upon trust to apply the rents as income thereof as in his will mentioned, his heir-at-law was held entitled to present on the vacancy occasioned by his death (*Martin v. Martin* (1842), 12 Sim. 579).

(q) *Tyringham's Case* (1584), 4 Co. Rep. 36 b; Watson, Clergyman's Law, 4th ed., p. 59. When, as could legally be done before the Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1 (b), the right of presentation for one or more

SECT. 3.
Beneficed
Clergy.

appendant passes by assurance or by devolution of law with the manor or other hereditament to which it is appendant (*r*). But it may be severed therefrom; and in that case, if the severance is complete, it becomes an advowson in gross, and cannot again be made appendant (*s*) except by operation of law (*t*). Where a benefice is held in medieties (*a*), there may be an advowson of each mediety (*b*).

1106. The right of presentation or legal patronage may be vested in one person and the right of nomination in another. In that case the legal patron is trustee for the person who has the right of nomination and is bound to present to the bishop the nominee of that person (*c*). Right of nomination.

turns was granted apart from the whole advowson, it was said to be in part appendant and in part in gross (Watson, *Clergyman's Law*, 4th ed., p. 60). The advowson of a rectory is normally appendant to a manor; but it may become appendant to some house or land formerly belonging to the manor by the alienation of such house or land with the advowson apart from the manor or the alienation of the rest of the manor apart from the house or land and the advowson (*ibid.*, pp. 60, 61). The advowson of a vicarage is normally appendant to the rectory out of which it is extracted; but it may be severed therefrom and may be appendant to a manor (*ibid.*, pp. 61, 62; *Hill v. Grange* (1556), 1 Plowd. 164, 174; *Case of Assize* (1576), Dyer, 350 b; *R. v. Norwich (Bishop)* (1615), Cro. Jac. 385; *Sherley v. Underhill* (1618), Moore (K. B.), 894; *Reynoldson v. Blake* (1697), 1 Ld. Raym. 192, 200).

(*r*) Co. Litt. 307 a; *A.-G. v. Sitwell* (1835), 1 Y. & O. (ex.) 559, 582, 583; *Rooper v. Harrison* (1855), 2 K. & J. 86). But a grant by the Crown of a manor or land with the appurtenances does not carry an appendant advowson unless mentioned expressly (stat. *Prerogativa Regis* (temp. incert.), c. 17; *A.-G. v. Sitwell*, *supra*) or by reference (*Whistler's Case* (1613), 10 Co. Rep. 63 a; Burn, *Ecclesiastical Law*, Vol. I., p. 9).

(*s*) 2 Bl. Com. 22; Watson, *Clergyman's Law*, p. 62; *Reynoldson v. Blake*, *supra*, at p. 198. If the appendancy is severed during an estate for life or other particular estate, or for a term of years, the advowson may become again appendant on the determination of the estate or term of years (Mallory, *Quare Impedit*, Part I., p. 39; *Hartopp and Cocks' Case* (1627), Hut. 88, 89; *Rooper v. Harrison*, *supra*). If the manor is mortgaged in fee, excepting the advowson, and the mortgage is paid off on the appointed day, the advowson becomes again appendant; but if repayment is not made until afterwards, the advowson will be reputed appendant but will not in fact be so (*R. v. Chester (Bishop)* (1698), 1 Ld. Raym. 292, 301).

(*t*) *Meath (Bishop) v. Winchester (Marquis)* (1835), 4 Cl. & Fin. 445, 551, H. L.). If on a partition between coparceners an advowson appendant is allotted to one and the manor to the other, and afterwards one dies without issue whereby the law unites them again, the advowson, which had been severed by the partition, becomes again appendant (*Finch's (Sir Moyle) Case* (1606), 6 Co. Rep. 63 a, 64 a).

(*a*) See p. 563, *ante*.

(*b*) Co. Litt. 17 b, 18 a; *Smith's (Richard) Case* (1613), 10 Co. Rep. 135 b.

(*c*) Gib. Cod. 794; Watson, *Clergyman's Law*, 4th ed., pp. 85, 86. The nomination is the substance of the advowson, and the presentation is only a ministerial interest (*Sherley v. Underhill* (1618), Moore (K. B.), 894). The Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1 (3), has made an agreement for an exercise of the right of patronage of a benefice on the nomination of a particular person invalid; but nothing in that section is to prevent the reservation or limitation in a family settlement of a life interest to the settlor or the reservation of a right of redemption in a mortgage (*ibid.*, s. 1 (7)). As to where the advowson is held in trust, see pp. 573, 580, *post*, and as to where it is mortgaged, see p. 573, *post*. As to the remedy of the person entitled to nominate in case of the non-presentation of his nominee, see p. 573, *post*. But where, as in Queen

SECT. 3.
Beneficed
Clergy.

Patronage of
vicarages.
Vesting of
patronage.

1107. The right of presentation to a vicarage (*d*) is ordinarily in the rector or parson (*e*); but it may be appendant to a manor (*f*) or have become vested in other hands or in the parishioners (*g*).

1108. Where in accordance with the rules of the Governors of Queen Anne's Bounty a benefice is augmented by a benefaction of £200 or upwards in money or land or tithes, the patronage thereof may be vested in the benefactor, his heirs and successors, by an agreement made, with the consent of the governors, by the King under the sign manual, or any bodies politic or corporate, or any person of full age, tenant of the advowson in fee simple or in fee tail or for life with remainder to his own issue, but in case of a parson or vicar, with the consent of his patron and ordinary (*h*). An agreement by a guardian on behalf of an infant, if made with the approbation of the Chancery Division of the High Court, is as effectual as if the infant were of full age and himself entered into the agreement (*i*). The judge in lunacy may authorise the committee of the estate of a lunatic to enter into the agreement on behalf of the lunatic (*k*).

Patronage of
churches and
benefices.

1109. Provision is made by the Church Building Acts and New Parishes Acts (*l*) for the patronage of churches and chapels and benefices established under those Acts. Before or during the building of a new church or previously to its consecration, the bishop of the diocese and the patron and incumbent of the parish may, by an agreement in writing, effectually vest the right of nomination to the church on its consecration, either in perpetuity or otherwise, in any corporation, aggregate or sole, or any person or persons and his or their heirs or assigns (*m*). Where no such agreement is entered into, the right of patronage varies according to the description of the church or benefice.

Distinct and
separate
parishes.

Where distinct and separate parishes are formed, the patronage

Anne's Bounty Act, 1714 (1 Geo. 1, stat. 2, c. 10), s. 6, and the Church Building Act, 1824 (5 Geo. 4, c. 103), ss. 6, 12, 13, and the New Parishes Act, 1843 (6 & 7 Vict. c. 37), ss. 20, 21, the legal patron is mentioned as having the nomination and the right to nominate to the bishop, the words have the same meaning or the same effect as "presentation" and "present."

(*d*) See p. 561, *ante*.

(*e*) Gib. Cod. 719; 2 Roll. Abr. 336; *Sherley v. Underhill* (1618), Moore (x. n.), 894; *Code v. Hulmed* (1623), 2 Roll. Rep. 304.

(*f*) 2 Roll. Abr. 336; *Sherley v. Underhill*, *supra*.

(*g*) *Code v. Hulmed*, *supra*. See p. 579, *post*.

(*h*) Queen Anne's Bounty Act, 1714 (1 Geo. 1, stat. 2, c. 10), ss. 8—12; Queen Anne's Bounty Act, 1840 (3 & 4 Vict. c. 20), ss. 2—4; Church Patronage Act, 1846 (9 & 10 Vict. c. 88), s. 1.

(*i*) Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), s. 26. See also title INFANTS AND CHILDREN.

(*k*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (*k*). See *Re Varasour* (1851), 3 Mac. & G. 275. See also title LUNACY.

(*l*) See note (*i*), p. 444, *ante*. For this purpose limited owners of patronage, whether individual or corporate, are empowered to surrender or arrange their patronage (Church Building Act, 1819 (59 Geo. 3, c. 134), s. 15; Church Building Act, 1822 (3 Geo. 4, c. 72), s. 15; Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 15).

(*m*) Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 23; Church Building Act, 1848 (11 & 12 Vict. c. 37), s. 4.

of the church and benefice of each belongs to the patron of the original parish (*n*).

SECT. 8.
Beneficed
Clergy.

1110. The patronage of the church or chapel of a district parish belongs to the patron of the church of the parish out of which the district parish is taken; except where the chapel was built wholly or in part by means of rates raised in the original parish, in which case the patronage belongs to the incumbent of the church of that parish (*o*).

District
parishes.

1111. The patronage of the church of a consolidated chapelry belongs to the body or person designated in the representation made by the Ecclesiastical Commissioners, upon which the Order in Council for the formation of the consolidated chapelry is founded (*p*).

Consolidated
chapelries.

1112. The patronage of a district chapelry, except where it has been otherwise legally vested, is in the incumbent of the parish out of which the chapelry is formed (*q*).

District
chapelries.

1113. Where a chapel is provided, and an endowment is created for the incumbent by a rentcharge on the emoluments of the benefice or by an apportionment of part of those emoluments, and no division of the parish or creation of a separate district for ecclesiastical purposes takes place, the right of presentation to the chapel is vested in the patron of the church to which the chapel appertains (*r*).

Chapel
where no
ecclesiastical
district is
formed.

1114. Where a separate and distinct parish for spiritual purposes is created under the Church Building Act, 1831 (*s*), on the endowment of an existing chapel of ease with a sufficient stipend for the minister thereof, the right of nominating the minister is settled by a deed of agreement between the patron of the parish in which the chapel is situate and the bishop of the diocese (*t*).

Separate
parish for
spiritual
purposes.

(*n*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 13.

(*o*) Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 67, 68. But where a church or chapel is provided under the Church Building Act, 1824 (5 Geo. 4, c. 103), in part by means of rates, the patronage, upon its becoming a district church, vests in the patron of the church of the original parish in which it is provided (*ibid.*, s. 13). As to churches built in extra-parochial places, see p. 571, *post*.

(*p*) Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 9 (amending the Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 6, 15); Church Building Act, 1851 (14 & 15 Vict. c. 97), ss. 19, 20.

(*q*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 16; Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 17. As to where an extra-parochial place is formed into a district chapelry, see p. 571, *post*. Where a district chapelry is taken out of a distinct and separate parish or a district parish, the right of nomination to the chapel thereof belongs to the incumbent of such distinct and separate parish or district parish (Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 12). And where it is taken out of one or more previously formed district chapelries, the right of nomination belongs to the incumbent of the parish out of which the first assigned district chapelry was taken, unless it is legally vested in some other party, in which case it is to belong to such other party or is to be vested as may be agreed upon between such party and the Ecclesiastical Commissioners with the consent of the bishop (Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 1).

(*r*) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 22.

(*s*) 1 & 2 Will. 4, c. 38, s. 23

(*t*) *Ibid.*, s. 24; Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 7. If the

SECT. 8.
Beneficed
Clergy.

Peel districts
and parishes.

1115. The right of patronage of a district or new parish formed under the New Parishes Act, 1843 (*a*), unless or until it is otherwise assigned in perpetuity and except so far as it is otherwise assigned in part (*b*), is exercisable alternately by the Crown and the bishop of the diocese, the first nomination being vested in the Crown (*c*).

New parishes.

1116. On the constitution of a new parish under the New Parishes Act, 1856 (*d*), the Ecclesiastical Commissioners, if they think fit, until compliance with the requirements relating to the assignment of the patronage of the church thereof in consideration of an endowment contributed for the same (*e*), may assign such patronage to the then incumbent of the original parish out of which the new parish has been formed for the term of his incumbency, or, if the new parish has been formed out of two or more parishes, then to one or other of the then incumbents of such parishes for the term of his incumbency (*f*).

Churches
and chapels
provided by
private
subscription.

1117. In the case of a church or chapel provided by private subscriptions under the Church Building Act, 1824 (*g*), the right of nomination for the first two turns, or for any number of turns occurring during forty years from the date of the consecration, is in three life trustees appointed by or representing the subscribers, and afterwards is in the incumbent of the parish or extra-parochial place in which the church or chapel was provided; or, if it was provided in part by means of rates, the right of nomination is, from the first, in the incumbent of the church of the original parish in which it was provided. But, in either case, if it becomes a district church, the right of nomination thenceforth belongs to the patron of the church of the original parish (*h*).

Churches
provided,
endowed and
supplied with
a repair fund.

1118. Where a body or person provides a church and endows it to the satisfaction of the Ecclesiastical Commissioners and also provides a competent fund for the repairs thereof, the Commissioners may, if they think it proper so to do, with the consent of the bishop, and whether they assign a particular district to the church or not, by an instrument under their common seal specially declare the patronage of the church to be in perpetuity in such body or person and their or his successors, heirs and assigns, or in their or his nominee, or in some trustees signified by them or him to the commissioners. If the church is provided and endowed by subscription, the patronage is to be declared to be in such body or person,

incumbent does not consent, the separation and deed of agreement do not take effect till the next avoidance of the parish church (Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 24).

(*a*) 6 & 7 Vict. c. 37.

(*b*) See pp. 569 *et seq.*

(*c*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 21; New Parishes Act, 1844 (7 & 8 Vict. c. 94), ss. 1—3.

(*d*) 19 & 20 Vict. c. 104.

(*e*) See pp. 569 *et seq.*

(*f*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 22.

(*g*) 5 Geo. 4, c. 103.

(*h*) Church Building Act, 1824 (5 Geo. 4, c. 103), ss. 12, 13; *Fowler v. Gloucester (Bishop)* (1869), L. R. 4 Q. P. 668, Ex. Ch.; affirmed *sub nom. Allen v. Gloucester (Bishop)* (1873), L. R. 6 H. L. 219.

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Clergy.

their or his successors, heirs, and assigns, or such trustees, as the major part in value of the subscribers of not less than £50 each signify to the commissioners. The patronage is not at any time to be vested in or held in trust by more than five persons, except where it passes by descent to coparceners or by the custom of gavelkind to more than five persons, or is conveyed by will or deed to more than five children, grandchildren, nephews, or nieces of the grantor or devisor (*i*). But previous notice of the proposal to provide the church must be given to the patron and incumbent of the parish, district, or extra-parochial place in which the church is provided or proposed to be provided (*k*), and also, if a particular district is proposed for the church and is to be taken out of any parish, district, or extra-parochial place other than that in which the church is provided or proposed to be provided, to the patron and incumbent of such parish, district, or extra-parochial place, in order that they may have the opportunity of objecting to the proposal. And if any such patron gives security that he will himself within two years provide and endow a church in accordance with the proposal and to the satisfaction of the bishop, he is to be given the preference in so doing (*l*). Preference is also to be given to a proposal to enlarge an existing church over a proposal to provide a new church (*m*).

1119. In certain cases where an ecclesiastical corporation aggregate or sole, or either of the Universities of Oxford, Cambridge, or Durham, or any college therein respectively, or any person or persons, make a contribution towards providing a church or chapel for a district, parish, or benefice, or towards the permanent endowment of such church or chapel, the Ecclesiastical Commissioners may, by means of a scheme ratified by an Order in Council, assign the right of patronage of the district, parish, or benefice, either in

Churches
 built or
 endowed by
 corporations.

(*i*) Church Building Act, 1831 (1 & 2 Will. 4, c. 38), ss. 2—12, 15, 19, 20; Church Building Act, 1840 (3 & 4 Vict. c. 60), ss. 12—18, 21; Church Building Act, 1851 (14 & 15 Vict. c. 97), ss. 7—15; New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), ss. 12, 13; *MacAllister v. Rochester (Bishop)* (1880), 5 C. P. D. 194). In order to acquire the patronage of a chapel under the Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 2, the statutory conditions must be strictly complied with (*Williams v. Brown* (1835), 1 Curt. 53). The appointment of new trustees is vested in the surviving or continuing trustees or the majority of them, where more than two; unless a different mode of appointment or election is agreed upon in the first instance between the Ecclesiastical Commissioners and the body or person providing and endowing the church, or where it is provided and endowed by subscription, between the Ecclesiastical Commissioners and the major part in value of the subscribers thereto of not less than £50 each. Every trustee on his appointment, and also whenever he exercises or concurs in exercising the right of nomination of which he is a trustee, is to sign a declaration that he is a member of the Church of England; and upon an appointment of new trustees no conveyance of the right of nomination to the church need be made. The trustees may act notwithstanding vacancies in their number, unless otherwise prescribed. But if all the trustees die without having appointed any new trustee or trustees the bishop of the diocese may by deed appoint any requisite number of trustees not exceeding five (Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 10).

(*k*) *MacAllister v. Rochester (Bishop)*, *supra*.

(*l*) Church Building Act, 1831 (1 & 2 Will. 4, c. 38), ss. 7, 11, 15; Church Building Act, 1851 (14 & 15 Vict. c. 97), ss. 7, 11, 12.

(*m*) Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 8.

SECT. 8.
Beneficed
Clergy.

Consents to
 assignment.

Restriction
 on sale of
 patronage.

perpetuity or to the extent of one or more nominations, to such corporation, university, college, person, or persons, or to its, his, or their nominee or nominees. The districts, parishes, or benefices whereof the right of patronage may be so assigned are (1) a district or new parish formed under the New Parishes Act, 1843 (*n*); (2) a church or chapel to which a district belongs and of which the patronage is vested in the incumbent of the original parish, district or place out of which such district was taken, as such incumbent; (3) a new parish constituted under the New Parishes Act, 1856 (*o*), or a parish or district having neither incumbent nor patron, and (4) a benefice of which the patronage is vested in the Crown or in the Chancellor of the Duchy of Lancaster, or in the Duke of Cornwall, or in an ecclesiastical or lay corporation, aggregate or sole, and of which the permanent annual endowment does not exceed £100 per annum, nor the annual income from all sources £250 per annum. But the assignment can only be made with the consent of the patron in the case of a benefice in the patronage of the Crown or of the Chancellor of the Duchy of Lancaster, or of the Duke of Cornwall, or of a bishop, or an ecclesiastical or lay corporation aggregate; or of the bishop of the diocese in the case of a benefice in the patronage of the incumbent of another benefice, or in the case of a district or parish having neither incumbent nor patron; and it can only be made in perpetuity if the contribution consists either of the building of a church for the district or parish or benefice with the provision of a clear yearly sum of at least £45 for its permanent endowment, or else of a permanent endowment of the church or chapel of the district or parish or benefice with the clear yearly sum of £150; and notice of an intention to make the assignment is to be sent to the patron of the benefice and the body or person whose consent thereto is required (*p*). Where any such assignment of patronage in perpetuity is made to a contributing body or person, and the benefice at the time of the assignment is already permanently endowed with an annual sum of not less than £100, or the annual income of the benefice from all sources, calculated on an average of the three years immediately preceding the contribution thereto, amounts to £150, no subsequent sale or disposition of the patronage for valuable consideration is to be made until thirty years after the assignment, unless the entire proceeds are legally secured for the further permanent augmentation of the benefice (*q*). Where any

(*n*) 6 & 7 Vict. c. 37.

(*o*) 19 & 20 Vict. c. 104.

(*p*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 20; New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 16—20, 22, 30; New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), ss. 10, 12, 13. In the case of a benefice in the patronage of the incumbent of another benefice which is in private patronage, the private patron may require the amount of diminution (if any) in the value of his advowson likely to be caused by the contemplated assignment of patronage to be assessed or ascertained by arbitration, and may recover the amount from the body or person to whom the assignment of patronage is made (New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), s. 10).

(*q*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 21. A presentation.

SECT. 8.
Beneficed
Clergy.

assignment of patronage in perpetuity is made to the nominees of a contributing body or person or of two or more contributing bodies or persons, the nominees must not exceed five in number. They are named in the deed of assignment by the bodies or persons making the contribution or the major part in value of the subscribers thereto of not less than £50, and become trustees for the exercise of the patronage (r).

1120. In certain cases where the Ecclesiastical Commissioners build or assist in building a new church or chapel, they may vest the patronage of it either in perpetuity or for a limited time in the bishop of the diocese (s).

Patronage of
 bishop in
 certain cases.

1121. Where a new church is built in an extra-parochial place, the patronage of it, if not vested elsewhere, is to belong to the bishop of the diocese in which it is situate; and where an extra-parochial place has been formed into a distinct and separate parish or district parish, or district chapelry, the patronage of it is to belong to the bishop, except in cases where the Ecclesiastical Commissioners, with the consent of the bishop, specially declare the patronage of a new church built in an extra-parochial place and endowed to their satisfaction (t).

Patronage
 in extra-
 parochial
 places.

1122. Generally, where the advowson or right of patronage of a benefice is vested in two or more persons, the bishop is not bound to act on a presentation in which they do not all concur, and if they do not make a joint presentation within the allowed period of six months, he may collate by right of lapse (u). If, however, he admits a clerk to the benefice on a presentation in which they do not all concur, the common title of them all is not thereby disturbed (a); for the advowson is one entire thing, not in its nature severable except by partition (b). But a right of patronage may in law be exercisable by several patrons in turn (c); and if coparceners do not agree in a presentation, the eldest sister or her heir has the first turn, and so on (d), and they can severally assign their

Patronage of
 coparceners,
 joint tenants
 and tenants
 in common.

collation, institution, induction, or admission made under any such sale or disposition is void, and the patronage for that turn lapses to the bishop (*ibid.*).

(r) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 24. Every nominee on his appointment is to sign a declaration that he is a member of the Church of England. Vacancies among the trustees are to be filled in the manner provided by the deed. If the power of filling vacancies is vested in the trustees and all die without having appointed successors, or if a vacancy is not filled up for two years after its occurrence, the bishop of the diocese may fill up the number of trustees. But the trustees may act notwithstanding one or more vacancies in their number (*ibid.*).

(s) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 31.

(t) Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 26.

(u) See p. 590, *post*.

(a) Co. Litt. 186 b, 213 a; 2 Co. Inst. 365; Burn, Ecclesiastical Law, Vol. I., pp. 14 a—18; *Walter v. Dennison* (1750), Amb. 82, 83. Trustee patrons must all join in a presentation (*ibid.*) unless otherwise provided in their instrument of trust; see p. 581, *post*. And where several *cestuis que trust* have the right of nomination, they must all join in exercising it (*Seymour v. Bennet* (1742), 2 Atk. 482, *per* Lord HARDWICKE, L.O., at p. 483).

(b) *Barker v. London (Bishop)* (1790), 1 Hy. Bl. 412, 417.

(c) *Dolman's Case* (1583), 4 Leon. 86.

(d) Gib. Cod. 765; *Anon.* (1537), 1 Dyer 35 a; *Reynoldson v. Blake* (1697), 1 Ld. Raym. 192, 197; *Barker v. London (Bishop)*, *supra*, at pp. 417, 418. The right is

SECT. 3.
Beneficed
Clergy.

turns without a partition of the advowson (e). But if coparceners, or joint tenants, or tenants in common make a partition of the advowson, whereby they agree to present by turns, then each becomes seised of her or his separate part of the advowson (f), with the right of presenting in the turn belonging to that part (g). The patronage of a new or consolidated benefice may be originally vested in several patrons in turns (h). If one of several part-patrons presents out of his or her turn, and the presentee is instituted or admitted, the presentation is an usurpation, and the patron entitled to the turn loses it for that turn, but the cycle of turns is not thereby altered (i). The turn is complete when the presentee is instituted or admitted. Therefore, if he is rejected by the bishop, or if his institution or admission is *ipso facto* void, the same part-patron may present again; but, if he is afterwards deprived, or his institution or admission is adjudged null and void by a declaratory sentence, the turn is gone and the part-patron next in turn has the presentation (k). The turn is lost if the part-patron allows his right of presentation to lapse to the bishop (l), or if he allows his right to be usurped by a stranger and does not vindicate it by *quare impedit* (m). But where, on the appointment of the incumbent to a bishopric, the King presents by royal prerogative (n), this presentation does not count as a turn (o).

assignable (*Buller v. Exeter (Bishop)* (1749), 1 Vea. Sen. 340, *per* CLARKE, B.), and goes to her husband by the curtesy and descends to her issue (Co. Litt. 166 b; *Buller v. Exeter (Bishop)*, *supra*; *Thrale v. London (Bishop)* (1790), 1 Hy. Bl. 376, 411, 412. If one of the coparceners dies leaving coheirs, they are entitled in turn to the turns of the deceased coparcener (*Richards v. Macclesfield (Earl)* (1835), 7 Sim. 257).

(e) *Harris v. Nichols* (1583), Cro. Eliz. 19; *Reynoldson v. Blake* (1697), 1 Ld. Raym. 192; *Thrale v. London (Bishop)*, *supra*.

(f) Co. Litt. 18 a; *Windsor v. Canterbury (Archbishop)* (1599), Cro. Eliz. 687; *Windham v. Norwich (Bishop)* (1615), 1 Brownl. 165; *Bodicoate v. Steers* (1737), 1 Dick. 69.

(g) *Eveleigh v. Turner* (1571), 3 Dyer, 299 a; *Salisbury (Bishop) v. Philips* (1700), 1 Ld. Raym. 535, Ex. Ch.; Advowsons Act, 1708 (7 Ann. c. 18), s. 2; 17 Vin. Abr. pp. 328—330, tit. Presentation, K, a; *Matthews v. Bath and Wells (Bishop)* (1785), 2 Dick. 652. In *Seymour v. Bennet* (1742), 2 Atk. 482, Lord HARDWICKE, L.C., at p. 483, said that in a partition case where parceners of an advowson could not agree in presenting one person, the court would direct them to draw lots as to who should have the first presentation; compare *Johnstone v. Baber* (1856), 6 De G. M. & G. 439, C. A.

(h) *Grocers' Co. v. Canterbury (Archbishop)* (1771), 3 Wils. 214, 221; *Keen v. Denny*, [1894] 3 Ch. 169; Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 16. As to the patronage of the benefice in Peel parishes being vested in the Crown and the bishop of the diocese alternately, see p. 568, *ante*.

(i) Stat. Westminster II. (1285), 13 Edw. 1, c. 5; *Dolman's Case*, (1583), 4 Leon. 86; *Birch v. Lichfield and Coventry (Bishop)* (1803), 3 Bos. & P. 444; *Richards v. Macclesfield (Earl)* (1835), 7 Sim. 257; *Keen v. Denny*, *supra*.

(k) *Windsor's Case* (1599), 5 Co. Rep. 102 a; S. C. *sub nom.* *Windsor v. Canterbury (Archbishop)* (1599), Cro. Eliz. 687.

(l) 2 Bro. Abr. 149 b, 150 a, tit. Presentation, pl. 26; 17 Vin. Abr., p. 329, tit. Presentation, K, a, 7; *Keen v. Denny*, *supra*, *per* CHITTY, J., at p. 177. As to lapse, see p. 590, *post*.

(m) *Leak v. Coventry (Bishop)* (1601), Cro. Eliz. 811.

(n) See p. 575, *post*.

(o) *Grocers' Co. v. Canterbury (Archbishop)* (1771), 3 Wils. 214, 221, 232; *Trouard v. Calland* (1796), 8 Bro. Parl. Cas. 71; *Keen v. Denny*, *supra*, *per* CHITTY, J., at p. 175.

SECT. 3.
Beneficed
Clergy.Patrons with
limited
interests.

1123. Where the legal estate in an advowson is vested in trustees, they are bound to present the nominee of the person or persons equitably interested in it (*p*). The person beneficially interested in an estate for life or other limited estate in the advowson of a benefice has the right of presentation or nomination when a vacancy in the benefice occurs during the continuance of such estate (*q*).

1124. Where the patronage of a vacant benefice is vested in an infant, of whatever age, the presentation is made by him and not by his guardian (*r*). Infants.

1125. Where the patronage of a benefice is vested in a married woman, she holds it as if she were a *feme sole*, if she was married after 31st December, 1882, or if the title to it first accrued to her after that date, and can, apparently, in either of those cases, present to the benefice, when vacant, without the concurrence of her husband (*s*). Otherwise, he must concur with her in the presentation (*t*). In any case, if a child of the marriage has been living while she has been seised of or entitled to patronage in possession, and she dies possessed of it, her husband, if he survives her, has the patronage during the rest of his life as tenant by the curtesy, unless she has barred his right by a testamentary disposition which has legal force (*a*). Married woman.

1126. Where a husband dies seised of or entitled to the patronage of a benefice, leaving a widow whose right to dower in respect thereof has not been barred, she is entitled by reason of such dower to present on every third vacancy of the benefice which occurs during her life (*b*). Dower.

(*p*) Burn, Ecclesiastical Law, Vol. I., p. 14. Where the advowson of a benefice is devised upon trust for sale, and the proceeds of sale and the income arising therefrom are to be applied for the benefit of a person or persons named in the will, and the benefice becomes vacant before the advowson is sold, the right of presentation or nomination is in the person or persons who, if the sale had taken place, would for the time being be beneficially interested in the proceeds of the sale or the income thereof (*Hawkins v. Chappel* (1739), 1 Atk. 621; *Johnstone v. Baber* (1856), 6 De G. M. & G. 439, O. A.; *Briggs v. Sharp* (1875), L. R. 20 Eq. 317). But where a testator devised an advowson to trustees upon trust to sell immediately after the death of the then incumbent, it was held that they would have the presentation on the vacancy occasioned by that death (*Bristow v. Skirrow* (1859), 5 Jur. (N. S.) 1379).

(*q*) *Albemarle (Earl) v. Rogers* (1794), 2 Ves. 477; *Briggs v. Sharp* (1875), L. R. 2 Eq. 317; *Welch v. Peterborough (Bishop)* (1885), 15 Q. B. D. 432.

(*r*) 3 Co. Inst. 156; Gib. Cod. 794; *Arthington v. Coverley* (1733), 2 Eq. Cas. Abr. 518; *Hearle v. Greenbank* (1749), 3 Atk. 695, *per* Lord HARDWICKE, L.C., at p. 710. But there appear to have been instances in which the guardian has presented (*Watson, Clergyman's Law*, 4th ed., p. 140).

(*s*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1 (1), 2, 5; *Reid v. Reid* (1886), 31 Ch. D. 402, O. A. See also title HUSBAND AND WIFE.

(*t*) *Watson, Clergyman's Law*, 4th ed., pp. 71, 140; except in the case of the Queen (*ibid.*, p. 140; Gib. Cod. 794).

(*u*) Co. Litt. 29 a; Gib. Cod. 794; 2 Bl. Com. 127; *Watson, Clergyman's Law*, 4th ed., p. 71; *Appleton v. Rowley* (1869), L. R. 8 Eq. 139; *Eager v. Furnivall* (1881), 17 Ch. D. 115; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1 (1), 2, 5; *Hops v. Hops*, [1892] 2 Ch. 336; see also note (*d*), p. 571, *ante*.

(*b*) Co. Litt. 379 a; *Watson, Clergyman's Law*, 4th ed., p. 72.

**SECT. 3.
Beneficed
Clergy.**

Lunacy of
patron.
Patronage
when the
advowson is
mortgaged.
Patronage
held by, or
in trust for,
a Roman
Catholic.

Patronage
held other-
wise than
as private
property.

1127. When the patron of a benefice is a lunatic, the Crown has the right of presenting to it (c).

1128. Where the advowson of a benefice has been mortgaged, the mortgagee is the legal owner of the patronage, but, until foreclosure or sale, he is bound to present the nominee of the mortgagor (d).

1129. Where an advowson or right of patronage of a benefice is held by or in trust for a Roman Catholic, it cannot be exercised by the person or persons possessed thereof; but the University of Oxford, if the benefice is within the limits of the city of London or certain of the counties in the province of Canterbury (e), and the University of Cambridge, if the benefice is within the limits of the remaining counties in the province of Canterbury or any of the counties in the province of York (f), has the right of presenting to the benefice when it becomes void (g). But, where a patron who has been a Roman Catholic becomes a lunatic, it is questionable whether the right of the university is not superseded by the right of the Crown (h).

1130. As regards patronage held otherwise than as private property, different legal incidents attach to rights of patronage

(c) Com. Dig. tit. Idiot, C; *Re Fitzgerald* (1805), 2 Sch. & Lef. 432, per Lord REDESDALE, L.C., at p. 437. See title LUNATICS AND PERSONS OF UNSOUND MIND.

(d) Gib. Cod. 794; *Jory v. Cox* (1697), Prec. Ch. 71; *Amhurst v. Dawling* (1700) 2 Vern. 401; *A.-G. v. Hesketh* (1706), *ibid.*, 549; *Gally v. Selby* (1720), 1 Com. 343; *Croft v. Powel* (1738), 2 Com. 603, 609; *Gardiner v. Griffith* (1726), 2 P. Wms. 404; *Kensley v. Langham* (1735), Cas. temp. Talb. 143, per Lord TALBOT, L.C., at p. 144; *Mackenzie v. Robinson* (1747), 3 Atk. 559. But in a case where the mortgage was of the advowson alone and was of long standing, and no interest had been paid, the mortgagee was considered to be entitled to present unless the mortgagor redeemed the mortgage (*Dyer v. Craven* (Lord) (1786), 2 Dick. 662).

(e) The counties of Oxford, Kent, Middlesex, Sussex, Surrey, Hants, Berks, Bucks, Gloucester, Worcester, Stafford, Warwick, Wilts, Somerset, Devon, Cornwall, Dorset, Hereford, Northampton, Pembroke Carmarthen, Brecknock, Monmouth, Cardigan, and Montgomery (stat. (1605) 3 Jac. 1, c. 5, s. 13).

(f) The counties of Essex, Herts, Bedford, Cambridge, Huntingdon, Suffolk, Norfolk, Lincoln, Rutland, Leicester, Derby, Nottingham, Salop, Radnor, Denbigh, Flint, Carnarvon, Anglesey, Merioneth and Glamorgan; and Chester, Lancaster, York, Durham, Northumberland, Cumberland and Westmoreland (*ibid.*).

(g) *Ibid.*; stat. (1689) 1 Will. & Mar. c. 26, s. 2; Presentation of Benefices Act, 1713 (13 Ann. c. 13); Church Patronage Act, 1737 (11 Geo. 2, c. 17); Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 16. The prohibition in the first two of those Acts against either university presenting a person holding at the time another benefice with cure of souls is now repealed (Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 7). The university may elect to the benefice and exercise any other rights which they possess with respect to it in any way from time to time determined by them to be expedient by a university statute or ordinance made in the ordinary manner after 1st January, 1899 (*ibid.*). The right of the university attaches where a patron who has the right of nomination out of a limited class of clerks, so that a college is bound to present a qualified clerk nominated by him, is a Roman Catholic (*Boyer v. Norwich* (Bishop), [1892] A. C. 417, P. O.). But if one of two tenants in common of an advowson is a Roman Catholic, the other can present alone, and the university have no right (*Edwards v. Easter* (Bishop) (1839), 6 Bing. (N. C.) 652).

(h) *Re Vavasour* (1851), 3 Mac. & G. 275, per Lord TRURO, L.C., at p. 277; see p. 573, r.

SECT. 3.
Beneficed
Clergy.

belonging (1) to the Crown, the Duchy of Lancaster or Duchy of Cornwall; (2) to an office in the gift of the Crown; (3) to a municipal corporation or body; (4) to a university or college; (5) to other ecclesiastical or lay corporations aggregate; (6) to a bishop in right of his see or to other ecclesiastical corporations sole or dignitaries, in right of their office; (7) to parishioners or some other numerous class, or to trustees for them; and (8) to trustees in perpetuity whether with or without an expressed trust or specified *cestuis que trust*.

1131. The King, besides possessing the patronage of divers benefices in right of the Crown or of the Duchy of Lancaster, or of the Duchy of Cornwall, where there is not a Duke of Cornwall of full age, is the patron paramount of all the other benefices (i), and, as such, has the right to fill all such benefices as are not regularly filled by the patrons thereof, whether this happens by neglect, as where the patronage ultimately lapses to the Crown (k), or by incapacity to present, as where the patron is attainted or outlawed, or is an alien or a lunatic (l), or has been guilty of simony (m) or the like (n). Moreover, where a benefice becomes void by the promotion of the holder thereof to a see in the province of Canterbury or York, or where the advowson of a benefice is attached to a see, and the benefice is void during a vacancy in the see, or where the advowson of a benefice is attached to another ecclesiastical office and the benefice is void during a vacancy of the office occasioned by the promotion of the holder to a see in the province of Canterbury or York, the King has the prerogative of presenting to the void benefice (o). And as against the King a benefice is not deemed full by institution or collation until induction has supervened (p). In exercising Crown patronage of a benefice above the yearly value of £20 in the King's books, the King acts under the advice of the First Lord of the Treasury (q). But no Roman Catholic or Jew may advise the King as to the exercise of ecclesiastical patronage (r).

(i) Gib. Cod. 763.

(k) See p. 590, *post*.

(l) See p. 573, *ante*.

(m) See p. 593, *post*.

(n) Gib. Cod. 763.

(o) *Ibid.*; *Basset v. Gee* (1600), Cro. Eliz. 790; *R. v. London (Bishop)* (1693), 3 Lev. 377; *Potter v. Chapman* (1750), Amb. 98, 101; *R. v. Eton College* (1857), 8 E. & B. 610, 632. But as to patronage lapsing to a bishop, see note (e), p. 590, *post*. The prerogative of presenting to a benefice vacated by the promotion of the incumbent to a bishopric must be exercised during the life of the person promoted (*Armagh (Archbishop) v. A.-G.* (1729), 3 Bro. Parl. Cas. 507, 514, n.). And if the King does not present and the presentee of another is admitted and dies without having been disturbed, the prerogative is lost (*Basset v. Gee*, *supra*).

(p) Gib. Cod. 763. Till induction he may revoke the presentation; and if his presentee dies after institution, but before induction, he may present another clerk (*Wright v. Norwich (Bishop)* (1590), 1 Leon. 156).

(q) See *Pluralities Act*, 1838 (1 & 2 Vict. c. 106), s. 126.

(r) *Roman Catholic Relief Act*, 1829 (10 Geo. 4, c. 7), s. 18; *Jews Relief Act*, 1858 (21 & 22 Vict. c. 49), s. 4. The offence is a high misdemeanor and disables the offender from thereafter holding any office under the Crown (*ibid.*).

SECT. 8.
Beneficed
Clergy.
Patronage
of Lord
Chancellor.

1132. The Lord Chancellor or Lord Keeper of the Great Seal has the right to present to benefices in the patronage of the Crown which do not exceed the yearly value of £20 in the King's books (*s*). As regards such of these benefices as are enumerated in the First Schedule to the Lord Chancellor's Augmentation Act (*t*), he was by that Act empowered to sell the advowson of any such benefice for a sum of money or in consideration of a perpetual annuity or rentcharge, or tithe rentcharge, or land, which is to be devoted to the augmentation of the benefice (*u*). As regards any of the benefices in the gift of the Lord Chancellor of the clear annual value of not less than £200 nor more than £500, whether included in such First Schedule or not, but not exceeding altogether one hundred in number, the Lord Chancellor was empowered to sell and convey the advowson to any tenant in fee or in tail, whether in possession, remainder, or reversion, of freehold or copyhold land within the limits of the benefice, either absolutely or to or upon the uses or trusts of a settlement of such land, for a sum certified by the Ecclesiastical Commissioners to be reasonable having regard to the age of the incumbent at the time of sale, and not being less than ten years' purchase of the clear annual value of the benefice; and the purchase-money was to be applied by him in the augmentation of benefices remaining in his gift (*a*). The purchaser of an advowson under the Act cannot himself sell it or contract for its sale until after the expiration of five years from the sale thereof to him; but this restriction does not operate in case of his death or bankruptcy (*b*).

Duchy of
Lancaster.

1133. Patronage belonging to the King in right of the Duchy of Lancaster is exercised under the advice of the Chancellor of the Duchy (*c*).

Duchy of
Cornwall.

1134. Patronage belonging to the Duchy of Cornwall, where there is a Duke of Cornwall of full age, is exercisable by him, and when that is not the case and the patronage belongs to the Crown in right of the Duchy, is exercisable by the same persons as the

(*s*) Gib. Cod. 763, 764; Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 126. Where the Lord Chancellor presented to a benefice above the yearly value of £20 in the King's books, and the presentee was instituted and inducted, it was held that he could not be removed in favour of a subsequent presentee of the King (*Lord Chancellor's Case* (1611), Hob. 214).

(*t*) 26 & 27 Vict. c. 120.

(*u*) Lord Chancellor's Augmentation Act (26 & 27 Vict. c. 120), ss. 1—22, 28—37. The purchase-money, to the extent of not more than £500, might be applied in purchasing, building, or rebuilding a parsonage house on the benefice, if an equal sum for the same purpose was provided by or on behalf of the incumbent or the owner of the advowson (*ibid.*, s. 8). The option accorded to the purchaser by s. 5, of giving security for payment of one half of the purchase-money with compound interest when a vacancy in the benefice accrued, appears to be repealed by the Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1 (3) (*b*); see p. 583, *post*.

(*a*) Lord Chancellor's Augmentation Act (26 & 27 Vict. c. 120), ss. 22—37. The augmentation was not to cause the annual value of a benefice to exceed £400, or to exceed £1 for every four inhabitants within its limits (*ibid.*, ss. 26, 27).

(*b*) *Ibid.*, s. 21.

(*c*) *R. v. Lincoln (Bishop)* (1613), Moore (K. B.), 874; Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 126.

Crown patronage, namely, by the King on the advice of the First Lord of the Treasury if the benefice is above the yearly value of £20 in the King's books, and, if not, by the Lord Chancellor (*d*).

SECT. 5.
Beneficed
Clergy.

1135. Where a right of presentation to a benefice belongs to an office in the gift or appointment of the Crown which is held by a Roman Catholic or a Jew, the right devolves on and is exercisable by the Archbishop of Canterbury (*e*).

Office held by
Roman
Catholic or
Jew.

1136. Before 1835 municipal corporations or particular bodies of members thereof (*f*) were in many cases possessed of advowsons and rights of nomination to benefices, ecclesiastical preferments, and offices of priest, curate, preacher or minister. All such advowsons and rights, if not vested in them as charitable trustees, were thenceforth directed to be sold (*g*). But notwithstanding any such sale the corporation and their property continue liable to any previously subsisting obligation of maintaining in whole or in part a priest, curate, preacher or minister; and the liability may be enforced in the same manner as if the advowson or right of nomination had remained vested in the corporation. And where a municipal corporation hold land subject to an obligation to provide a priest, curate, preacher, or minister, they may, with the approval of the Treasury, augment or endow his office by assigning a competent portion of the land, or charging thereon an annual

Municipal
patronage.

(*d*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 128; Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 38.

(*e*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 17; Jews Relief Act, 1858 (21 & 22 Vict. c. 49), s. 4.

(*f*) In *Guye v. Hanley* (1776), 3 Term Rep. 288, n. (a), where the advowson of a benefice had been granted by royal charter to the mayor, aldermen, and burgesses of St. Albans, uniform usage was held to interpret the charter as entitling the mayor and aldermen to present to the benefice.

(*g*) Where at the passing of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), a municipal corporation, or any particular body of members thereof, were in their municipal capacity, and not as trustees of a charity, possessed of any advowson appendant or in gross, or any right of nomination to the office of priest, curate, preacher or minister, the advowson or right of nomination, if not already sold, is to be sold at such time and in such manner as the Ecclesiastical Commissioners for England may direct, so that the best price be obtained for it, and is, with their consent, to be conveyed to the purchaser by the council of the borough under their corporate seal (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 122). This Act repealed similar provisions in the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), the Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 26, and the Municipal Corporations (Benefices) Act, 1838 (1 & 2 Vict. c. 31). The proceeds of sale are to be invested, and the income is to be paid into the borough fund; or the proceeds may be applied in whole or in part towards the liquidation of a debt contracted by the corporation before the passing of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76). Any vacancy in the benefice or preferment occurring before the sale is to be filled by the collation or nomination of the bishop or ordinary of the diocese in which the benefice or preferment is situate (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 122). Upon the sale of a right of nomination to a preferment which is not a benefice or perpetual curacy, such preferment becomes a benefice presentative, and the holder thereof and his successors become a body corporate with perpetual succession and capable of taking and holding in perpetuity property granted to or purchased for them by the Governors of Queen

SECT. 8.
Beneficed
Clergy.

University,
college, and
public school
patronage.

stipend in money or in kind, to or for the benefit of him and his successors in office (*h*).

1137. Provision has been made by statute for the sale, under the authority of the Ecclesiastical Commissioners, of advowsons and rights of patronage held wholly or partly by or in trust for the Universities of Oxford, Cambridge, and Durham, or any college therein, or the Colleges of Winchester and Eton, or the head or any other member of any such college, and for the purchase of advowsons by any such university or college under the same authority (*i*).

The Universities of Oxford and Cambridge may elect to benefices in their patronage and exercise any other rights which they possess in respect thereof in any way from time to time determined by them to be expedient by a university statute or ordinance made in the ordinary manner since 1st January, 1899 (*k*).

Statutes may be made by the governing bodies of the colleges of Eton, Winchester, and Westminster, and the other public schools to which the Public Schools Act, 1868 (*l*), applies, with respect to the mode and conditions of appointment to any ecclesiastical benefice, the patronage whereof is vested in the governing body as such, or to which persons educated at or connected with the school have an exclusive or preferential claim (*m*).

The colleges of Eton, Winchester, and Westminster are prohibited

Anne's Bounty or by other persons contributing with such governors as benefactors (*ibid.*, s. 121 (3)). Where a municipal corporation or any members thereof in their corporate capacity were possessed of an advowson in trust for a charity, trustees in their place were to be appointed by the Lord Chancellor (Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 71; *Re Shrewsbury School* (1836), 1 My. & Cr. 632; *A.-G. v. Powis (Earl)* (1853), Kay, 186).

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 121 (1), (2).

(*i*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), ss. 69, 70, 83—87; Universities and College Estates Act Extension, 1860 (23 & 24 Vict. c. 59), ss. 7—10. A college in the University of Oxford or Cambridge may sell or may themselves purchase the advowson of a benefice attached to the headship of the college (Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 69). Or, where the endowments of the benefice are sufficient, the college may charge them with payment to the head of such annual sum, not exceeding one half of the total revenue, as in the opinion of the Ecclesiastical Commissioners and the bishop is adequate; and thereupon the advowson will be vested in the college free from any trust in favour of the head (Universities and College Estates Amendment Act, 1880 (43 & 44 Vict. c. 46), s. 5). Where under the statutory powers for the purpose an ecclesiastical rectory, prebend, or other preferment without cure of souls, or impropriate rectory, belonging to a university or college, and having a right of patronage attached thereto, is sold or annexed to a benefice with cure of souls, and the right of patronage is intended to be excluded from the sale or annexation, it becomes thereupon severed from the rectory, prebend, or preferment sold or annexed, and is vested in the university or college who were the former patrons or owners of such rectory, prebend, or preferment (Universities and College Estates Act Extension, 1860 (23 & 24 Vict. c. 59), s. 8).

(*k*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 7. For the right of one or other of the universities to present where the advowson of a benefice is held by or in trust for a Roman Catholic, see p. 574, *ante*.

(*l*) 31 & 32 Vict. c. 118.

(*m*) *Ibid.*, s. 6 (5). See as to preferential claims, *A.-G. v. Powis (Earl)* (1853), Kay, 186.

from holding more advowsons than equal in number one moiety of the fellows or reputed fellows of the college, or in case of there being none such, one moiety of the students of the college in the year 1735, exclusive of advowsons annexed to or given for the benefit or support of the headship of the college (*n*).

SECT. 3.
Beneficed
Clergy.

1138. The chapter of a cathedral or collegiate church, unless otherwise arranged between themselves, exercise ecclesiastical patronage by the votes of a majority of their body, and the dean has no veto upon it (*o*). They can only present to a vacant benefice in their patronage a clerk possessing certain qualifications of connection with their church or with a university, or of service in the diocese (*p*).

Restriction
on patronage
of cathedral
and collegiate
chapters.

1139. A spiritual person cannot sell or assign any patronage or right of presentation belonging to him by virtue of a dignity or spiritual office held by him (*q*).

Patronage of
ecclesiastical
corporations
sole in right
of their
office.

1140. Where a benefice was on or before 11th August, 1840, possessed by a dean in right of any separate estate held by him as part of the emoluments of his office, any succeeding dean may, upon its becoming vacant, present himself thereto (*r*).

Patronage
of dean.

1141. In the absence of custom or agreement to the contrary, the incumbent of a parish is, in right of his benefice, entitled to the patronage of all chapels in his parish (*s*), and of any district chapelry which has been formed thereout (*t*).

Patronage of
incumbent.

1142. While a benefice is under sequestration, the incumbent is incapable of presenting to any vacant benefice of which he is patron in right of the sequestered benefice, and the right of presenting thereto is exercisable by the bishop of the diocese in which the vacant benefice is situate (*u*).

Benefice
under
sequestration.

1143. Where a vicarage in the patronage of the rector becomes void during a vacancy in the rectory, the patron of the rectory has the right of presenting to it (*a*).

Exercise of
patronage
belonging
to vacant
benefice.

1144. In some cases the advowson of a church or benefice is in the ownership of inhabitants, ratepayers, freeholders, or other persons

Patronage in
inhabitants
or numerous
class.

(*n*) Charitable Uses Act, 1735 (9 Geo. 2, c. 36), s. 5.

(*o*) Stat. (1541) 33 Hen. 8, c. 27; Burn, Ecclesiastical Law, Vol. II., pp. 115—118; *Hascard (Doctor) v. Somany (Doctor)* (1693), Freem. (K. B.) 504.

(*p*) See p. 599, *post*.

(*q*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 42.

(*r*) *Ibid.*, ss. 41, 50.

(*s*) *A.-G. v. Brereton* (1751), 2 Ves. Sen. 425, 429; *Lins v. Harris* (1752), 1 Lee, 146, 156; *Dixon v. Kershaw* (1766), Amb. 528; *Farnworth v. Chester (Bishop)* (1825), 4 B. & C. 555, *per* ABBOTT, C.J., at pp. 568, 569.

(*t*) See p. 567, *ante*.

(*u*) Sequestration Act, 1871 (34 & 35 Vict. c. 45), s. 6.

(*a*) 2 Roll. Abr. 346, and see pp. 561, 566, *post*. As to the exercise by the Crown of patronage belonging to a vacant see, and to a vacant benefice when the incumbent has been promoted to a see, see p. 575, *ante*, and note (*d*), p. 585, *post*.

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Beneficed
Clergy.

forming a numerous class and deriving no pecuniary advantage from the exercise of the right of patronage, and is vested in them or in trustees appointed by or acting on behalf of them (b). The right is exercised by the owners by election; and the trustees or the churchwardens present the clergyman who has obtained the majority of the votes given (c). The election may be by ballot (d). The advowson is charitable property (e). The owners may direct a sale of it; and if ten of them so require the incumbent of the church or benefice is to convene a meeting of the owners to decide whether it shall be sold (f). If the decision is in the affirmative, the advowson and the duty of carrying out the sale are to vest absolutely in the existing trustees, if any, and, if there are none, in a body of trustees consisting of the incumbent and not less than five nor more than eleven owners, who are appointed for the purpose at the meeting or some adjournment thereof; and the advowson is to be sold with all convenient speed by public auction or private contract (g).

Trustee
 patrons in
 perpetuity.

1145. An advowson or right of patronage of a benefice may be held by trustees in perpetuity, and without power of alienation (h),

(b) Decisions on the right have been given in the cases of Sandford in Lincolnshire (*A.-G. v. Davy* (1741), 2 Atk. 212); Clerkenwell (*A.-G. v. Parker* (1747), 3 Atk. 576; *A.-G. v. Rutter* (1770), 2 Russ. 101, n.; *A.-G. v. Forster* (1805), 10 Ves. 335; *A.-G. v. Newcombe* (1807), 14 Ves. 1; *Carter v. Cropley* (1857), 8 De G. M. & G. 680, C. A.; *Shaw v. Thompson* (1876), 3 Ch. D. 233); Leeds (*A.-G. v. Scott* (1750), 1 Ves. Sen. 413; *Wilson v. Kershaw* (1750), 7 Bro. Parl. Cas. 296); Painswick (*Fearon v. Webb* (1802), 14 Ves. 13); Willenhall (*R. v. Stafford (Marquis)* (1790), 3 Term Rep. 646; *A.-G. v. Stafford (Marquis)* (1796), 3 Ves. 77); St. Sepulchre, Cambridge (*Faulkner v. Elger* (1825), 4 B. & C. 449); St. Stephen, Coleman Street (*Edenborough v. Canterbury (Archbishop)* (1826), 2 Russ. 93; *Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury* ((1888), 39 Ch. D. 492) Sandford in Devonshire (*R. v. Davie* (1837), 6 Ad. & El. 374; *Chudleigh (A.-G. v. Cuming* (1843), 2 Y. & C. Ch. Cas. 139); and Orton (*R. v. Orton (Trustees)* (1849), 14 Q. B. 139). Where an advowson is vested in the master and brethren of an eleemosynary hospital the majority are entitled to present and the master has no veto (*R. v. Kendall* (1841), 1 Q. B. 366).

(c) *A.-G. v. Forster* (1805), 10 Ves. 335; *R. v. Orton (Trustees)*, *supra*; *Carter v. Cropley* (1857), 4 De G. M. & G. 680, C. A., at p. 685.

(d) *Shaw v. Thompson* (1876), 3 Ch. D. 233, 252. The contrary was held before the ballot was prescribed for civil elections (*Edenborough v. Canterbury (Archbishop)* (1826), 2 Russ. 93).

(e) *A.-G. v. Parker* (1747), 3 Atk. 576; *Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury* (1888), 39 Ch. D. 492.

(f) Sale of Advowsons Act, 1856 (19 & 20 Vict. c. 50), ss. 1—3.

(g) *Ibid.*, ss. 4—16. The net money produced by the sale is to be applied to certain specified purposes in connection with a parsonage house, the augmentation of the benefice, if small, the repair of the church, the erection of schools or the building or endowing of a chapel of ease, or in aid of the rates, in the prescribed order; but with power for the meeting which resolves on the sale to modify the order of application of the money (*ibid.*, s. 9). Vacancies among the trustees before the trust is completely executed are to be supplied in the prescribed manner, and the concurrence of two-thirds of their whole number is requisite to all their resolutions (*ibid.*, ss. 11, 12). If the benefice becomes void before the sale is completed, the right of presentation is to be exercised as if no proceedings for the sale had been initiated (*ibid.*, s. 14).

(h) *A.-G. v. Floyer* (1716), 2 Vern. 748; *Foley v. A.-G.* (1721), 7 Bro. Parl. Cas. 249, 254.

SECT. 2.
Beneficed
Clergy.

whether or not a trust is expressed or *cestuis que trust* are named (i). If no trust is expressed nor *cestuis que trust* named, or a trust is declared simply to present a fit person to the benefice, which is the legal duty of all patrons, the trust is not a charitable trust (k). But the trust is a charitable trust if the advowson is given to trustees for the benefit of a charity (l), or if the trustees are to present a clerk elected by the parishioners or some other class of persons (m), or a clerk holding special opinions in the interest of a particular school of thought in the Church (n). In the absence of any provision to the contrary, all the trustees must present (o), unless they are a corporation, in which case the majority may select the presentee without using the corporate seal (p). But a power for the majority to present may be contained in the instrument creating or regulating the trust (q). In the absence of a provision to the contrary in the instrument of trust the survivors or survivor of the trustees may present (r).

1146. Where the bishop of a diocese, as such, either alone or jointly with one or more other persons, is trustee of, or is invested with the power of exercising, the patronage of any church and benefice which, when he or his predecessor was first invested with the trust or power, were within the diocese, but owing to an alteration of the limits of the diocese have since become included in another diocese, the Charity Commissioners, with the consent of the Ecclesiastical Commissioners, under their common seal, may make an order substituting for such bishop, in respect of the trust or power, the bishop of the diocese in which the church and benefice have become included (s).

Substitution
of one bishop
for another
as trustee.

(i) *Foley v. A.-G.*, *supra*; *A.-G. v. Scott* (1750), 1 Ves. Sen. 413; *A.-G. v. Litchfield (Bishop)* (1801), 5 Ves. 825; *A.-G. v. Lawson* (1866), 36 L. J. (CH.) 130. As to the appointment of patronage trustees under the Church Building Acts and New Parishes Acts, see pp. 568 *et seq.*, *ante*.

(k) *Re Church Patronage Trust, Laurie v. A.-G.*, [1904] 2 Ch. 643, O. A. But a trust to present a fit and proper person duly qualified according to law has been held to require more than the mere presentation of a legally qualified person (*A.-G. v. Powis (Earl)* (1853), Kay, 186, *per* Lord HATHERLEY (then PAGE WOOD, V.-O.), at pp. 212, 213).

(l) *A.-G. v. Ward* (1829), 7 L. J. (O. S.) (CH.) 114; *Re Shrewsbury School* (1836), 1 My. & Cr. 632.

(m) *Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury* (1888), 39 Ch. D. 492.

(n) *Re Hunter, Hood v. A.-G.*, [1897] 2 Ch. 105 (reversed on other grounds in House of Lords, *Hunter v. A.-G.*, [1899] A. C. 309); *Re Church Patronage Trust, Laurie v. A.-G.*, [1904] 2 Ch. 643, 652, 654, 655, C. A.

(o) *A.-G. v. Scott*, (1750), 1 Ves. Sen. 413. But the presentation will be sustained where one trustee dissents (*A.-G. v. Cuming* (1843), 2 Y. & O. Ch. Cas. 139), or is incapable of assenting (*A.-G. v. Lawson* (1866), 36 L. J. (CH.) 130). A majority cannot present without consulting all the others who are capable of acting (*ibid.*, *per* KINDERSLEY, V.-O., at p. 134).

(p) *A.-G. v. Davy* (1741), 2 Atk. 212. But the presentation ought to be under the common seal (Bro. Abr. tit. Corporation, 83).

(q) *Foley v. A.-G.* (1721), 7 Bro. Parl. Cas. 249, 254.

(r) *A.-G. v. Litchfield (Bishop)* (1801), 5 Ves. 825, where the heir of the surviving trustee was also held entitled to present; *A.-G. v. Lawson*, *supra*. But the number of trustees ought to be kept filled up (*A.-G. v. Litchfield (Bishop)*, *supra*).

(s) Bishops' Trusts Substitution Act, 1858 (21 & 22 Vict. c. 71), *ss.* 1, 2.

**SECT. 3.
Beneficed
Clergy.**

Who to be
deemed or
act as patron
in certain
cases.

1147. Where, under the Pluralities Act, 1838 (*t*), or any of the Acts to which the provisions of that Act as to patrons are extended (*a*), the consent or concurrence of the patron of a benefice, or notice to him, is required in the case of a matter affecting the benefice, the person who, if the benefice were at the time vacant, would be entitled to present or nominate thereto is for those purposes to be deemed the patron (*b*). But where consent to the exercise of any power is required from a patron who is a minor, idiot or lunatic, or a married woman not having a separate interest in the advowson, the guardian, committee, or husband of such patron (but in the case of a married woman with her written consent), may execute the instrument by which the power is exercised, in testimony of the patron's consent (*c*). Where the patronage of a benefice is in the Crown, the consent of the patron to the exercise of any power and the notice to the patron are to be given by and to (1) the First Lord of the Treasury, if the benefice is above the yearly value of £20 in the King's books, and the Lord Chancellor, if the benefice does not exceed that yearly value, and (2) the Chancellor of the Duchy of Lancaster, if the benefice is in the patronage of the Crown in right of the Duchy of Lancaster (*d*). Where the patronage of a benefice belongs to the Duchy of Cornwall, the consent of the patron to the exercise of any power and the notice to the patron are to be given by and to (1) the Duke of Cornwall, if of full age, and (2) the same persons as where the patronage is in the Crown, when the benefice is within the patronage of the Crown in right of the Duchy of Cornwall (*e*).

(ii.) *Transfer and Transmission of Patronage.*

Transfer and
transmission
of patronage.

1148. An advowson or right of patronage is transferable or transmissible by conveyance or devise or by operation of law in the

(*t*) 1 & 2 Vict. c. 106.

(*a*) Namely, the Church Building Acts, 1818 to 1840 (see Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 21; New Parishes Act, 1843 (6 & 7 Vict. c. 37) (see *ibid.*, s. 23); New Parishes Act, 1856 (19 & 20 Vict. c. 104) (see *ibid.*, s. 20); and Union of Benefices Act, 1860 (23 & 24 Vict. c. 142) (see *ibid.*, s. 24)).

(*b*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 125. A parish or place in which there is no parish church, nor any known patron of the benefice, is to be treated as an extra-parochial place for the purpose of forming an ecclesiastical district thereout; and notices required to be sent to the patron are to be sent to the bishop of the diocese (New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), s. 11).

(*c*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 127.

(*d*) *Ibid.*, s. 128.

(*e*) *Ibid.*, s. 128. The Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53), ss. 14, 20, and the Parsonages Act, 1838 (1 & 2 Vict. c. 23), ss. 10—12, contain similar provisions as to the consent of the patron to the exercise of powers given by those Acts where the right of patronage is in the Crown or belongs to the Duchy of Cornwall, or where the patron is a minor, idiot, lunatic, or married woman; and these provisions, with a provision that for the purpose of such consent the person who, if the benefice were vacant, would be entitled to present or nominate or collate thereto, shall be deemed the patron, are by the Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 22, extended to the consents of patrons required by that Act or by any of the earlier Church Building Acts (see note (*t*), p. 444, *ante*), or by Queen Anne's Bounty Act, 1714 (1 Geo. 1, stat. 2, c. 10).

SECT. 3.
Beneficed
Clergy.

same manner as other incorporeal hereditaments (*f*); but under the Benefices Act, 1898 (*g*), the transfer thereof as defined in that Act (*h*) is subject to the following restrictions: (1) It must be registered in the prescribed manner (*i*) in the registry of the diocese within one month from the date thereof or within such extended time as the bishop under special circumstances thinks fit to allow; (2) it must transfer the whole interest of the transferor in the advowson or right of patronage, except that in a family settlement a life interest may be reserved to the settlor, and in a mortgage a right of redemption may be reserved; (3) more than twelve months must have elapsed since the last institution or admission to the benefice; (4) except in the case of an advowson to be sold in conjunction with a manor or with an estate in land of not less than one hundred acres situate in the parish in which the benefice is situate, or in an adjoining parish and belonging to the same owner as the advowson, a right of patronage cannot be offered for sale by public auction (*k*). The following agreements are also invalid, namely: (1) An agreement for the exercise of a right of patronage in favour of or on the nomination of a particular person, and (2) an agreement on or in connection with the transfer of a right of patronage (*i*.) for the re-transfer of the right; (*ii*.) for postponing payment of any part of the consideration of the transfer until a vacancy in the benefice or for more than three months; (*iii*.) for payment of interest until a vacancy or for more than three months; (*iv*.) for any payment in respect of the date at which a vacancy occurs; and (*v*.) for the resignation of a benefice in favour of any person (*l*).

The advowson of a benefice may be legally transferred when the incumbent is *in extremis*, if an intended presentee is not privy to the transfer (*m*).

When
incumbent is
in extremis.

1149. The proprietor of an advowson may be registered under the Land Transfer Acts in the same manner and with the same

Registration.

(*f*) Co. Litt. 17 b, 332 a, 335 b; Com. Dig. tit. Advowson, c. 1; *Pannell v. Hodgson* (1576), Cary, 74; *Holdsworth v. Fairfax* (1834), 3 Cl. & Fin. 115, H. L.

(*g*) 61 & 62 Vict. c. 48, s. 1.

(*h*) The definition includes any conveyance or assurance passing or creating a legal or equitable interest *inter vivos*, and any agreement for such a conveyance or assurance, but does not include a transmission on marriage, death, or bankruptcy, or otherwise by operation of law, nor a transfer on the appointment of a new trustee where no beneficial interest passes (*ibid.*, s. 1 (6)).

(*i*) Benefices Rules, 1898, rr. 2, 3, Sched., Form, No. 1 (Statutory Rules and Orders Revised, Vol. I., Benefice, England, pp. 1, 4).

(*k*) A person who offers a right of patronage for sale by auction in contravention of this restriction, or who bids at any such sale, is liable, on summary conviction, to a fine not exceeding £100 (Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1 (2)).

(*l*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1 (3). As to what agreements for resignation of a benefice in favour of certain persons, entered into otherwise than on the transfer of a right of patronage, are valid under the Clergy Resignation Bonds Act, 1828 (9 Geo. 4, c. 94), see pp. 627 *et seq.*, *post*.

(*m*) *Smith v. Shelbourn* (1899), Cro. Eliz. 685; *Barret v. Glubb* (1776), 3 Wm. Bl. 1053; *Fos v. Chester (Bishop)* (1829), 6 Bing. 1, H. L.

SMO. 8.
Beneficed
Clergy.

Descent
where not
effectually
devised.

incidents as in the case of land, or as near thereto as circumstances admit (*n*).

1150. If the owner of an advowson dies without having devised his whole interest in it, the advowson or the undevised interest in it passes to his heir-at-law (*o*), although in the first instance, like other real estate of a deceased person, it vests in his legal personal representatives and is liable to be administered as his assets (*p*).

Exchange,
transfer, or
alteration of
patronage.

1151. An exchange or transfer of advowsons, or alterations in the exercise of patronage of benefices, with a view either to improve value or make better provision for the spiritual duties of ill-endowed parishes or districts, or to make better provision for the cure of souls in the benefices affected by the transaction, may be effected by schemes of the Ecclesiastical Commissioners ratified by Order in Council, with the consent of the patrons and of the bishop of the diocese, or of each diocese if the benefices lie in different dioceses, and, where the bishop is himself one of the patrons, of the archbishop of the province (*q*). An exchange of advowsons or rights of patronage with a view to proceedings for the union of two or more benefices under the Pluralities Act, 1838 (*r*), may be effected by Order in Council, with the consent of the patrons, and, where a patron is an ecclesiastical corporation, aggregate or sole, of the bishop of the diocese, or of each diocese if the benefices lie in different dioceses, and, where the bishop is a patron, of the archbishop of the province (*s*). And, generally, the King, as regards patronage vested in him in right of the Crown or in right of the Duchy of Lancaster or the Duchy of Cornwall, and any archbishop or other ecclesiastical corporation, sole or aggregate, and any other corporation, and the head or governing body of any college or collegiate establishment or hospital, entitled in his or their corporate capacity to any patronage, may give and take, by way of exchange, advowsons and ecclesiastical patronage, by means of a scheme of the Ecclesiastical Commissioners ratified by Order in Council (*t*). Where the

(*n*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 82; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 18, Sched. I.

(*o*) *Kensley v. Langham* (1735), *Qas. temp. Talb.* 143; *Sherrard v. Harborough* (Lord) (1753), 1 Amb. 165; *Martin v. Martin* (1842), 12 Sim. 579; *Johnstone v. Baber* (1856), 6 De G. M. & G. 439, O. A.

(*p*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), ss. 1—3.

(*q*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), ss. 73, 83—87; Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), ss. 22, 24; Ecclesiastical Commission Act, 1868 (31 & 32 Vict. c. 114), s. 12; Church Patronage Act, 1870 (33 & 34 Vict. c. 39). The patronage may be transferred from or to an ecclesiastical corporation aggregate or sole, notwithstanding any statute of mortmain (Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 22; Church Patronage Act, 1870 (33 & 34 Vict. c. 39)).

(*r*) 1 & 2 Vict. c. 106, s. 16. See p. 606, *post*.

(*s*) Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), ss. 23, 24.

(*t*) Ecclesiastical Commissioners (Exchange of Patronage) Act, 1853 (16 & 17 Vict. c. 50); Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), s. 42.

patronage of a benefice is given in exchange by the Crown, the benefice taken in exchange follows the course of patronage of the benefice so given in exchange (a).

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1152. When a benefice becomes vacant, the right of presentation thereto is said to be fallen. It has become a personal right or chattel, disannexed from the advowson (b); and it cannot be alienated (c), but must be exercised by the person who was patron at the time when it fell, or by the legal personal representative of such person (d). Consequently it does not pass by a transfer of the patronage which is not completed before the avoidance of the benefice (e).

Right of
presentation
when benefice
vacant.

(iii.) *Disturbance of Right.*

1153. The right of the patron of a benefice may be disturbed by a pretending patron, if he presents a clerk to the benefice; by a clerk presented by a pretending patron, if he demands or obtains institution or admission to the benefice; and by the bishop, if he either institutes or admits a clerk presented by a pretending patron, or, without any adverse presentation having been made, collates a clerk selected by himself, or refuses or unduly delays (f) to institute or admit a clerk presented by the patron. Where both the patron and a pretending patron make presentations, the church of the benefice becomes litigious (g). If a clerk is instituted or admitted to a benefice upon the presentation of one who is not the lawful patron, it is called a usurpation (h).

How right
may be
disturbed.

(a) Ecclesiastical Commissioners (Exchange of Patronage) Act, 1853 (16 & 17 Vict. c. 50), s. 4.

(b) *Stephens v. Wall* (1569), 3 Dyer, 282 b, 283 a; *Gorge v. Lincoln (Bishop)* (1587), Owen, 53; *R. v. Fane* (1589), 4 Leon. 107, 109; *Baker v. Rogers* (1600), Cro. Eliz. 788; *Mirehouse v. Rennell* (1833), 7 Bli. (N. S.) 241, H. L., per BOSANQUET, J., at p. 256; *Alston v. Atlay* (1837), 7 Ad. & El. 289, 293, 311, 312, Ex. Ch.

(c) *Baker v. Rogers, supra*; *Lincoln (Bishop) v. Wolforstan* (1764), 3 Burr. 1504, 1510, 1512, Ex. Ch.

(d) *Stephens v. Wall, supra*; *Gorge v. Lincoln (Bishop) supra*; *R. v. Fane, supra*; *Repington v. Tamworth School (Governors)* (1763), 2 Wils. 150; *Mirehouse v. Rennell, supra, per Lord LYNDHURST*, at p. 318. The rights of the king, upon the death of a bishop or a tenant *in capite* of the Crown, to present to a benefice in his patronage as bishop, or as such tenant *in capite*, which has fallen vacant previously to his death, are exceptions to the rule, arising out of the royal prerogative (*ibid.*, at pp. 258, 259, 318, 319). Where a married woman entitled to the advowson of a benefice dies while the benefice is vacant, her husband is entitled to present (*ibid.*, per Lord LYNDHURST, at p. 318; Co. Litt. 120 a). But where the advowson of a benefice belongs to the incumbent, so that his death creates a vacancy in it, the right of presentation goes to his heir or devisee, and not to his executor (*Holt v. Winchester (Bishop)* (1682), 3 Lev. 47; *Hill v. London (Bishop)* (1738), 1 Atk. 618; *Martin v. Martin* (1842), 12 Sim. 579).

(e) *Mirehouse v. Rennell, supra, per Lord LYNDHURST*, at p. 319; *Alston v. Atlay, supra*. If a vicarage in the patronage of the rector becomes vacant, and the rector before he presents is made a bishop or otherwise vacates the rectory by cession, he retains the right of presentation for that turn (Fitz. Nat. Brev. 34, N). If a prebendary, entitled in right of his prebend to the advowson of a benefice, dies while the benefice is vacant, the right to present belongs to his legal personal representatives (*Mirehouse v. Rennell, supra*).

(f) 2 Roll. Abr. 366.

(g) 3 Bl. Com. 244—246; Watson, Clergyman's Law, 4th ed., pp. 227, 228.

(h) No usurpation upon the avoidance of a benefice has the effect in itself of

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Remedies.

1154. The remedies for disturbance of right of patronage are fourfold, namely, an action of *quare impedit* (i); a suit of *duplex querela* (k); a *jus patronatus* (l); and an appeal to the court constituted under the Benefices Act, 1898 (m). Pending a dispute as to the patronage, the presentation, institution, and induction of the clerk of one of the claimants can be restrained by injunction (n).

Action of
quare
impedit.

1155. An action of *quare impedit* (o) can be brought in the temporal court by the patron where the bishop refuses to institute or admit his presentee on the ground of unfitness in respect of doctrine or ritual (p), or on the ground of the patron's want of title, or of the church having become litigious (q). It can also be brought by a person having the right of nomination to the benefice against the legal patron, if he does not give effect to that right (r). If the disturbance arises from the action of the bishop alone, he alone is made defendant to the action. But if another clerk has been presented by a pretending patron, the action must be brought against the pretending patron (s), and it is important to join his clerk and the bishop as co-defendants (a). For if the clerk has already been instituted or admitted to the benefice, and is not joined in the action, a judgment in favour of the patron will not extend to remove the clerk, and the patron, though successful, will,

displacing the estate of the patron; but if he is disturbed upon a subsequent avoidance, he may maintain his action of *quare impedit* notwithstanding such usurpation (Advowsons Act, 1708 (7 Ann. c. 18), s. 1), provided he is not barred by lapse of time; see p. 589, *post*.

(i) Watson, Clergyman's Law, 4th ed., pp. 238—305.

(k) *Ibid.*, pp. 231—235.

(l) *Ibid.*, pp. 235—237.

(m) 61 & 62 Vict. c. 48, s. 3.

(n) *Potter v. Chapman* (1750), 1 Dick. 146; *Nicholson v. Knapp* (1838), 9 Sim. 326; *Greenalade v. Dare* (1853), 17 Beav. 502.

(o) As to the indorsement on the writ, see R. S. O., Appendix A, Part III., s. 4. As to the pleadings, see *Shireburne v. Hitch* (1708), 1 Bro. Parl. Cas. 110; *Marshall v. Exeter (Bishop)* (1859), 6 O. B. (N. S.) 716; *Exeter (Bishop) v. Marshall* (1868), L. R. 3 H. L. 17. The right to bring the action is lost by a grant of the advowson made after it has accrued, since it neither remains in the grantor nor passes to the grantee (*Leak v. Coventry (Bishop)* (1600), Cro. Eliz. 811). When a benefice is full, the King, like any other patron, cannot present to it without displacing the incumbent in possession by an action of *quare impedit* (stat. (1389) 13 Ric. 2, stat. 1, c. 1; stat. (1402) 4 Hen. 4, c. 22).

(p) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 3 (1), (5); *Heywood v. Manchester (Bishop)* (1884), 12 Q. B. D. 404. The bishop's defence must state the particulars of the presentee's unfitness (*Exeter (Bishop) v. Marshall* (1868), L. R. 3 H. L. 17). As to refusal on any other ground of unfitness, see p. 588, *post*.

(q) Stat. Westminster II. (1285), 13 Edw. 1, c. 5; 3 Bl. Com. 246—250. A church is said to become litigious if two presentations are offered to the bishop upon the same avoidance by persons claiming adversely to one another (3 Bl. Com. 246).

(r) *Quare Impedit de Hospital*, Bast. 506 b; *R. v. Stafford (Marquis)* (1790), 3 Term Rep. 646, per Lord KENYON, C.J., at p. 651; *Welch v. Peterborough (Bishop)* (1885), 15 Q. B. D. 432.

(s) *Hall v. Bath and Wells (Bishop)* (1589), 7 Co. Rep. 25 b; *Elvis v. York (Bishop)* (1600), Hob. 315, 316. The action does not abate on the death of the presenting patron (*Hall v. Bath and Wells (Bishop)*, *supra*, at p. 26 b).

Burn, Ecclesiastical Law, Vol. I., p. 43; Vol. II., p. 358.

therefore, lose the present turn (b). And if the action is not determined within six months after the benefice became void, the bishop, unless he is made a party to it, will become entitled to collate to the benefice by lapse (c). The bishop and the clerk, when so joined, usually disclaim all title, except as ordinary and presentee respectively, and leave the pretending patron to defend his title; and upon their disclaimer the party against whom judgment is given is ordered to pay their costs (d). In order that either the plaintiff or the pretending patron may obtain a judgment in his favour he must not only disprove the other's title, but must prove his own (e). The judgment for the party who establishes his right, whether plaintiff or defendant (f), is that he recover his right of presentation, the costs of the action, and also, where the plaintiff is the successful party, damages (g). If the church became void more than six months before the institution of the action, and a clerk has been admitted on the presentation of a person other than the plaintiff, or if the bishop, either before or during the action, having the right to do so by lapse, has collated to the benefice, the successful party loses his present turn (h). Otherwise the judgment

(b) *Lancaster v. Lowe* (1605), Cro. Jac. 92, S. C. *sub nom. Boswel's Case*, 6 Co. Rep. 48 b.

(c) *Brickhead v. York* (Archbishop) (1617), Hob. 197, 201; *Elvis v. York* (Archbishop), *supra*, 320. If lapse to the bishop is barred by his being made a defendant, the right by lapse will not pass on to the archbishop and the King (*Lancaster v. Lowe* S. C. *sub nom. Boswel's Case*, *supra*).

(d) 3 Bl. Com. 249. The bishop, unless he has collated, cannot counterplead the plaintiff's title (*Apperley v. Hereford* (Bishop) (1833), 9 Bing. 681; *Storie v. Winchester* (Bishop) (1850), 9 C. B. 62; 17 C. B. 653) except in the case of a title alleged in the King as against the bishop's collation by lapse (Ordinance for the Clergy, 1352 (25 Edw. 3, stat. 6, c. 7)).

(e) *Tufton v. Temple* (1668), Vaugh. 1, 6—8. He must prove that he or some one under whom he claims has made a presentation to the benefice (*Meath* (Bishop) *v. Belfield* (Lord) (1748), 1 Wils. 215; *Tillard v. Shebbeare* (1767), 2 Wils. 366; *Cooke v. Elphin* (Bishop) (1831), 5 Bl. (n. s.) 103, H. L., *per Lord TENTERDEN*, at p. 126). For the requisite evidence to support the claim of a bishop to collate, see *Irish Society v. Derry* (Bishop) (1846), 12 Q. & Fin. 641, H. L. If the clerk of the pretending patron has been already admitted to the benefice, that is *prima facie* proof of his title (*Carlisle v. Whaley* (1867), L. R. 2 H. L. 391, 418).

(f) *Portman's* (Sir Hugh) *Case* (1598), 7 Co. Rep. 27 b.

(g) Stat. Westminster II. (1285), 13 Edw. 1, c. 5; 3 Bl. Com. 249, 250; *Gardiner v. Griffith* (1726), 2 P. Wms. 404; *Boteler v. Allington* (1746), 3 Atk. 453, 458. If judgment is given for the plaintiff, inquiry has to be made into three further points: (i.) whether the church is full, and, if full, on whose presentation; (ii.) as to the yearly value of the church; and (iii.) whether six months have elapsed since the church became void (2 Co. Inst. 362, 363; 3 Bl. Com. 249; *Poyner v. Chorleton* (1556), Dyer, 135 a; *Boswel's Case* (1605), 6 Co. Rep. 48 b, 49 a). The damages are two years' full value of the benefice where the turn is lost, and six months' value if a clerk has been admitted to the benefice but is removable (Stat. Westminster II. (1285), 13 Edw. 1, c. 5; *Henslow v. Salisbury* (Bishop) (1551), Dyer, 76 b; 2 Co. Inst. 362; *Boswel's Case* (1605), 6 Co. Rep. 48 b, 51 a). As to the costs of an ecclesiastical patron reasonably defending the action before R. S. C., Ord. 65, see *Edwards v. Exeter* (Bishop) (1839), 6 Bing. (n. c.) 146.

(h) Stat. Westminster II. (1285), 13 Edw. 1, c. 5; 3 Bl. Com. 250; unless the holding of the benefice by the clerk in possession is void for simony (17 Vin. Abr. 338), or unless the successful party is the King, in which case the present turn is not lost by the expiration of the six months, provided a presentation is

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in favour of the plaintiff orders the issue of a writ to the bishop to admit his presentee (*i*), and, if the church is full, orders the removal of the clerk who holds it (*k*).

Duplex
querela.

1156. Except where the bishop refuses institution or admission on some ground specified in s. 2 of the Benefices Act, 1898 (*l*), or on some other ground of unfitness or disqualification of the presentee sufficient in law to justify the refusal, not being a ground of doctrine or ritual (*m*), a presentee who is refused institution or admission by the bishop may bring a suit of *duplex querela* (*n*) against the bishop before the provincial court, or, if the refusing ordinary is an archbishop, before the Judicial Committee of the Privy Council: and if another clerk has been also presented, he is made a co-defendant to the suit (*o*). The suit, however, cannot be brought after another clerk has been inducted to the benefice, since a temporal right has been then acquired which can only be questioned in a temporal court (*p*).

Jus
patronatus.

1157. A *jus patronatus* is a process instituted by the bishop, if he so thinks fit, at the request of either of the parties claiming to be patrons, or either of the clerks presented by them, when the church is litigious, or, when it is not litigious, if he has a doubt as to the title of the patron claiming to present. He may himself sit as judge, but the process is usually carried out by a commission issued by him. A jury of six clergymen and six laymen is summoned to inquire who is the rightful patron, and the bishop institutes or

made within the next six months (stat. temp. incert. Prerogativa Regis, c. 10 (17 Edw. 2, stat. 1, c. 8, Ruff.)).

(*i*) *Portman's (Sir Hugh) Case* (1598), 7 Co. Rep. 27 b; 3 Bl. Com. 250.

(*k*) 3 Bl. Com. 249, 250.

(*l*) 61 & 62 Vict. c. 48. The grounds specified in s. 2 are (i.) that at the date of the vacancy not more than one year has elapsed since a transfer as defined by s. 1 (see note (*m*), p. 599, *post*) of the right of patronage of the benefice, unless it be proved that the transfer was not effected in view of the probability of a vacancy within such year; (ii.) that at the date of the presentation not more than three years have elapsed since the presentee was ordained deacon; and (iii.) that the presentee is unfit for the discharge of the duties of the benefice by reason of physical or mental infirmity or incapacity, pecuniary embarrassment of a serious character, grave misconduct or neglect of duty in an ecclesiastical office, evil life, having by his conduct caused grave scandal concerning his moral character since his ordination, or having, with reference to the presentation, been knowingly party or privy to a transaction or agreement which is invalid under the Act (see p. 583, *ante*).

(*m*) *Ibid.*, s. 3 (1), (5).

(*n*) Or double complaint. The proceeding, being also available in other cases of denial or delay of justice on the part of an inferior ecclesiastical judge or ordinary, was so called because it was usually instituted against both the judge and the party at whose instance the denial or delay of justice took place (*Termes de la Ley*, 271). A clerk who, as patron, claims to present himself to a benefice, cannot proceed to enforce his claim by a suit of *duplex querela* and an action of *quare impedit* concurrently (*Walsh v. Lincoln (Bishop)* (1874), L. R. 4 A. & E. 242).

(*o*) 2 Bl. Com. 247; Burn, *Ecclesiastical Law*, Vol. I., pp. 159—162; *Gorham v. Exeter (Bishop)* (1850), 14 Jur. 443, P. C.; S. C. on applications for prohibition, 15 Q. B. 52; 10 O. B. 102; 5 Exch. 630.

(*p*) *Hutton's Case* (1614), Hob. 15; *Rowth v. Chester (Bishop)* (1615), Moore (κ. B.), 861; *Middleton v. Lawte* (1617), *ibid.* 879; Burn, *Ecclesiastical Law*, Vol. I., p. 162.

admits the presentee of the person so found by their verdict and certified as such by the commissioners, where a commission is issued (*q*).

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1158. Where a bishop on any ground mentioned in s. 2 of the Benefices Act, 1898 (*r*), or any other ground of unfitness, or disqualification of the presentee sufficient in law to justify the refusal, not being a ground of doctrine or ritual, refuses to institute or admit a presentee to a benefice, he must signify in writing the refusal and the grounds thereof to the person who presented and the person presented (*s*); and within one month after the signification either of these persons may require that the matter be heard by a court consisting of the archbishop of the province, or if the presentation was made to him, the archbishop of the other province, and a judge of the Supreme Court nominated from time to time by the Lord Chancellor for the purpose; and the bishop is to be made a party to the proceedings. The judge decides all questions of law and finds as to any fact alleged as a ground of unfitness or disqualification, and his decision and finding in these respects are binding on the archbishop. The archbishop directs institution or admission if the judge finds that no fact exists sufficient in law to be a reason of unfitness or disqualification, or, if the judge finds that any such fact exists, decides, if necessary, whether by reason thereof the presentee is unfit for the discharge of the duties of the benefice, and determines whether institution or admission ought, under the circumstances, to be refused; and in either case gives judgment accordingly, which is final (*t*).

Under the
Benefices
Act, 1898.

1159. A patron cannot bring an action or suit to enforce a right of patronage after the expiration of the period during which the benefice has been held by three incumbents in succession, all of whom have obtained possession thereof adversely to the right of patronage of such patron or of some person through whom he claims, if the three incumbencies together amount to sixty years; or if the benefice has been so held for a period of less than sixty years, then after the expiration of such further time as with the times of the three incumbencies will make up the full period of sixty years; or after the expiration of one hundred years from the time at which an incumbent has obtained possession of the benefice adversely to the right of patronage of such patron or of some person through

Limitation
of time for
recovery.

(*q*) Clerke, *Praxis in Curia Ecclesiasticis*, tit. xcviii.—c.; Burn, *Ecclesiastical Law*, Vol. I., pp. 24—28; 3 Bl. Com. 246, 247; Watson, *Clergyman's Law*, 4th ed., pp. 235—237; *Elvis v. York (Archbishop)* (1619), Hob. 315, 317, 318.

(*r*) 61 & 62 Vict. c. 48; see note (*l*), on p. 588, *ante*.

(*s*) *Ibid.*, s. 3 (1); Benefices Rules, 1898, r. 13; Sched., Forms, Nos. 8, 9 (Statutory Rules and Orders Revised, Vol. I., Benefice, England, pp. 3, 7).

(*t*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 3; Benefices Rules, 1899, rr. 1—16, 23—52, Sched. I.; Sched. II., Forms Nos. 1—16, 25—50 (Statutory Rules and Orders Revised, Vol. I., Benefice, England, pp. 8—11, 13—35). Where in cases to which s. 3 of the Benefices Act, 1898 (61 & 62 Vict. c. 48), applies, the bishop signifies his refusal in the manner therein directed, no proceeding in the nature of *quare impedit* or *duplex querela* can be taken in any other court in respect of the refusal (Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 3 (5)). The archbishop's official principal institutes or admits if the bishop fails to do so after judgment in that behalf (*ibid.* ss. 3, 4).

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whom he claims, or of some person entitled to some preceding estate or interest or undivided share or alternate right of patronage held or derived under the same title, unless an incumbent has subsequently obtained possession of the benefice on the presentation or gift of such patron or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title (*a*). At the determination of the period limited for bringing an action or suit to enforce a right of patronage, the right to the advowson is extinguished (*b*). These limitations do not apply to the Crown; but by the Crown Suits Act, 1769 (*c*), the Crown cannot institute proceedings to recover an advowson by reason of any right or title which has not first accrued and grown within sixty years next before the proceedings are instituted, unless within such sixty years the Crown has enjoyed some possession thereof or the same has been duly in charge to the Crown or has stood insuper of record (*d*).

(iv.)

1160. If the patron of a benefice neglects to present to it within the allowed time, the patronage for that turn lapses to the bishop. If a bishop neglects to collate to a benefice within the allowed time after the patronage thereof has lapsed to him, or, being the patron thereof, within the allowed time after it has become void, the patronage for that turn lapses to the archbishop of the province. And if an archbishop neglects to present to a benefice within the allowed time after the patronage thereof has lapsed to him, or, being the patron thereof, within the allowed time after it has become void, the patronage for that turn lapses to the King as supreme patron (*e*).

(*a*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 1, 30—33, 43. A person claiming a right of patronage by virtue of an estate or interest, which a tenant in tail of the advowson might have barred, is to be deemed a person claiming through the tenant in tail (*ibid.*, s. 32). If, after an incumbent has obtained possession of a benefice adversely to the right of the patron, the next avoidance is filled by the incumbent collated by the ordinary or presented by the King by reason of lapse, such incumbent is to be deemed to have obtained on of the benefice adversely to the right of the patron. But where a benefice becomes void by the incumbent having been appointed to a diocesan bishopric in the province of Canterbury or of York, and a new incumbent is consequently presented by the King, his incumbency is to be deemed a continuance of the incumbency of the incumbent who was made a bishop (*ibid.*, s. 31). The periods limited by the Act apply to the case of a bishop claiming a right as patron to collate to or bestow a benefice; but do not affect his right of collation by reason of lapse (Limitation of Actions Act, 1843 (6 & 7 Vict. c. 54), s. 3). Within the periods limited by the Act a usurpation upon the avoidance of a benefice does not displace the interest of the patron, but on a future avoidance he may present to it or may maintain his right by proceedings *in quare impedit* (Advowsons Act, 1708 (7 Ann. c. 18), s. 1).

(*b*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 34; Limitation of Actions Act, 1843 (6 & 7 Vict. c. 54), s. 3.

(*c*) 9 Geo. 3, c. 16.

(*d*) *Ibid.*, ss. 1, 2, 10.

(*e*) Ordinance for the Clergy, 1352 (25 Edw. 3, stat. 6, c. 7); 2 Roll. Abr. 362—368; 2 Bl. Com. 276—278; Gib. Cod. 768—770; *Beverley v. Canterbury (Bishop) and Cornwel* (1586), 1 And. 148; *Thornton v. Savill* (1622), Palm. 306, 311. If patronage has lapsed to a bishop, and he dies or is translated or deprived before he exercises it, the patronage devolves on the archbishop of

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Where the patronage of a benefice is originally in the King or has come to him or to a preceding king by lapse, it is not lost by any delay in the exercise thereof (*f*).

The time allowed to the patron, the bishop, or the archbishop is in each case six calendar months (*g*).

1161. In the case of the patron the time begins to run from the date of the vacancy of the benefice if it becomes vacant by death or cession (*h*), or by other *ipso facto* avoidance not being in the nature of deprivation (*i*). But if it becomes void by resignation or deprivation, or if the patron presents and his presentee is refused by the bishop for unfitness or disqualification, the time begins to run only from the day when he receives notice from the bishop of the resignation or deprivation, or of such refusal of his presentee (*k*);

Calculation
of time.

the province (*Colt v. Coventry and Lichfield (Bishop)* (1617), Hob. 140, 154; Gib. Cod. 770).

(*f*) 2 Co. Inst. 273; 2 Bl. Com. 276, 277; Gib. Cod. 770; *R. v. Canterbury (Archbishop)* (1634), Cro. Car. 354, 355.

(*g*) That is to say, half a year or 182 days (2 Co. Inst. 361; 2 Bl. Com. 276; *Peterborough (Bishop) v. Cutesby* (1607), Cro. Jac. 106, Ex. Ch.; overruling *Albany and St. Asaph's (Bishop) Case* (1585), 1 Leon. 31). The time is exclusive of the day from which it begins to run (*Cornwallis v. Hood* (1665), Cart. 33, 44). This decision seems to have been overlooked by Sir WILLIAM GRANT, M.R., when he made his observation to the contrary in *Lester v. Garland* (1808), 15 Ves. 248, at p. 264.

(*h*) 2 Bl. Com. 278; and as to avoidance by cession, see *Case of Quare Impedit* (1565), 2 Dyer, 237 a; *Holland's Case* (1597), 4 Co. Rep. 75 a; *R. v. Canterbury (Archbishop)* (1634), Cro. Car. 354, and p. 633, *post*. (The distinction drawn in *Alston v. Atlay* (1837), 7 Ad. & El. 289, 304—311, Ex. Ch., between cases where the ceded benefice is under or over the yearly value of £8 in the King's books was abolished by the Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 1, 11.) Before 1838 the six months began to run from the induction of the incumbent into the new benefice (*Lincoln (Bishop) v. Wolforstan* (1764), 3 Burr. 1504, Ex. Ch.); but the patron of the ceded benefice might, if he pleased, have presented to it after the incumbent had been instituted to the new benefice and before his induction (*ibid.*, per WILMOT, J., at p. 1512). The six months apparently now run from the date of the institution to the new benefice (Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 11). If the incumbent dies beyond the seas, the time is to be reckoned from the day on which the patron might reasonably have known of it (2 Roll. Abr. 363). If the avoidance is occasioned by a union of benefices, the time runs from the date of the agreement for the union, since the patron is a party to it (Mirehouse, Advowsons, ch. vii., p. 164).

(*i*) *Case of Quare Impedit* (1565), 2 Dyer, 237. Stat. 13 Eliz. c. 12 (1571), s. 7, provides "that no title to confer or present by lapse shall accrue upon any deprivation *ipso facto*, but after six months after notice of such deprivation given by the ordinary to the patron"; and in *Green's Case* (1602), 6 Co. Rep. 29 a, it was accordingly held that the patron was entitled to notice although he was a party to a suit brought to enforce deprivation for not reading the Thirty-nine Articles (compare *R. v. Lincoln (Bishop)* (1582), 1 And. 62; and see now the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 7). So, too, in the case of *ipso facto* avoidance or deprivation by virtue of the Clergy Ordination Act, 1804 (44 Geo. 3, c. 43), in consequence of the incumbent having been admitted to deacon's orders before the age of twenty-three, or to priest's orders before the age of twenty-four, the time for the accrual of a title to collate or present by lapse is to commence when notice of the avoidance or deprivation is given by the bishop to the patron (*ibid.*, s. 1).

(*k*) 2 Roll. Abr. 364, 365; 2 Bl. Com. 278. An intimation of the refusal affixed to the door of the church of the benefice is not a sufficient notice to the patron, except, perhaps, where he cannot be found (*Bacon v. Carlisle (Bishop)* (1576), 3 Dyer, 346 a; 2 Roll. Abr. 365). The patron is not entitled to notice if his

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except where the presentee of a spiritual patron is refused for insufficiency of learning, since the law presumes that a spiritual person was aware of the insufficiency before he made the presentation (*l*). But under the Benefices Act, 1898 (*m*), all patrons alike are entitled to notice in writing from the bishop of his refusal of a presentee on any ground mentioned in s. 2 of that Act, or on any other ground of unfitness or disqualification sufficient in law, not being a ground of doctrine or ritual (*n*).

Suspension
of the
running of
time.

1162. The running of time for lapse is suspended if the bishop collates or the archbishop presents before the right has lapsed to him (*o*), or if the bishop is made a party to a *bonâ fide* action of *quare impedit* or a suit of *duplex querela* (*p*), but is not suspended by a feigned and baseless action of *quare impedit* brought against himself (*q*), or by an action of *quare impedit* to which he is not a party (*r*). The bishop cannot bring about a lapse by delaying his examination or acceptance of the presentee (*s*); and in reckoning the time for lapse no account is to be taken, in the case of the first and second presentations to a benefice by a patron in respect of the same vacancy, of the period between a presentation by the patron and the refusal by the bishop to institute or admit the presentee, or of the period between the refusal of the bishop to institute or admit and the decision of the court constituted by the Benefices Act, 1898 (*t*), upon such refusal; nor, in the case of a bishop having a right to collate to a benefice, of the period between the service of the notice on the churchwardens under the provisions of that Act (*a*), and the expiration of a month from such service (*b*). When the running of time for lapse is postponed as against the bishop, the periods for lapse to the archbishop and the King are correspondingly postponed (*c*).

When patron
may present
not with-
standing
lapse.

1163. If, after the patronage has lapsed to the bishop, the patron presents before the bishop collates, the presentation is as effectual as if it had been made within the allowed time (*d*). So, too, if the

presentee refuses or neglects to be admitted to the benefice (*R. v. Lincoln (Bishop)* (1582), And. 62, 63).

(*l*) 2 Roll. Abr. 364; Watson, Clergyman's Law, 4th ed., pp. 216, 217.

(*m*) 61 & 62 Vict. c. 48.

(*n*) *Ibid.*, s. 3 (1). As to the grounds mentioned in s. 2, see p. 599, *post*.

(*o*) 2 Roll. Abr. 350, 368.

(*p*) *Elvis v. York (Archbishop)* (1619), Hob. 315, 320; Co. Litt. 344 b; 3 Bl. Com. 247.

(*q*) *Brickhead v. York (Archbishop)* (1617), Hob. 197, 200.

(*r*) *Ibid.*, at p. 201; 2 Roll. Abr. 365; *Wilson v. Dennison* (1750), Amb. 82, *per* Lord HARDWICKE, L.C.

(*s*) 2 Roll. Abr. 366; *Salisbury (Bishop) v. Philips* (1700), 1 Ld. Raym. 535, Ex. Ch.; *Wilson v. Dennison*, *supra*.

(*t*) 61 & 62 Vict. c. 48.

(*a*) *Ibid.*, s. 2 (2).

(*b*) *Ibid.*, s. 5.

(*c*) Co. Litt. 344 b., 345 a.; 2 Bl. Com. 278; *R. v. Lincoln (Bishop)*, *supra*; *Lancaster v. Lowe* (1605), Cro. Jac. 92, 93; *Colt v. Coventry and Lichfield (Bishop)* (1617), Hob. 140, 154, Ex. Ch.

(*d*) 2 Co. Inst. 273; 2 Roll. Abr. 367, 368; *Anon.* (1568), 3 Dyer, 277 a, pl. 56; 2 Bl. Com. 277; *Colt v. Coventry and Lichfield (Bishop)*, *supra*; *Wilson v. Dennison*, *supra*.

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bishop allows the patronage to lapse to the archbishop, and the patron presents before a presentation is made by the archbishop (*e*). But after lapse to the archbishop, a bishop loses his right to collate by lapse; since his right is merely temporary and accidental (*f*). After lapse to the King, the patron cannot defeat the King's right by a prior presentation. It will be overridden by a subsequent presentation of the King, and if the patron's presentee is admitted to the benefice, the King may remove him by an action of *quare impedit*, and present notwithstanding his admission. But if the patron's presentee is admitted and is not so removed during his incumbency, the right of the King is lost, for it was only for that turn (*g*). If the King dies before exercising the right, it will descend to his successor (*h*).

1164. Where the see of the bishop becomes vacant before he has collated to a benefice by lapse, the lapsed patronage, being not an interest but a spiritual trust, devolves on the archbishop of the province as guardian of the spiritualities of the see (*i*).

Right to
lapsed
patronage
where
bishop's see
is vacated.

SUB-SECT. 3.—*Simony.*

1165. Simony, so called from Simon Magus, is the buying or selling of holy orders or of an ecclesiastical benefice or admission thereto (*j*). The procuring or acceptance of the presentation, institution, collation, induction, or admission to a benefice, in consideration of any money or profit or benefit, direct or indirect, or of any promise, agreement, or assurance of or for such money, profit, or benefit, whether before or after the benefice has become vacant, is simoniacal and void. Where it takes place, the King may present or bestow the benefice for that turn; and every person and body giving or taking any such money profit or benefit or making or taking any such promise, agreement, or assurance, forfeits double the value of one year's income of the benefice (*k*). And the person who so corruptly procures or accepts

Penalties and
disability
in case of
simony.

(*e*) 2 Bl. Com. 277; *Booton v. Rochester (Bishop)* (1618), Hut. 24. But if after lapse to the archbishop the bishop collates, the collation, though bad as against the archbishop, will prevent the patron from presenting (2 Roll. Abr. 350, 368).

(*f*) 2 Bl. Com. 277; 2 Roll. Abr. 350, 368.

(*g*) 2 Bl. Com. 277; *Baskerville's Case* (1585), 7 Co. Rep. 28 a; *Lincoln's (Bishop) Case* (1587), Owen, 89; *R. v. Canterbury (Archbishop)* (1634), Cro. Car. 354. But in the case of churches, curacies, and chapels augmented by the Governors of Queen Anne's Bounty and made perpetual cures and benefices by Queen Anne's Bounty Act, 1714 (1 Geo. 1, stat. 2, c. 10), s. 4, a nomination by the patron is good even after a lapse to the Crown, if made before the Crown has taken advantage of it (*ibid.*, s. 7).

(*h*) *R. v. Canterbury (Archbishop)*, *supra*.

(*i*) Gib. Cod. 770; Burn, Ecclesiastical Law, Vol. II., p. 360.

(*j*) 3 Co. Inst. 153—156; 7 Bac. Abr. 229, tit. Simony; 2 Bl. Com. 278—280; Com. Dig. tit. Eglise, N. 3. For simoniacal ordination, see pp. 551, 552, *ante*; and for simoniacal exchange and resignation of benefices, see pp. 628, 633, *post*.

(*k*) Stat. (1589) 31 Eliz. c. 6, s. 4; Simony Act, 1713 (13 Ann. c. 11), s. 2; *Mosse v. Killick* (1881), 50 L. J. (Q. B.) 300. Where a mortgagor patron made a simoniacal presentation, the mortgagee's title was not allowed to bar the King's title (*A.-G. v. Sudell* (1702), Prec. Ch. 214). As against a patron who has been guilty of simony, the King's right to present is not lost by the clerk

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the benefice becomes thenceforth disabled in law to hold it (*l*). A transaction may be simoniacal although neither the patron nor the presentee is a party or privy to it (*m*). If, however, the presentee is not cognisant of it, he is not himself simoniacal, although he is simoniacally promoted (*n*). A contract to pay money in consideration of being promoted to a benefice is void and cannot be enforced (*o*).

Declaration
against
simony

1166. A clerk who is about to be instituted, collated, or licensed by a bishop to a benefice, lectureship, or preachership must previously make and subscribe in the presence of the bishop or his commissary the prescribed declaration against simony (*p*). A clerk

simoniacally promoted having died in undisturbed possession of the benefice (*Winchcombe v. Winchester (Bishop)* (1617), Hob. 165). But the forfeiture to the Crown will not prejudice a patron innocent of simony or his presentee after the death of the clerk simoniacally presented or promoted, unless such clerk or his patron was previously thereto convicted of the offence (stat. (1689) 1 Will. & Mar. c. 16, s. 1). The simony does not invalidate leases *bond fide* made by the simoniacal clerk to tenants for valuable consideration and without notice of the simony (*ibid.*, s. 2), and a tenant to an incumbent cannot impeach the incumbent's title as landlord on the ground of simony (*Cooke v. Lozley* (1792), 5 Term Rep. 4). A clerk may purchase the entire advowson or an estate for life therein, and present himself to the benefice on a vacancy occurring (*Walsh v. Lincoln (Bishop)* (1875), L. R. 10 C. P. 518). The sale of an advowson when both vendor and purchaser knew that the incumbent of the benefice was *in extremis* has been held not to be simoniacal (*Smith v. Shelbourn* (1599), Cro. Eliz. 685; *Barret v. Glubb* (1776), 2 Wm. Bl. 1052; *Fox v. Chester (Bishop)* (1829), 6 Bing. 1, H. L.). Except in the particular cases specially authorised by statute, where a bond is given by a presentee on his presentation that he will resign the benefice at the request of the patron, both the bond and the presentation are simoniacal and void (*Fletcher v. Sondes (Lord)* (1826), 3 Bing. 501, H. L.; *Doe d. Watson v. Fletcher* (1828), 8 B. & C. 25). An agreement before presentation to give up a claim to some of the emoluments of the benefice is simoniacal (*R. v. Oxford (Bishop)* (1806), 7 East, 600). In *Stevens' Case* (1628), Litt. 176, the judges differed as to whether a presentation to the intent that the presentee might marry the patron's daughter was simoniacal (*ibid.* 177). The penalty is not incurred where the simoniacal presentation, though drawn up and sent in, is withdrawn before it is submitted to the bishop (*Greenwood v. Woodham* (1841), 2 Mood. & R. 363).

(*l*) Stat. (1589) 31 Eliz. c. 6, s. 4; Simony Act, 1713 (13 Ann. c. 11), s. 2; 3 Co. Inst. 154; *Baker v. Rogers* (1600), Cro. Eliz. 788; *Lee v. Merest* (1669), 39 L. J. (ECLL.) 53. He can never afterwards hold that benefice, but is eligible for another (*R. v. Norwich (Bishop)* (1615), Cro. Jac. 385, 386; Com. Dig. tit. Eglise, N. 3), unless incapacitated by a sentence under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), ss. 6, 8. The incapacity to hold the benefice will not be removed by the King's pardon of the simony (*Smith v. Shelbourn* (1599), Cro. Eliz. 685; *Winchcombe v. Winchester (Bishop)* (1616), Hob. 165, 167, 168). If the simoniacally promoted clerk has been admitted to the benefice and does not voluntarily resign, he may be removed by *quare impedit* (*R. v. Norwich (Bishop)*, *supra*), or by an action of ejectment brought by the king's presentee after admission to the benefice (*Doe d. Watson v. Fletcher* (1828), 8 B. & C. 25).

(*m*) *Baker v. Rogers*, *supra*; *Hutchinson's Case* (1610), 12 Co. Rep. 101; *Boyer v. High Commission Court* (1614), 2 Bulst. 182; *Wilson v. Bradshaw* (1624), 2 Roll. Rep. 463; *R. v. Trussel* (1667), 1 Sid. 329; *Walker v. Hammersly* (1683), 3 Lev. 115; *R. v. Norwich (Bishop)* (1692), *ibid.* 337; *Whish v. Hesse* (1831), 3 Hag. Ecc. 659.

(*n*) *Wilson v. Bradshaw*, *supra*; *Whish v. Hesse*, *supra*.

(*o*) *Mackaller v. Todderick* (1634), Cro. Car. 337, 363, 361; *Byrte v. Manning* (1635), *ibid.* 425.

(*p*) Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 5. The declaration is also to be made and subscribed on all other occasions on which before

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who knowingly makes any false statement in this declaration is guilty of a misdemeanour and is liable to be punished for perjury; and if he commits a breach of the promissory part of the declaration (q), he is guilty of an offence in respect of which proceedings under s. 2 of the Clergy Discipline Act, 1892 (r), may be taken against him (s).

SUB-SECT. 4.—*Mode of Filling Benefices.*

(i.) *Presentation.*

1167. The first legal steps towards filling a vacant benefice (t), except where the bishop collates by reason either of being himself the patron or of the right of presentation lapsing to him (a), is the presentation of a fit clerk to the bishop by the patron or other person entitled under the special circumstances of the case to present (b). Where the patron is under a legal obligation to present the nominee of some other person, a nomination of the clerk by that person to the patron precedes the presentation (c). In other cases the patron selects the presentee.

1168. A presentation is made when it is exhibited to the bishop (d), and cannot be made until the church and benefice are actually void (e). The presentation ought to be to the church of the benefice, and the document or announcement should show how the benefice became void, whether by death, cession, resignation or

that Act an oath against simony was required to be taken (*ibid.*, s. 10). The present form of the declaration is set forth in the schedule to the Benefices Act, 1898 (61 & 62 Vict. c. 48); see s. 1 (4).

(q) The promissory part of the declaration is that the clerk will not at any time thereafter perform or satisfy any payment, contract or promise made in respect of the presentation of the benefice to him by any person without his knowledge or consent (Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1 (4), sched.).

(r) 55 & 56 Vict. c. 32.

(s) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1 (4), (5). Other breaches of the law against simony are not triable under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32) (*Beneficed Clerk v. Lee*, [1897] A. C. 226, P. O.).

(t) The benefice must be actually vacant; see note (e), *infra*.

(a) See p. 602, *post*; and as to lapse, pp. 590 *et seq.*, *ante*.

(b) See pp. 564 *et seq.*, *ante*. Before 1st January, 1899, certain benefices were donatives, and were filled by a donation of the benefice to a clerk by the patron without recourse to the bishop (Co. Litt. 344 a). But since that date all such benefices have become presentative (Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 12).

(c) Gib. Cod. 794; *Amhurst v. Dawling* (1700), 2 Vern. 401, n. (2); *Mackenzie v. Robinson* (1747), 3 Atk. 559; *R. v. Stafford (Marquis)* (1790), 3 Term Rep. 646, 651. A presentation cannot be made on the nomination of a Roman Catholic (Presentation of Benefices Act, 1713 (13 Ann. c. 13), s. 1; *Boyer v. Norwich (Bishop)*, [1892] A. C. 417, P. O.).

(d) *Rud v. Lincoln (Bishop)* (1623), Hut. 86. A presentation refused by the bishop and established by *quare impedit* can be afterwards again exhibited to the bishop; since the benefice, if full before, is made void by the judgment in the *quare impedit* (*ibid.*).

(e) Watson, Clergyman's Law, 4th ed., pp. 217, 218; *Harris v. Austen* (1615), 1 Roll. Rep. 210, 213; *Rud v. Lincoln (Bishop)*, *supra*; *Owen v. Stainoe* (1682), Skin. 45; *Alston v. Atlay* (1837), 7 Ad. & El. 289, 311, Ex. Ch. As to a presentation by the king when the benefice is full, see stat. (1389), 13 Ric. 2, stat. 1, c. 1; stat. (1402), 4 Hen. 4, c. 22.

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deprivation (*f*). It may be made by word of mouth (*g*), except where a corporation aggregate is patron, in which case it must be under the common seal (*h*). But it is usually in writing; and in that case is in the nature of a letter missive to the bishop presenting to him a clerk for admission to the vacant benefice (*i*), and is not complete until it is sent or delivered to the bishop by the patron (*k*).

By the King.

An instrument purporting to be a grant by the King of a benefice in his patronage to a clerk is a good presentation without any actual words of presentation (*l*). He may present generally without specifying by what title; but if he recites a particular title and has no such title, the presentation is void (*m*). The presentation may be either under the Great Seal or under the privy seal, but not under the exchequer seal (*n*).

Co-patrons.

Where two or more persons have the right to present jointly, the bishop may accept the presentation of one, but may require a presentation by all, unless one of them is the person presented (*o*).

Self-presentation.

1169. A patron cannot technically present himself; but, if he is in other respects fit, he may offer himself to the bishop

(*f*) Com. Dig. tit. Eglise, H. 7. See pp. 627 *et seq.*, *post*.

(*g*) Co. Litt. 120 a.; *Clerk v. Prinn* (1669), 2 Keb. 484; *A.-G. v. Brereton* (1752), 2 Ves. Sen. 425, 429; and as to a presentation by the King, *R. v. Emerson* (1612), 1 Brownl. 162.

(*h*) Bro. Abr. tit. Corporation, 83. But the choice of the presentee need not be made under the common seal (*A.-G. v. Davy* (1741), 2 Atk. 212).

(*i*) Co. Litt. 120 a.; Watson, Clergyman's Law, 4th ed., pp. 149, 150, where a form of presentation is given. The precise form is not material. But it should be made to the bishop "or in his absence his vicar-general in spirituals or any other person having sufficient authority in this behalf"; for in that case it will remain good, although the bishop himself, by death or otherwise, becomes incapable of acting upon it (*Watson, Clergyman's Law*, 4th ed., p. 150). A presentation to the benefice, instead of to the church, is good (*R. v. —* (1610), Cro. Jac. 247). In that case COKE, C.J., said that in the case of *The Dean of Norwich* it had been ruled that a presentation by the wrong name of a corporation was good; but in a subsequent case of *Ayray v. Lovelas* (1610), 1 Bulst. 91, it was held that a presentation by a corporation by a wrong name was void. As to where the improper rector of a church, being the patron, presents to the rectory or parsonage instead of to the vicarage, see note (*n*), p. 561, *ante*.

(*k*) *Grendit v. Baker* (1602), Yelv. 7; where it was said that if the writing was taken to the bishop without the privy or licence of the patron, it would be no presentation. A presentation by a wrong name, or reciting a wrong title in the patron, is void (*Ayray v. Lovelas*, *supra*; *Watson, Clergyman's Law*, 4th ed., pp. 220, 221).

(*l*) 2 Roll. Abr. 353.

(*m*) *R. v. Thorneborough* (1677), 1 Mod. Rep. 253; *Watson, Clergyman's Law*, 4th ed., pp. 220, 221.

(*n*) *R. v. —* (1610), Cro. Jac. 247. In *Stephens v. Potter* (1627), Cro. Car. 99, it was held that a presentation by the King in right of a ward might be either under the seal of the court of wards or under the Great Seal; but a presentation under the seal of the court of wards, if it was not in right of a ward, would be void. So too a presentation under the Great Seal to a benefice of which the advowson belongs to the Duchy of Lancaster is good (*The Queen and York's (Archbishop) Case* (1591), 1 Leon. 226; *R. v. Lincoln (Bishop)* (1613), Moore (K. B.), 874).

(*o*) *Fuljamb's (Sir Godfrey) Case* (1539), Moore (K. B.), 4; *Harris v. Austin* (1615), 3 Bulst. 36, 43; Co. Litt. 186 b; Gib. Cod. 794; *Watson, Clergyman's Law*, 4th ed., pp. 226, 227.

to be admitted to the benefice, and the bishop is bound to admit him (*p*).

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When presen-
tation is
complete.

1170. A presentation by a spiritual patron is complete when it is received by the bishop, and cannot afterwards be varied or revoked (*q*), though, if his presentee is on good grounds refused by the bishop, he can make a fresh presentation (*r*). But a presentation by a lay patron, other than the King, is not complete until the institution or admission of the presentee; and before this takes place he may either (1) vary his presentation by presenting an additional clerk or clerks, in which case the bishop may elect which of the clerks presented he will institute or admit; or (2) revoke his presentation and present another clerk, in which case the bishop must institute or admit the later presentee. And if his presentee is refused by the bishop, he can make a fresh presentation within the permitted time (*s*). A presentation by the King is not complete until induction. Until that has taken place he may, even after institution or admission, make a fresh presentation (*t*). And his later presentation, although not in express terms revoking the former, has the effect of revoking it, so that the bishop cannot elect to act upon it (*u*).

1171. The death of a presentee of the King before he is inducted, or of the presentee of another patron before he is instituted or admitted, revokes the presentation (*x*). If the King dies before his presentee is inducted, his successor can revoke the presentation. But if another patron dies before his presentee is instituted or admitted, the presentation is not revocable; and if his executors make another presentation the bishop may elect between the two presentees (*a*).

Death of
patron or
presentee.

1172. The presentee must be a fit person (*b*); that is to say, a person (1) of the canonical age, and in priests orders by episcopal

Qualifications
etc. of
presentee.

(*p*) Gib. Cod. 794; Watson, Clergyman's Law, 4th ed., p. 227; *Walsh v. Lincoln (Bishop)* (1875), L. R. 10 C. P. 518; *Lowe v. Chester (Bishop)* (1883), 10 Q. B. D. 407. As to the statutory right of a dean to present himself in certain cases, see p. 579, *ante*.

(*q*) Gib. Cod. 795; Watson, Clergyman's Law, 4th ed., p. 226.

(*r*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 6 (2).

(*s*) Gib. Cod. 795; Watson, Clergyman's Law, 4th ed., pp. 225, 226. A lay patron can vary *cumulando* and can also revoke a presentation (*Stoke v. Sykes* (1627), Lat. 191; *Evans v. Ascough* (1626), Lat. 233, 248; *Stoke v. Stiles* (1626), Lat. 253; *Rogers v. Holled* (1775), 2 Wm. Bl. 1039). If the clerk first presented is refused by the bishop, and the patron thereupon presents another, the bishop cannot withdraw his refusal and admit the first clerk (*Hereford's (Bishop) Case* (1584), Cro. Eliz. 27).

(*t*) Gib. Cod. 795; Watson, Clergyman's Law, 4th ed., p. 223.

(*u*) Co. Litt. 344 b; Gib. Cod. 795; Watson, Clergyman's Law, 4th ed., pp. 223—225; *R. v. —* (1610), Cro. Jac. 247, 248; *Kitchin v. Calvert* (1611), Lane, 100—102; *Hutchins v. Glover* (1617), Cro. Jac. 463.

(*x*) *Holt's Case* (1611), 9 Co. Rep. 131 b, 132 a; *Brockham's Case* (1628), Litt. 128, 135; *A.-G. v. Wycliffe* (1748), 1 Ves. Sen. 80, *per* Lord HARDWICKE, L.C., at p. 81.

(*a*) *Smalwood v. Lichfield (Bishop)* (1589), 1 Leon. 205; *Kitchin v. Calvert*, *supra*, at p. 102; Watson, Clergyman's Law, 4th ed., p. 225.

(*b*) *Exeter (Bishop) v. Murshall* (1868), L. R. 3 H. L. 17, 39, 51.

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ordination, or who can obtain such ordination before he is instituted or admitted (c); (2) of sufficient learning; and (8) against whose orthodoxy and morals no charge can be established (d).

As regards orders, the bishop is at liberty to refuse a presentee if at the date of the presentation not more than three years have elapsed since he was ordained deacon (e).

As regards sufficiency of learning, the bishop is the judge; but if after examination and inquiry he decides that the clerk is deficient in this respect, he must give notice to the patron of his decision, and of the particulars of the deficiency, the adequacy of which is subject to judicial review (f). As regards orthodoxy, it is not enough that the bishop should notify that he finds the presentee schismatic or unfit, but he must specify particulars, and his decision is liable to be judicially overruled (g). As regards moral life, the presentee must produce a sufficient testimony of his former good

(c) Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 10; Gib. Cod. 805. As to clergymen ordained by bishops of the Protestant Episcopal Church in Scotland, see the Episcopal Church (Scotland) Act, 1864 (27 & 28 Vict. c. 94), s. 5 (p. 555, *ante*); and as to clergymen ordained by bishops of dioceses outside the United Kingdom, see the Colonial Clergy Act, 1874 (37 & 38 Vict. c. 77), s. 4 (p. 554, *ante*). By *Canones Ecclesiastici* (1603), 39 (as to which see *Exeter (Bishop) v. Marshall* (1868), L. R. 3 H. L. 17, at p. 54), it is required that a presentee applying for institution to a bishop who has not ordained him shall produce his letters of orders; as to which, see p. 552, *ante*. This was ~~originally~~ not essential (*Palmes v. Peterborough (Bishop)* (1591), Cro. Eliz. 4, B. D. 404, at p. 1).

(d) In *Heywood v. Manchester (Bishop)* the court was treated as containing an exhaustive category of ecclesiastical law which would justify refusal of a presentee. In 2 Co. Inst. 631, 632; *Hele v. Exeter (Bishop)* (1891), 3 Lev. 313; *R. v. Canterbury (Archbishop)* (1812), 15 East, 117, per Lord ELLENBOROUGH, C.J., at pp. 143, 144; *Willis v. Oxford (Bishop)* (1877), 2 P. D. 192. Want of proficiency in the Welsh language is a ground for refusing a presentee to a benefice within any of the four Welsh dioceses (*Albany v. St. Asaph (Bishop)* (1588), Cro. Eliz. 119; *Pluralities Act*, 1838 (1 & 2 Vict. c. 106), s. 104; *Abergavenny (Marquis) v. Llandaff (Bishop)* (1888), 20 Q. B. D. 460).

(e) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 2 (1) (b).

(f) Stat. (1315) 9 Edw. 2, st. 1, c. 13 (*Articuli Cleri*); *Canones Ecclesiastici* (1603), 39; 2 Co. Inst. 631, 632; *Hele v. Exeter (Bishop)* (1891), 3 Lev. 313; *R. v. Canterbury (Archbishop)* (1812), 15 East, 117, per Lord ELLENBOROUGH, C.J., at pp. 143, 144; *Willis v. Oxford (Bishop)* (1877), 2 P. D. 192. Want of proficiency in the Welsh language is a ground for refusing a presentee to a benefice within any of the four Welsh dioceses (*Albany v. St. Asaph (Bishop)* (1588), Cro. Eliz. 119; *Pluralities Act*, 1838 (1 & 2 Vict. c. 106), s. 104; *Abergavenny (Marquis) v. Llandaff (Bishop)* (1888), 20 Q. B. D. 460).

(g) *Specol's Case* (1594), 5 Co. Rep. 57 a; *Gorham v. Exeter (Bishop)* (1850), Moore's Report, P. O. A bishop may refuse a presentee who has been guilty of ritual offences which, if he were beneficed, would be dealt with, in the first instance, not by deprivation, but by monition (*Heywood v. Manchester (Bishop)* (1884), 12 Q. B. D. 404, 421).

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life and behaviour, if the bishop requires it (*h*). It is not sufficient for the bishop to refuse him on the general ground that he is criminous (*i*). The notice of refusal must specify the particulars of his moral unfitness (*j*). But any cause which would be sufficient to deprive an incumbent is a sufficient ground for refusing a presentee (*k*). The presentee may be refused on the ground that he is unfit for the discharge of the duties of the benefice by reason of physical or mental infirmity or incapacity, pecuniary embarrassment of a serious character, grave misconduct, or neglect of duty in an ecclesiastical office, evil life, having by his conduct caused grave scandal concerning his moral character since his ordination, or having, with reference to the presentation, been knowingly party or privy to any transaction or agreement which is invalid under the Benefices Act, 1898 (*l*). He may also be refused if, at the date of the vacancy, not more than one year has elapsed since a transfer, as defined by the first section of that Act, of the right of patronage of the benefice, unless it is proved that the transfer was not effected in view of the probability of a vacancy occurring within the year (*m*).

The bishop is allowed twenty-eight days for inquiring and informing himself of the sufficiency and qualifications of a presentee (*n*).

When a presentee has been refused, he cannot be presented again by the patron in respect of the same vacancy (*o*).

1173. Where a benefice is in the patronage of the chapter of a cathedral or collegiate church, the presentee must be either (1) a

No second
presentation
where
refused.
Further
qualifications.

(*h*) This sufficient testimony has, by long-established custom, consisted of a testimonial by three beneficed clergymen, countersigned, if they are not beneficed in the diocese of the bishop to whom the testimonial is produced, by the bishop of the diocese in which their respective benefices are situate, that the presentee has been personally known to them for the three years last past; that they have had opportunities of observing his conduct; that during the whole of that time they verily believe that he lived piously, soberly, and honestly; and that they have not heard anything to the contrary thereof, nor that he has at any time held, written, or taught anything contrary to the doctrine or discipline of the Church; and that they believe him to be, as to his moral conduct, a person worthy to be admitted to the benefice (*Exeter (Bishop) v. Marshall* (1868), L. R. 3 H. L. 17, at p. 48).

(*i*) *Specot's Case* (1590), 5 Co. Rep. 57 a.

(*j*) *Ibid.*

(*k*) *Specot's Case*, *supra*; Watson, Clergyman's Law, 4th ed., p. 215. Probably, therefore, the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 12, with its reference to Canones Ecclesiastici (1603), 75, has altered the law as laid down by the case of *Bell v. Norwich (Bishop)* (1566), 2 Dyer, 254 b, in which the fact that a presentee had continually frequented taverns and other unlawful and prohibited places and games was held an insufficient ground for refusing him. There is no fixed limit of time beyond which the bishop cannot inquire into the past life of the presentee (*Marriner v. Bath and Wells (Bishop)* (1876), reported [1893] P. 145).

(*l*) 61 & 62 Vict. c. 48, s. 2 (1) (b). See p. 592, *ante*.

(*m*) *Ibid.*, s. 2 (1) (a). "Transfer" is defined by s. 1 (6) to include any conveyance or assurance passing or creating any legal or equitable interest *inter vivos*, and any agreement for any such conveyance or assurance; but not (a) a transmission on marriage, death or bankruptcy, or otherwise by operation of law; or (b) a transfer on the appointment of a new trustee where no beneficial interest passes.

(*n*) Canones Ecclesiastici (1603), 96.

(*o*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 6 (1).

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member of the chapter; or (2) an archdeacon of the diocese; or (3) a non-residentiary prebendary or honorary canon of their church, or (4) a clerk who has served for at least five years as minor canon or lecturer of their church, or as master of a grammar or other school attached to or connected with their church, or as incumbent or curate in the diocese, or as public tutor in either of the Universities of Oxford or Cambridge; or, in the alternative, (5) in the case of the cathedral church of Durham, a clerk who has served for the like term as professor, reader, lecturer, or tutor in the University of Durham, or has been educated thereat and is a licentiate or graduate of theology therein, or who has served as incumbent or curate within the diocese of Durham for the like term (*p*). If no such qualified clerk is presented to the benefice within six months from the time of its becoming vacant, the bishop of the diocese in which it is situate may, within the next six months, collate or license thereto a clerk who has actually served for at least five years as incumbent or curate within the diocese; and in default of his so doing the presentation for that turn lapses to the archbishop of the province (*q*).

Notice of
 refusal to
 present.

1174. Where the ground of refusal to institute or admit a presentee is either a ground included in s. 2 (1) of the Benefices Act, 1898 (*r*), or any other sufficient ground of unfitness or disqualification, except a ground of doctrine or ritual, the bishop is to signify his refusal by a notice stating the grounds of refusal, and sent to the person presenting and to the presentee by registered letter (*s*).

Refusal when
 presentor has
 no title
 or church is
 litigious.

1175. The bishop has the right, and ought, to refuse, or rather suspend, the admission of a presentee where the person presenting appears to have no title (*t*), or when the church is litigious; that is to say, when two or more persons claiming adversely to one another present different clerks or the same clerk to be admitted to the church and benefice (*u*). If the bishop admits a clerk on one of such presentations, or admits a clerk on a presentation when a caveat against his so doing has been entered by another person, he will be liable as a disturber in the event of the title of the presentor being disproved. In either of such cases he ought to pause until the conflicting claimants or their clerks either take legal proceedings to establish their rights or pray him to award a writ *de jure patronatus* to inquire into and determine the right of patronage (*x*). If, however,

(*p*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 44. Where the presentee holds the office of minor canon, lecturer, schoolmaster, professor, reader, or tutor, that office, if not previously resigned, becomes vacant at the expiration of one year from his admission to the benefice (*ibid.*).

(*q*) *Ibid.*

(*r*) 61 & 62 Vict. c. 48. See notes (*l*) and (*m*), p. 599, *ante*.

(*s*) Benefices Rules 1898, r. 13, Sched., Forms Nos. 8, 9 (Statutory Rules and Orders Revised, Vol. I., Benefice, England, pp. 3, 7). For the remedies of patron and presentee in case of unjustifiable refusal, see p. 589, *ante*.

(*t*) *Ayray v. Lovelace* (1610), 1 Bulst. 91; Watson, Clergyman's Law, 4th ed., p. 217.

(*u*) See note (*q*), p. 586, *ante*.

(*x*) *Elvis v. York (Archbishop)* (1619), Hob. 315, 317; Degge, Parson's Counsellor, Part I., ch. 3, pp. 11—14; Watson, Clergyman's Law, 4th ed., pp. 113,

the bishop institutes upon a void presentation, the presentee thereby acquires the benefice, by the bishop's collation, against all persons except the lawful patron (*y*).

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(ii.) *Admission by Institution or Collation or by Licence.*

1176. The bishop admits a clerk to a benefice in respect of the cure of souls, which is its spiritual part, either by institution after presentation; or by collation, where the bishop is the patron or acquires the right of appointment by lapse; or by licence, in the case of a perpetual curacy, whether a presentation has been made to the benefice or the bishop is himself the patron (*a*). Admission.

1177. Before a person is instituted or admitted or collated to a benefice, notice that the bishop proposes to institute or admit him must be sent to the churchwardens by registered letter addressed to them as such. Immediately on the receipt of this notice the churchwardens fix it on the principal door or notice board of the church or chapel of the benefice, or, if there is more than one, of such one of the churches or chapels as the bishop determines, where it is left fixed for one calendar month, and take such other steps as they think expedient for giving publicity to the notice. At the end of the month they return it to the bishop with a certificate that they have complied with the directions as to fixing it (*b*). Notice of
intention to
admit.

1178. Before a person is instituted or admitted or collated to a benefice by the bishop, he must in the presence of the bishop, or of the bishop's commissary, subscribe a declaration of assent to the Thirty-nine Articles, the Book of Common Prayer, and of the Ordering of Bishops, Priests, and Deacons, and a declaration against simony, and take the oaths of allegiance and of canonical obedience (*c*). Requisite
declarations
and oaths.

1179. Admission of a presentee to the cure of souls and spiritualities of a rectory or vicarage is by institution (*d*). This act, Institution.

227—230; Clerke, *Praxis in Curia Ecclesiasticis*, tit. xcvi.—c. As to examining the title of the King to present, see stat. (1351) 25 Edw. 3, stat. 6, c. 3; stat. (1389) 13 Ric. 2, stat. 1, c. 1.

(*y*) Watson, *Clergyman's Law*, 4th ed., pp. 221.

(*a*) Strictly speaking, admission is merely the declaration of the bishop that he approves of a presentee as a fit person to serve the cure of the church or benefice (Co. Litt. 344 a; Watson, *Clergyman's Law*, 4th ed., p. 154). But the word is more commonly used to signify generally the actual committal of the cure to the clerk, or particularly the committal of the cure in the case of a perpetual curacy by licence, as distinguished from institution or collation. As to the simoniacal admission of a clerk to a benefice, see pp. 593, 594, *ante*.

(*b*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 2 (2); Benefices Rules, 1898, rr. 11, 12, sched., Form No. 7 (Statutory Rules and Orders Revised, Vol. I., Benefice, England, pp. 2, 3, 6).

(*c*) Canon Ecclesiasticus (1865); Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), ss. 1, 5; as amended, with respect to the declaration against simony, by the Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1 (4), sched.; and, with respect to the oath of allegiance, by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), ss. 2, 8. As to the oath of canonical obedience, see Clerke, *Praxis in Curia Ecclesiasticis*, tit. xci; Gib. Cod. 810; *Long v. Cape Town (Bishop)* (1863), 1 Moo. P. C. C. (N. S.) 411, at p. 465.

(*d*) The clerk kneels down before the bishop while he reads the words of institution out of a written instrument, drawn beforehand for the purpose, with

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which admits the clerk *ad officium*, may be performed either within or outside the diocese, and the particular seal used for the instrument of institution is not material (*e*).

Collation.

1180. Where the bishop is himself patron of the rectory or vicarage, he institutes without a previous presentation; but the act, though in the same form, is, in that case, called collation (*f*).

Effect of
institution
or collation.

1181. By institution or collation the cure of souls of the benefice is committed to the clerk. He is admitted *ad officium* to pray and preach, and he is thenceforth bound to discharge his duties as incumbent, and is liable for any neglect thereof. He may also enter into the glebe and receive the profits of the benefice, but until induction he has no title to sue for or deal with them. After presentation and institution the church is regarded in law as full, except as against the King, against whom it is not full until after induction, and except also in the case of an exchange, which is not complete until induction (*g*). But collation, if not rightful, does not render the church full, and is only a temporary provision for celebration of divine service until the lawful patron presents (*h*).

Admission
by licence.

1182. In the case of a perpetual curacy, admission by the bishop's licence puts the clerk in complete possession of both the spiritualities and temporalities of the benefice, without institution or induction (*i*). But where the perpetual curacy is a titular vicarage (*k*), a clerk is sometimes in practice instituted or collated and inducted to it, instead of being licensed.

Fees.

1183. The fees for institution, collation, and licence to a perpetual curacy are regulated by a table established under statutory authority (*l*).

(iii.) *Induction.*

Process of
induction.

1184. The induction of an instituted or collated clerk into the church and benefice is performed by the archdeacon (*m*), to whom

the episcopal seal appendant (Burn, Ecclesiastical Law, Vol. I., p. 168). The institution of a person not in holy orders is a nullity (*R. v. Ellis* (1888), 16 Cox, O. C. 469).

(*e*) *Cort v. St. David's (Bishop)* (1634), Oro. Car. 341, 342.

(*f*) Gib. Cod. 813; Burn, Ecclesiastical Law, Vol. I., p. 164. It is likewise collation if the bishop institutes upon a void presentation (*Watson, Clergyman's Law*, 4th ed., p. 221).

(*g*) See p. 633, *post*. Pending a dispute as to the patronage of the benefice, the institution of the presentee of one of the claimants can be restrained by injunction (*Nicholson v. Knapp* (1838), 9 Sim. 326; *Greenslade v. Dare* (1853), 17 Beav. 502).

(*h*) Gib. Cod. 813; *Hare v. Bickley* (1578), Plowd. 526 a, 528; *Green's Case* (1602), 6 Co. Rep. 29 a, 29 b; *Hutchins v. Glover* (1618), Cro. Jac. 463; Burn, Ecclesiastical Law, Vol. I., pp. 164, 167, 170, 171.

(*i*) Gib. Cod. 819, 820; *Bowell v. Milbank* (1771), cited 1 Term Rep. 399, n., per Lord MANSFIELD, C. J., at p. 401, n.

(*k*) Under the Incumbents Act, 1868 (31 & 32 Vict. c. 117), s. 2; see pp. 561, 562, *ante*.

(*l*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 131; London Gazette, June 2nd, 1908.

(*m*) By prescription or composition others may have the right to induct

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the bishop issues a mandate for the purpose, or by some person to whom the archdeacon by precept delegates the duty (*n*). The person who inducts usually takes the clerk by the hand and lays it upon the key or ring of the church door while he pronounces the words of induction. He then opens the door and puts into the church the inducted clerk, who thereupon tolls a bell to make known the fact of the induction. The mandate is then returned to the bishop with a certificate of the induction indorsed upon it (*o*).

1185. By induction the instituted or collated clerk is put into complete possession of the church and benefice, with all the profits and emoluments, and, if the benefice is a rectory, becomes *persona impersonata* or parson imparsonee (*p*). Effect of induction.

1186. The fees for induction are settled by the same table as those for admission (*q*). Fees.

(iv.) *Subsequent Requisites.*

1187. After institution or collation to a benefice or licence to a perpetual curacy, the clerk must, on the first Sunday on which he officiates in the church of the benefice, or on such other Sunday as the ordinary appoints or allows, publicly in the presence of the congregation read the Thirty-Nine Articles of Religion, and immediately afterwards make the prescribed declaration of assent, adding after the words "Articles of Religion" the words "which I have now read before you" (*r*). Reading of Thirty-nine Articles and declaration of assent.

instead of the archdeacon (Gib. Cod. 815; Burn, Ecclesiastical Law, Vol. I., p. 172). As to the simoniacal induction of a clerk to a benefice, see p. 593, *ante*.

(*n*) If the archdeacon issues a general mandate for the induction to all and singular the clergy and literates within his archdeaconry, induction made by a clergyman not resident within the archdeaconry will be good (*Dean's Case* (1609), Noy, 134). A mandate for induction is not revoked by the accession of a new bishop before it is executed (*Robinson v. Wolley* (1677), T. Jo. 78).

(*o*) Gib. Cod. 815. No particular form of induction is requisite. If the church key cannot be had, or there is no ring on the door, the hand may be laid on the wall of the church or on the fence of the churchyard. Induction may also be made by delivery of a clod or turf and twig of the glebe (*ibid.*; Degge, Parson's Counsellor, Part I., ch. 2, pp. 7, 8; Johnson, Clergyman's Vade Mecum, Vol. I., p. 84).

(*p*) *Hare v. Bickley* (1578), Plowd. 526 a, 528; Ayl. Par. 302; 1 Bl. Com. 391; Burn, Ecclesiastical Law, Vol. I., p. 176. By the act of induction the incumbent is put into the actual possession of a part for the whole; and it is not necessary that he should actually go upon the glebe itself (*Bulwer v. Bulwer* (1619), 2 B. & Ald. 470). An injunction will be granted to restrain the induction of an incumbent who has been improperly presented (*Potter v. Chapman* (1750), 1 Dick. 146); and in case of obstruction to the induction of a lawful incumbent an injunction will be granted to restrain interference therewith (*Ex parte Jenkins* (1868), 5 Moo. P. O. O. (N. S.) 351). Induction will be presumed after possession of the benefice for several years (*Chapman v. Beard* (1797), 3 Anst. 942).

(*q*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 131; London Gazette, June 2, 1908.

(*r*) Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), ss. 1, 7. Failure to do so involves absolute forfeiture of the benefice or perpetual curacy (*ibid.*, s. 7; see *Green's Case* (1602), 6 Co. Rep. 29 a). Reading the articles in the porch of the church, when entry into the church was unlawfully obstructed, and

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Holding of
 more than
 one benefice
 illegal, with
 exceptions.

When
 benefices
 may be held
 together.

SUB-SECT. 5.—Pluralities.

(1.) Holding of Two Benefices together.

1188. With certain specified exceptions, no incumbent can hold more than one benefice at the same time; and if he is instituted or admitted to a second, he thereby *ipso facto* vacates the first (s).

1189. A clerk may, with a licence or dispensation from the Archbishop of Canterbury, hold together any two benefices, the churches of which are within four miles of one another by the nearest road, and the annual value of one of which does not exceed two hundred pounds. If one of the benefices has no church, the distance between the two benefices is to be computed in such manner as the bishop of the diocese may direct (a). In estimating the annual value of either benefice, a deduction or allowance is to be made for all taxes, rates, tenths, dues, and permanent charges and outgoings, but not for the stipend of any stipendiary curate, nor for such taxes or rates in respect of the house of residence of the benefice or of the glebe land belonging thereto as are usually paid by tenants or occupiers, nor for money expended in the repair or improvement of the house of residence and the buildings and premises belonging thereto (b).

Procedure
 for obtaining
 licence or
 dispensation.

1190. In order to obtain the requisite licence or dispensation the clerk must deliver to the bishop of the diocese in which each benefice is situate a written statement according to a prescribed form, verified as the bishop may require, setting forth, to the best of the clerk's belief, the yearly income of each benefice and the deductions to be made therefrom, on an average of the three years ending on the last preceding 29th day of September, and the amount of the population of each benefice, according to the last parliamentary returns, and the distance between the two. The bishop may make inquiries as to the correctness of the statement, and must, within one month after he has received it, transmit to the Archbishop of Canterbury a copy of the statement, with a certificate under his hand as to the amount at which he considers that the annual value and population of the two benefices, or of such one of them as is within his diocese, ought to be taken. In case of the benefices or either of them being in the diocese or jurisdiction of the Archbishop of Canterbury, the certificate is to be made out and retained by him (c). The certificate, when transmitted to or retained by the archbishop, is to be deposited in the Office of Faculties, and is to be conclusive evidence of the annual

divine service was consequently being performed in the porch, has been held to be sufficient (*Brown v. Spence* (1663), 1 Keb. 502). Whether doing so in a chapel of ease of the benefice would be sufficient is doubtful (*ibid.*). The due reading will be presumed in the absence of evidence to the contrary (*Powel v. Milburn* (1771), 3 Wils. 355; *Chapman v. Beard* (1797), 3 Anst. 942).

(s) See pp. 633, 634, *post*.

(a) Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), s. 14; see Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 129. See also, as to holding cathedral preferments and benefices together, pp. 633 *et seq.*, *post*.

(b) Pluralities Act, 1850 (13 & 14 Vict. c. 98), s. 4.

(c) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 7.

value and population of each of the benefices and of their distance from each other; and the Registrar of the Faculties is to produce it to any person requiring to inspect it (*d*).

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Issue of
licence or
dispensation.

If the Archbishop of Canterbury is satisfied of the fitness of the clerk and of the expediency of allowing the two benefices to be held together, he may grant a licence or dispensation for such joint holding, under the seal of the Office of Faculties, in such manner and form as he thinks fit. If he refuses to grant it, the King in Council, upon the application of the clerk who desires to obtain it, may enjoin the Archbishop to grant it or to show sufficient cause to the contrary, and may thereupon make such order touching the refusal or grant of the licence or dispensation as to the King in Council seems fit (*e*).

(ii.) *Union of Benefices.*

Union of
benefices.

1191. Provision is made by the Pluralities Acts, 1838 and 1850 (*f*), for uniting into one benefice with cure of souls two or more benefices, or one or more benefices and one or more spiritual sinecure rectories or vicarages, situate in the same parish or contiguous to each other, and having an aggregate population of not more than one thousand five hundred persons (*g*). If it appears to the archbishop of the province with respect to his own diocese, or if in other cases it is represented to him by the bishop of the diocese or the bishops of two dioceses, that the union may be effected with advantage to the interests of religion, and upon inquiry he is satisfied that the union may be usefully made and will not be of inconvenient extent, and that the patron or patrons consent thereto in writing, he is to cause in his own diocese a statement of the facts, and in other cases a written copy of the representation, to be affixed on or near the principal outer door of the church, or in some public and conspicuous place, in each benefice and sinecure rectory or vicarage affected, with a notice that any person interested may,

(*d*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 9.

(*e*) *Ibid.*, s. 6. No stamp duty is payable on the licence or dispensation, nor any fee, except 30s. to the Registrar of the Office of Faculties, and 2s. to the seal keeper; and no confirmation thereof is necessary; nor is the clerk applying for it to be required to give any caution or security by bond or otherwise before it is granted (*ibid.*).

(*f*) 1 & 2 Vict. c. 106; 13 & 14 Vict. c. 98.

(*g*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 16—20, 27; Pluralities Act, 1850 (13 & 14 Vict. c. 98), s. 8. These enactments extend to the metropolis (Union of Benefices Act, 1860 (23 & 24 Vict. c. 142), s. 30). For the union of medieties or several benefices in the same parish, see p. 563, *ante*. Before 1838 benefices were in some cases united by special Act of Parliament, as in the city of London, after the fire, by stat. (1670) 22 Car. 2, c. 11, ss. 55, 56 (*Hardinge v. Winchester (Bishop)* (1777), 2 Wm. Bl. 1162); or they could be united by the patrons and bishop at common law or under stat. (1545) 37 Hen. 8, c. 21 (*St. Swithin Parish Case* (1695), Holt (K. B.), 139; *Reynoldson v. Blake* (1697), 1 Ld. Raym. 192; *Robinson v. Bristol (Marquis)* (1851), 11 C. B. 241, Ex. Ch.). But since 1838 the union can only be effected under the provisions of the Pluralities Act, 1838 (1 & 2 Vict. c. 106), and subsequent enactments amending and extending those provisions (*ibid.*, s. 20). A union of benefices constitutes them a single benefice (*Wilson v. Van Mildert* (1801), 2 Bos. & P. 394), but does not effect a union of the parishes (*St. Swithin Parish Case, supra*).

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within six weeks, show cause in writing against the union (*h*). If no sufficient cause against it is shown within that time, he is to certify the inquiry and consent to the King in Council, who may thereupon make an order for the union (*i*). The order may regulate the course and succession in which the patrons, if more than one, shall present or nominate to the united benefice, and may determine to which diocese it shall belong, if it is in two dioceses; and the order is to be registered in the registry of the diocese or each diocese to which it has belonged or is determined to belong (*k*). If at the time when the order is registered all the benefices and sinecure rectories and vicarages ordered to be united are not all held together, provision is made for their being ultimately held by the same incumbent, and when this takes place they become permanently united (*l*).

Exception
and exchange
of endow-
ments and
advowsons.

1192. In any such case, if it appears that the total income of any benefices and sinecure rectories or vicarages proposed to be united would be more than sufficient for the due maintenance of the incumbent of the united benefice, and that the whole or part of the tithes, rentcharges, buildings, and lands belonging to any of such benefices and sinecure rectories or vicarages might, and could with advantage to the interests of religion, be excepted out of the union and be exchanged for some tithes, buildings, and lands in another benefice in the same diocese having no competent provision for its incumbent, an Order in Council, upon a certificate of the archbishop of the province and with the requisite consents, may be obtained for the exchange, and for the assurance of the tithes, buildings, and lands taken in exchange for the further endowment of the benefice within which they arise or are situate (*m*). Moreover, upon a certificate of the Ecclesiastical Commissioners an exchange of advowsons may be effected by Order in Council with a view to proceedings for any such union (*n*).

Parish church
of united
benefice.

1193. With the consent of the incumbent and the patron or patrons of the united benefice and two-thirds of the parishioners within its limits, one of the churches within it may by faculty be made the parish church of the whole united benefice (*o*).

In the
metropolis.

1194. In the metropolis, as defined by the Metropolis Management Act, 1855 (*p*), either two or more contiguous benefices, or a benefice or contiguous benefices and one or more spiritual sinecure rectories or vicarages contiguous thereto, may be united in the manner provided by the Union of Benefices Act, 1860 (*q*), without regard to or limitation as to aggregate population or aggregate yearly value. Wherever a union appears to the bishop of the diocese to be

(*h*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 16.

(*i*) *Ibid.*

(*k*) *Ibid.*

(*l*) *Ibid.*

(*m*) *Ibid.*, ss. 17—19, 27.

(*n*) Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 23.

(*o*) Union of Benefices Acts Amendment Act, 1871 (34 & 35 Vict. c. 90), s. 3.
 18 & 19 Vict. c. 120, s. 250.
 23 & 24 Vict. c. 142.

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advantageous in the interests of religion, he may issue a commission to five persons, nominated as the Act prescribes (*r*), to inquire and report as to the expediency of the proposed union; and, if they recommend the union, the bishop will cause proposals for a scheme for effecting it to be drawn up and sent, with the written consent of the patrons of the benefices affected, to the churchwardens of each of the parishes affected, in order that they may be considered by the vestry, who are to notify to the bishop their assent to the proposals, or any objections or suggestions in relation thereto (*s*). When the proposals have been finally approved by the bishop and assented to by the patrons and the vestries of the parishes affected, they are to be transmitted to the Ecclesiastical Commissioners, who will prepare a scheme for carrying out the proposed union and send it to the churchwardens of the parishes affected, that they may, if they so desire, show cause against the union or any parts of the scheme (*t*). If no cause is shown within two months, the scheme, after having been laid for two months before both Houses of Parliament (*a*), is certified with the consents thereto to the King in Council, who may thereupon make an order for effecting the union (*b*). If cause is shown against any provisions of the scheme, the objections may be considered by the Judicial Committee of the Privy Council, and the scheme may be affirmed, varied, or dismissed in accordance with their report (*c*).

The scheme may contain all proper regulations for the appointment of the first incumbent of the united benefice and for regulating the succession in which the patrons, if more than one, shall present or nominate to the united benefice, and other necessary provisions, including such as may be required for compensating any incumbents of the benefices to be united who may be willing to retire (*d*). If it is deemed expedient to unite only a portion of a benefice with some contiguous benefice, that portion may be severed and be included in the union as if it were a separate benefice; and the remaining portion will in that case continue as an independent benefice (*e*). If the total revenue of the benefices proposed to be united appears to be more than sufficient for the due maintenance of the incumbent of the united benefice and of any requisite assistant curates, a scheme may be prepared and carried into effect by an Order in Council for subjecting parts of the endowments of

Provisions
of scheme.

Union of Benefices Act, 1860 (23 & 24 Vict. c. 142), ss. 4, 32.

(*a*) *Ibid.*, ss. 3—8, 24.

(*s*) *Ibid.*, s. 8.

(*a*) *Ibid.*, s. 15.

(*b*) *Ibid.*, s. 8. The order may be corrected or supplemented by further orders (*id.*, s. 25). All orders are to be published in the London Gazette and registered in the registry of the diocese, and, after having been gazetted, have the force of law, without prejudice to the rights of any incumbent affected thereby who has not assented thereto (*ibid.*, ss. 13, 23).

(*c*) *Ibid.*, s. 16.

(*d*) *Ibid.*, s. 9. An annuity provided by a scheme to a retiring incumbent and his assigns out of the income of a united benefice while performing the duties of curate of the united benefice is not a benefice with cure of souls within stat. (1671) 13 Eliz. c. 20, and may be validly mortgaged by him (*McBean v. Deane* (1885), 30 Ch. D. 521).

(*e*) Union of Benefices Act, 1860 (23 & 24 Vict. c. 142), s. 10.

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any of the benefices proposed to be united to a perpetual annual rentcharge in favour of, or transferring and annexing them to, some benefice in, or in the vicinity of, the metropolis having no competent provision for its incumbent (*f*). In order to facilitate a union the Ecclesiastical Commissioners may arrange for exchanges of advowsons (*g*).

Disuniting
of united
benefices.

1195. If it appears to the archbishop of the province with respect to his own diocese, or in other cases it is represented to him by the bishop of a diocese, that, from the increase of population or from other circumstances, one or more of the benefices of which a united benefice consists may be separated therefrom with advantage to the interests of religion, and upon inquiry he is satisfied that the union may be usefully dissolved as respects such benefice or benefices, he is to cause in his own diocese a statement of the facts, and in other cases a written copy of the representation, to be affixed on or near the principal outer door of the church, or in some public and conspicuous place in each of the benefices forming part of the united benefice, with a notice that any person interested may within six weeks show cause in writing against the disunion (*h*). If no sufficient cause against it is shown within that time, he is to certify the inquiry and the patron's consent, when necessary, to the King in Council, who may thereupon make an order for separating the benefice or benefices from the united benefice, and for declaring the rights of patronage of the several patrons, if there is more than one. The order is to be registered in the registry of the diocese, and thereupon, if the united benefice is then vacant, or if not vacant on the first avoidance thereof, the union is to be *ipso facto* dissolved as regards the benefice or benefices so to be separated (*i*). If the united benefice is full at the date of the order, the incumbent may resign the benefice or benefices proposed to be separated, to which a presentation or nomination may then be made in like manner as if the united benefice had been vacant at the date of the order (*k*). Upon any such disunion a portion of the endowments belonging to the united benefice may be assigned and attached to each benefice, notwithstanding that such portion may not arise or accrue within the limits of, or have originally belonged to, the benefice to which it is so assigned and attached; and the charges and outgoings which before the disunion were imposed upon the united benefice may be apportioned between the benefices; but where there are mortgages, with the consent of the mortgagees under their hands and seals (*l*). And where the house of residence of the united benefice is inconveniently situated for any of the disunited benefices, it may be sold, and the proceeds of sale may

(*f*) Union of Benefices Act, 1860 (23 & 24 Vict. c. 142), s. 11.

(*g*) *Ibid.*, s. 12.

(*h*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 21.

(*i*) *Ibid.*, ss. 21, 27; and as to the metropolis, Union of Benefices Act, 1860 (23 & 24 Vict. c. 142), s. 30. Benefices united for more than sixty years before 14th August, 1838, are not to be disunited without the written consent of the patrons thereof (Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 21).

(*k*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 22.

(*l*) *Ibid.*, ss. 23, 24, 27.

be applied in or towards the erection or purchase of houses of residence for the disunited benefices (*m*).

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SUB-SECT. 6.—*Rights and Duties of Beneficed Clergy.*

(i.) *Cure of Souls.*

1196. The bishop has the general cure of souls throughout the whole of his diocese (*n*), and has the right accordingly personally to officiate at pleasure in any church within it. But he cannot exercise this right by deputy; and, subject to it, an incumbent has the exclusive cure of souls within his parish, and no other clergyman has any right publicly to officiate or perform clerical ministrations within the parish without his consent (*o*), except where the necessity for his consent has been abrogated by statutes or by arrangement, or has been forfeited by some default on his part (*p*). All parochial duties are committed to and imposed upon him, and all fees and emoluments arising from the performance of those duties belong to him (*q*). Except where it is dispensed with by the Church Building Acts and New Parishes Acts (*r*), his consent is necessary to the erection of any chapel of ease or other public chapel or church within his parish (*s*). He has the nomination of the minister to serve in any chapel of ease in his parish (*t*), and all the offertory money collected in any such chapel is at the disposal of himself and the churchwardens of the parish (*a*).

Incumbent under the bishop has sole care of souls in his parish.

1197. An incumbent has the right, without any licence from the bishop, to perform divine service in any consecrated building within his benefice, but he requires a licence to do so elsewhere in the parish (*b*). Subject to this legal requisite, he, or in case of his non-residence the curate in charge, or any person authorised by them respectively, may hold and conduct a congregation or assembly for religious worship anywhere within the parish (*c*).

Right to officiate.

(*m*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 25.

(*n*) Watson, *Clergyman's Law*, 4th ed., p. 38; *Portland (Duke) v. Bingham* (1792), 1 Hag. Con. 157, 161; see note (*a*), p. 442, *ante*.

(*o*) *Clerke d. Prin v. Heath* (1669), 1 Mod. Rep. 11; *Portland (Duke) v. Bingham*, *supra*, at p. 161; *Carr v. Marsh* (1814), 2 Phillim. 198, 206; *Farnworth v. Chester (Bishop)* (1825), 4 B. & O. 555, 568; *Nesbitt v. Wallace*, [1901] P. 354.

(*p*) *MacAllister v. Rochester (Bishop)* (1880), 5 O. P. D. 194, 203. For cases of default, see pp. 614, 626, 640—643, *post*.

(*q*) *Moysey v. Hillcoat* (1828), 2 Hag. Ecc. 30, 48.

(*r*) See note (*t*), p. 444, *ante*.

(*s*) *Portland (Duke) v. Bingham*, *supra*; *Bliss v. Woods* (1831), 3 Hag. Ecc. 486, 509; *MacAllister v. Rochester (Bishop)*, *supra*, at p. 204.

(*t*) *Dixon v. Kershaw* (1766), 2 Amb. 528; *Portland (Duke) v. Bingham*, *supra*; *Moysey v. Hillcoat*, *supra*; *Bliss v. Woods*, *supra*.

(*a*) *Dowdall v. Hewitt* (1863), 10 L. T. 823; *Mages v. Cushel (Bishop)* (1846), 9 L. Eq. R. 319. But the incumbent and chapelwardens of a chapel to which a district chapelry is attached have not the disposal of the offertory money collected at an unconsecrated chapel situate within the chapelry (*Liddell v. Rainford* (1868), 38 L. J. (EXCL.) 15).

(*b*) *Moysey v. Hillcoat* (1828), 2 Hag. Ecc. 30, 46.

(*c*) Liberty of Religious Worship Act, 1855 (18 & 19 Vict. c. 86), s. 1 (2). Previously to this Act it was against ecclesiastical law to preach in an unconsecrated place (*Finch v. Harris* (1702), 12 Mod. Rep. 641, *per Holt*,

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Must reside
on benefice
and in house
of residence
thereto.

(ii.) *Residence.*

1198. It is the duty of an incumbent to reside on his benefice, or, if he holds two benefices, on one of them, and in the house of residence, if any, belonging thereto (*d*). If, without a licence for non-residence or legal exemption from residence (*e*), he absents himself therefrom for upwards of three months at one time or different times in any one year, he is liable to forfeit one-third of the annual value of the benefice, if the absence does not exceed six months; one-half, if it exceeds six months; two-thirds, if it exceeds eight months, and three-fourths if it lasts for the whole year (*f*).

(*d*) *Butler and Goodale's Case* (1598), 6 Co. Rep. 21 b; *Wilkinson v. Allot* (1776), 2 Cowp. 429; *Wright v. Legge* (1815), 6 Taunt. 48; *Wright v. Flumank* (1815), *ibid.*, 52. Where an incumbent holds two benefices, one of which has, while the other has not, a house of residence, he may reside within the latter (*Wynn v. Smithies* (1815), 6 Taunt. 198). An incumbent is so called from his being incumbent or diligently resident on the benefice (Co. Litt. 119 b).

(*e*) The following persons, having a single benefice with cure of souls, are exempt from the penalties for non-residence: Heads of colleges and halls in the Universities of Oxford and Cambridge, the warden of the University of Durham, and the headmasters of Eton, Winchester and Westminster schools (Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 37). The following are exempt from penalties for non-residence during the time when they are actually discharging the duties of their office, and may count that time as residence: Deans of cathedral or collegiate churches; professors and public readers in either of the three above-mentioned universities; royal chaplains, chaplains of archbishops and bishops, and chaplains of the House of Commons; incumbents serving as chancellors or commissaries of a diocese or as archdeacons; deans, subdeans, priests, and readers in the Chapels Royal; preachers in the Inns of Court or at the Rolls; the provost of Eton, the warden of Winchester, the master of the Charterhouse, and the principals of Saint David's College and of King's College, London (*ibid.*, s. 38). Prebendaries, canons, priest-vicars, vicars choral and minor canons of cathedral and collegiate churches, and fellows of Eton and Winchester, who reside and perform the duties of their office during the prescribed time, may reckon that residence as residence on their benefice. But they must not be actually absent from their benefice for more than five months in any one calendar year, except that where the year of residence in the cathedral or collegiate church or college commences at some other date than January 1st, and they keep the periods of residence required in respect of their office for two successive years in whole or in part in one calendar year, they may account such residence, although exceeding five months in the calendar year, as if they had resided on their benefice (*ibid.*, ss. 39, 120).

(*f*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 32; see ss. 10, 114, 118—121, and pp. 612, 613, *post*. A suit can only be brought in respect of penalties or forfeitures for non-residence incurred subsequently to 1st January in the year immediately preceding the year in which the suit is commenced. It can only be instituted in the consistory court of the diocese in which the benefice is situated and by a person authorised under the hand and seal of the bishop; and the bishop may direct that the penalties or forfeitures recovered in the suit, so far as not remitted in whole or in part, shall be applied towards augmenting or improving the benefice or the house of residence or other buildings or appurtenances thereof (*ibid.*, ss. 114, 118). The suit is a civil proceeding (*Bluck v. Rackham* (1846), 5 Moo. P. C. C. 305; *Rackham v. Bluck* (1846), 9 Q. B. 691). Strict proof of the admission of the incumbent is not necessary to sustain it (*Bevan v. Williams* (1776), 3 Term Rep. 635, n. (a)). Where an archbishop or bishop after proceeding by monition for a penalty for non-residence exceeding six months remits the whole or any part, the King in Council in case of such remission by an archbishop, and the archbishop in case of such remission by a bishop, is to be informed of the remission and may allow or disallow the same in whole or in part (Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 67). A house provided by Queen Anne's Bounty for a poor benefice outside

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Beneficed
Clergy.**

1199. Where a benefice has not a house, or no fit house, of residence, the bishop, on the written application of the incumbent, may, by licence, permit him to reside in some specified fit house, although not belonging to the benefice, for a specified time not exceeding the end of the calendar year next after that in which the licence is granted, and may from time to time renew the licence; but the house must be within three miles of the church, or within two miles, if the church is in a city, or market or borough town (g).

Licence to
reside in
some other
house.

1200. Upon a petition by an incumbent stating certain prescribed particulars, the bishop may grant to him a licence to reside out of the house of residence, or out of the limits of his benefice, or out of the three or two miles limit above mentioned, (1) if he is prevented from so residing by any incapacity of mind or body (h); (2) if there is no house of residence, or the house is unfit for his residence from some cause other than his own negligence, default, or other misconduct, and he keeps the house of residence, if any, in good repair, and two neighbouring incumbents with the rural dean certify that no house, convenient for his residence, can be obtained within the parish or within the three or two miles limit above mentioned; (3) for a period not exceeding six months, renewable only with the permission of the archbishop, on account of the dangerous illness of his wife or child residing with him; and (4) for his residence in a mansion or messuage of his own within the parish, provided that he keeps the house of residence

Licence for
non-residence
in certain
cases.

the limits of the benefice, if approved by the bishop, is to be deemed the house of residence belonging to the benefice (*ibid.*, s. 34); and where there is a rectory appropriate or inappropriate, the residence of the vicar or perpetual curate in the rectory house is a legal residence, provided that the house belonging to the vicarage or perpetual curacy is kept in repair to the satisfaction of the bishop (*ibid.*, s. 35). Moreover, the widow of a deceased incumbent may occupy the house of residence belonging to the benefice for two months after his decease (*ibid.*, s. 36); and an incumbent is not liable to a penalty for not residing in the house of residence while it is occupied by a tenant to whom it has been let in good faith (*ibid.*, s. 60). But an agreement for the letting of a house of residence in which the incumbent of the benefice is liable to be ordered by the bishop to reside, or which is liable to be appointed by the bishop as a residence for a curate, or of the buildings, grounds, or necessary appurtenances thereof, must be in writing and must contain a condition for the avoiding thereof upon a copy of the bishop's order or appointment being served on the occupier or left at the house; and a person who after such service continues to hold such house, buildings, grounds, or appurtenances beyond the day specified in an order or appointment by the bishop, forfeits the sum of 40s. for every subsequent day during which, without the written permission of the bishop, he wilfully continues to hold the same; and the incumbent or curate named in the order or appointment may obtain summary and, if necessary, forcible possession of the premises under a warrant of a justice of the peace. But a tenant in possession under a verbal agreement, or under an agreement not containing the prescribed condition, may recover damages for being turned out of possession from the person with whom the agreement was entered into (*ibid.*, s. 59).

(g) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 33, 45—51. Where a benefice has no house of residence, the licence of the bishop is not requisite to enable the incumbent to reside in a particular house within the benefice (*Wyrn v. Smithies* (1815), 6 Taunt. 198, 199).

(h) *Scammel v. Willet* (1799), 3 Esp. 29.

SMOT. 8.
Beneficed
Clergy.

May reside
 outside
 benefice in
 certain cases.
 Duration of
 licences.
 Revocation.

of the benefice in good repair. In case of any such licence being refused, an appeal lies within one month to the archbishop (*i*).

The bishop may grant a licence to an incumbent to reside out of the limits of his benefice in other suitable cases, but such licence will only be valid if and so far as it is allowed by the archbishop (*k*).

No licence for non-residence continues in force after the 31st of December of the year next after the year in which it was granted (*l*).

A licence for non-residence may be revoked by the bishop after the incumbent has had an opportunity of showing cause to the contrary, or by the King in Council; but an appeal from any revocation by the bishop lies within one month to the archbishop (*m*).

Enforcement
 of non-
 residence
 under
 licence.

1201. An incumbent who is non-resident with the licence of the bishop cannot, without the bishop's permission, resume the duties of his benefice before the expiration of the period mentioned in the licence; and, if non-resident for more than twelve months during that period, cannot interfere with the discharge of the duties of the benefice intrusted by the bishop to a curate or curates (*n*).

Annual
 returns by
 incumbents.

1202. The bishop must send yearly in January to every incumbent in each diocese certain prescribed questions as to his residence and service, and must make yearly, before 25th March, returns to the King in Council of the resident and non-resident incumbents in his diocese and of the substance of the answers received to the questions (*o*).

Enforcement
 of residence.

1203. Where an incumbent is non-resident without a licence or legal cause of exemption from residence (*p*), the bishop, either instead of or after proceeding for the penalties for non-residence, may issue a monition to him to proceed to and reside on his benefice and perform the duties thereof, and to make a return to the monition after a period of not less than thirty days, and, in case of no return or an unsatisfactory return being made, may issue an order requiring him to proceed and reside within thirty days. If the order is not complied with, the bishop may, subject to an appeal to the archbishop, sequester the profits of the benefice until compliance or proof of sufficient reasons for non-compliance (*q*). If an incumbent

(*i*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 43, 45—51.

(*k*) *Ibid.*, ss. 44—51.

(*l*) *Ibid.*, s. 46.

(*m*) *Ibid.*, ss. 49—51.

(*n*) Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), s. 12; see p. 640, *post*.

(*o*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 52, 53, Sched. I.

(*p*) Imprisonment for a crime is not a legal cause of exemption (*Ex parte Bartlett* (1848), 12 Q. B. 488; *Re Bartlett* (1848), 3 Exch. 28, 33).

(*q*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 54, 55, 112, 113. Subject to the appeal, the decision as to the reasons for non-residence rests with the bishop (*Re Bartlett, supra*). The monition need not be preceded by a citation or other warning (*Bartlett v. Kirwood* (1853), 2 E. & B. 771). But before sequestration is issued the incumbent must be allowed an opportunity of showing cause against it; and the instrument of sequestration should recite the delinquency in respect of which it issues (*Bonaker v. Evans* (1850), 16 Q. B. 162, Ex. Ch.).

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after a monition or order to reside on his benefice begins to reside and within twelve months thereafter wilfully absents himself from his benefice for one month together or at several times, the bishop, subject to the like appeal, may issue sequestration without any other monition or order, and may repeat the process as occasion may require (*r*).

(iii.) *Ecclesiastical Duties.*

1204. An incumbent is bound, by himself or an assistant or substitute, regularly and duly to perform divine service on Sundays and holy days in his benefice (*s*), and to supply to the parishioners the rites and offices of the Church as and when lawfully required by them (*a*), and to perform within his benefice all the duties the performance of which was solemnly promised by him at his ordination (*b*). Duties of incumbent.

1205. The bishop has express power to intervene to enforce on the part of an incumbent the regular and due performance of divine service on Sundays and holy days (*c*), and of all such other duties as an incumbent is bound by law to perform, or the performance of which was solemnly promised by him at his ordination (*d*), and the performance of which has been required of him in writing by the bishop, including, in the case of benefices within the four Welsh dioceses and the county of Monmouth, such ministrations in Welsh as the bishop directs to be performed (*e*). Where these duties appear to the bishop to be inadequately performed in a benefice (*f*), he may issue a commission of inquiry to six persons, namely, the archdeacon or rural dean, a canon residentiary, prebendary, or honorary canon of the cathedral church Bishop may enforce duties.

If, however, in response to the monition or order to return into residence, he sends an affidavit containing an insufficient excuse, the bishop may issue sequestration after the thirty days without further hearing him (*Bartlett v. Kirwood* (1853), 2 E. & B. 771). As to the sequestration, see pp. 622 *et seq.*, *post*. An incumbent is also liable to suspension for non-residence (*Pawlet v. Head* (1728), 2 Lee, Appendix, 566). As to deprivation in case of continued or repeated sequestration, see p. 536, *ante*.

(*r*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 56. The bishop may, if he thinks fit, issue another order (*Bonaker v. Evans* (1850), 16 Q. B. 162, Ex. Ch.).

(*a*) See pp. 657, 661, *post*.

(*a*) *Canones Ecclesiastici* (1603), 68; *Argar v. Holdsworth* (1758), 2 Lee, 515; *Kemp v. Wickes* (1809), 3 Phillim. 264, 274; *R. v. James* (1850), 3 Car. & Kir. 167; *Tuckniss v. Alexander* (1863), 32 L. J. (CH.) 794, 806.

(*b*) Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), s. 2. For the promises made by a priest at his ordination, see note (*b*), p. 553, *ante*. As to the restrictions on an incumbent in respect of farming and trading, see pp. 557, 558, *ante*, and as to his exemption from tolls when in the performance of his duty and his liability to criticism in respect of his parochial actions and sermons, see p. 556, *ante*.

(*c*) See pp. 657 *et seq.*, *post*.

(*d*) See note (*b*), p. 553, *ante*.

(*e*) Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), s. 2. A bishop cannot in any case require more than one Welsh service on every Sunday in such (*sic*) church or chapel of ease situated in any of these benefices, and due provision must be made for the English-speaking portion of the population (*ibid.*). The word "such" in the Act is probably a clerical error for "each."

(*f*) In the four Welsh dioceses imperfect knowledge of the Welsh language on the part of the incumbent is a sufficient ground for deciding that the duties are inadequately performed (Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 56).

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of the diocese, elected by the cathedral body, a beneficed clergyman elected from among themselves by the beneficed clergy of the archdeaconry, and a lay justice of the peace of the county, and two other laymen, being either such justices or barristers or solicitors of at least ten years' standing, nominated respectively on the requisition of the bishop by the chairman of the last quarter sessions for the county or division of the county in which the benefice is situate or the lord lieutenant (*g*). The incumbent of the benefice is to have notice of the bishop's intention to issue the commission, and may within fourteen days nominate an additional commissioner, being an incumbent in the diocese or a justice of the peace (*h*). If the commissioners or the majority of them report that the duties of the benefice are inadequately performed, the bishop may require the incumbent, though resident and engaged in performing the duties, to nominate to him one or more persons, with sufficient stipend, with a view to being licensed as assistant curates, and, if the incumbent fails to make such nomination within three months, the bishop may appoint and license one or more curates; but an appeal from the requisition or appointment lies within one month to the archbishop (*i*).

Appointment
of curate and
inhibition in
case of
negligence by
incumbent.

1206. The commissioners may report that the ecclesiastical duties of the benefice are inadequately performed owing to the negligence of the incumbent; and in case of their so reporting, the bishop, if he thinks the appointment of a curate desirable, is himself to appoint one or more curates, without requiring the incumbent to do so, and may, if he considers it expedient in the interests of the benefice, inhibit the incumbent from performing all or any of the duties (*k*); but an appeal from the appointment or the inhibition lies within one month to the court constituted under the Benefices Act, 1898 (*l*). An incumbent so inhibited is not to interfere with or control any curate in the performance of the ecclesiastical duties of the benefice; and any right of patronage vested in him as incumbent vests, while he is inhibited, in the patron of the benefice, or, if the incumbent is himself the patron, in the archbishop of the province (*m*). He is not, while so inhibited, liable to any penalty or forfeiture for non-residence; but the bishop may require the curate to reside in the house of residence of the benefice, and may assign the house and a portion of the glebe land to the curate in like manner and upon the same terms as if the incumbent were non-resident for four months in each year, and as if the curate's stipend were not less than the whole value of the benefice (*n*). The

(*g*) Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), ss. 3—5; Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 8.

(*h*) Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), s. 3.

(*i*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 77; Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), ss. 3—8, 15.

(*k*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 9.

(*l*) *Ibid.*, ss. 3, 9 (6), 11. The procedure on the appeal is regulated by the Benefices Rules, 1899, rr. 17—52, Sched. I., Sched. II., Forms Nos. 17—50 (Statutory Rules and Orders Revised, Vol. I., Benefice, England, pp. 12—35).

(*m*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 9 (4).

(*n*) *Ibid.*, s. 9 (5); see pp. 640, 641, *post*.

incumbent remains liable for repairs, but may retain out of the curate's stipend such amount in respect of repairs during the curate's occupation, and may have such facilities for executing repairs, as the bishop in case of difference decides to be reasonable (o).

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SUB-SECT. 7.—*Charges on Benefices.*

1207. Charges on a benefice, or on any of the property or profits thereof, to secure the payment of money, or for any other purpose, are unlawful and void (p), except such charges as are expressly authorised by statute (q).

Unlawful
and void
charges.

A mortgage by the incumbent of the pew rents of the church of a consolidated chapelry falls under this general prohibition and is void (r).

Mortgage
of pew rents.

The charge is void whatever be its form. A lease of the benefice or its emoluments granted as part of, or to effect, a charge thereon is void (s). So, too, is a composition with creditors on the terms of the income of the benefice being applied in payment of the incumbent's debts (t).

Form of
charge
immaterial.

The charge alone is void, and not the instrument which contains it. Therefore a covenant in the instrument for payment of the money is valid (u).

Deed con-
taining
charge not
void.

A warrant of attorney given by an incumbent to enter up judgment for debt is void, if declared to be for the purpose of securing money charged on his benefice or with a view to sequestration being procured (x). But a judgment against an incumbent is not of itself a charge on his benefice (y), even when registered (z); and, therefore, a simple warrant to enter up judgment does not constitute such a charge (a).

Warrant of
attorney and
judgment.

(o) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 9 (5).

(p) Stat. (1571) 13 Eliz. c. 20. This Act was repealed by stat. (1803) 43 Geo. 3, c. 84, s. 10; but, so far as it related to charges, was revived by stat. (1817) 57 Geo. 3, c. 99, which repealed the repealing Act, while it again repealed parts of the Act of Elizabeth not relating to charges (*Doe d. Broughton v. Gully* (1829), 9 B. & C. 344, 354). Consequently charges on benefices made between 1803 and 1817 were valid (*White v. Peterborough (Bishop)* (1818), 3 Swan. 109; *Doe d. Wilks v. Ramsden* (1833), 4 B. & Ad. 608; *Metcalf v. York (Archbishop)* (1836), 1 My. & Cr. 547).

(q) As to charges which are so authorised for the purpose of improving the property of the benefice, see pp. 755 *et seq.*, *post*.

(r) *Re Leveson, Ex parte Arrowsmith* (1878), 8 Ch. D. 96, C. A.

(s) *Shaw v. Pritchard* (1829), 10 B. & C. 241; *Walthew v. Crafts* (1851), 6 Exch. 1.

(t) *Alchin v. Hopkins* (1834), 1 Bing. (N. C.) 99.

(u) *Mouys v. Leake* (1799), 8 Term Rep. 411; *Faircloth v. Gurney* (1833), 9 Bing. 622; *Sloane v. Packman* (1843), 11 M. & W. 770.

(w) *Flight v. Salter* (1831), 1 B. & Ad. 673; *Newland v. Watkin* (1832), 9 Bing. 113; *Saltmarsh v. Hewett* (1834), 1 Ad. & El. 812; *Long v. Storie* (1849), 3 De G. & Sm. 308.

(y) *Cottle v. Warrington* (1833), 5 B. & Ad. 447; *Bates v. Brothers* (1854), 2 Sm. & G. 509.

(z) *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1, C. A.

(a) *Gibbons v. Hooper* (1831), 2 B. & Ad. 734; *Kirlew v. Butts* (1831), *ibid.*, 736, n.; *Aberdeen v. Newland* (1831), 4 Sim. 281; *Britten v. Wait* (1832), 3 B. & Ad. 915; *Colebrook v. Layton* (1833), 4 B. & Ad. 578; *Faircloth v. Gurney* (1833), 9 Bing. 622; *Johnson v. Brazier* (1834), 1 Ad. & El. 624; *Moore v.*

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1208. A pension granted to a retiring incumbent under the Incumbents Resignation Act, 1871 (*b*), is a charge on the revenues of the benefice (*c*).

For endowing
a chapel of
ease or a
poorer
benefice.

1209. An incumbent, with the consent of his bishop and patron, may grant an annual sum in perpetuity to and for the benefit of the incumbent of a chapel of ease or parochial chapel, or district church or chapel, or chapel having a district assigned thereto, being within the limits or the original limits of his benefice, or having part of its district within the limits of his benefice, whether the church or chapel is within such limits or not, and may charge this annual sum on all or any part of the lands and profits of his benefice. Where contiguous parts of several parishes are united into a separate and distinct district and are constituted a consolidated chapelry, the incumbents of the several parishes may make and create similar grants and charges in favour of the incumbent of the consolidated chapelry. Any part of the lands and profits charged may afterwards be released from the charge by the incumbent of the church or chapel benefited by the charge, with the consent of his bishop and patron, provided that sufficient lands or profits to be a security for the charge remain unreleased (*d*).

For endowing
benefice in
the metro-
polis.

1210. Where under the Union of Benefices Act, 1860 (*e*), benefices within the metropolis, as defined by that Act, are united by an Order in Council confirming a scheme of the Ecclesiastical Commissioners, provision may be made for subjecting specific parts of the revenues of the united benefice to a perpetual annual rentcharge in favour of some other specified benefice in the metropolis or in the vicinity thereof (*f*).

SUB-SECT. 8.—Sequestration of Benefices.

(i.) Nature and Occasions of the Process.

Sequestration.

1211. Sequestration of a benefice is a process issued by the bishop or other ordinary, or by an ecclesiastical court, whereby the profits and income of the benefice are ordered to be taken by one or more persons, who are called sequestrators, and to be applied in the manner required by the circumstances of the case, care being taken that the duties of the church are provided for out of them (*g*). It is

Ramsden (1838), 7 Ad. & El. 898; *Bendry v. Price* (1839), 7 Dowl. 753; *Bishop v. Hatch* (1839), *ibid.*, 763. As to charges, see also p. 755, *post*.

(*b*) 34 & 35 Vict. c. 44.

(*c*) *Ibid.*, s. 10. See pp. 629 *et seq.*, *post*.

(*d*) Augmentation of Benefices Act, 1831 (1 & 2 Will. 4, c. 45), ss. 21–27; Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 14; Augmentation of Benefices Act, 1854 (17 & 18 Vict. c. 84), ss. 1, 3, 5–7. These enactments did not authorise a grant or charge for the benefit of a chapel of ease situate within a division which under the provisions of the Church Building Act, 1818 (58 Geo. 3, c. 45), was intended to become a distinct parish (Augmentation of Benefices Act, 1831 (1 & 2 Will. 4, c. 45), s. 22).

(*e*) 23 & 24 Vict. c. 142.

(*f*) *Ibid.*, s. 11.

(*g*) Burn, Ecclesiastical Law, Vol. III., pp. 588 *et seq.*; *Arbuckle v. Courtan* (1803), 3 Bos. & P. 321, 328. The word “sequestration” properly means the setting aside of a thing in controversy from the possession of both of the parties contending for it (*Termes de la Ley*, p. 509; *Ayl. Par.* 493).

issued either for the recovery of a debt from the incumbent or on his bankruptcy, or in the course of proceedings against him in an ecclesiastical court, or during a vacancy in the benefice, or in certain cases of default by the incumbent. It may be issued where the incumbent is a lunatic or of unsound mind (*h*).

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(ii.) *Sequestration for Debt or on Bankruptcy.*

1212. Sequestration is the legal means by which the creditors of an incumbent can obtain satisfaction of their debts out of the profits of his benefice (*i*). It is obtained by a writ of *fieri facias de bonis ecclesiasticis* or a writ of *sequestrari facias de bonis ecclesiasticis* (*k*) sued out of the court in which a judgment or order has been obtained for payment of the debt, after a writ of execution has been issued to the sheriff and the sheriff has made a return that the debtor has no goods or lay fee out of which the debt can be satisfied, but that he is incumbent of a benefice named in the return (*l*). The writ can be issued in an action in the Chancery Division of the High Court where the defendant has been attached for non-payment of a sum which he has been ordered by the Court to pay, and *non est inventus* has been returned to the attachment, and the ordinary writ of sequestration has been thereupon issued, and the return has been made to it that the defendant has no lay property, but is incumbent of a benefice named in the return (*m*). The writ is admissible in evidence, although the judgment roll contains no entry of its having been awarded (*n*). It must not be issued for a sum exceeding the amount of the debt due (*o*). How obtained.

1213. The writ is directed to the bishop and commands him to enter into the benefice and church and take and sequester the Warrant of sequestration.

(*h*) *Ex parte Hastings* (1807), 14 Ves. 182.

(*i*) 2 Co. Inst. 4; *Arbuckle v. Cowtan*, *supra*. Without sequestration there can be no appointment of a receiver of the profits of the benefice (*McCurdy v. Chichester* (1837), 2 Jo. Ex. Ir. 358). A judgment against an incumbent does not in itself create a lien on his benefice (*Wise v. Beresford* (1843), 3 Dr. & War. 276).

(*k*) In former times there was also a writ of *levari facias* (*Anon.* (1552) Jenk. 206, 207; *sub nom.* *Henslow v. Salisbury* (*Bishop*) and *Keble* (1552), 1 Dyer, 76 b; 3 Bl. Com. 417, 418), but it was abolished by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 146 (2).

(*l*) R. S. C., Ord. 43, rr. 3—5, Appendix H, Forms Nos. 5, 6, 7 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, pp. 169, 353, 354). A writ for sequestration cannot properly issue until the sheriff has returned *nulla bona* to the writ of execution (*Rabbits v. Woodward* (1869), 20 L. T. 693, 778). If it issues previously, it is irregular and may be set aside on an application for the purpose made within reasonable time (*Bromage v. Vaughan* (1852), 7 Exch. 223). The name and situation of the benefice must be stated in the return (*R. v. Powell* (1836), 1 M. & W. 321).

(*m*) *Allen v. Williams* (1854), 2 Sm. & G. 455. Where a defendant in an action for debt was incumbent of two benefices in different counties, but in the same diocese, and writs of special *capias utlagatum* were issued against him to the sheriffs of the two counties, to which returns were made that he had no goods or chattels or lay fee but was incumbent of the several benefices, one rule and one writ of *sequestrari facias* were granted in respect of both (*R. v. Hind* (1831), 1 Cr. & J. 389; S. C. *sub nom.* *Re Hinde* (1831), 1 Tyr. 347).

(*n*) *Pack v. Tarpley* (1839), 9 Ad. & El. 468.

(*o*) *Britten v. Wait* (1832), 3 B. & Ad. 915.

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same into his possession, and hold the same until he has levied the debt, and incidental damages, costs and charges, out of the profits thereof, and to make a return of the amount levied on a given date (*p*). On its delivery to him, he issues a warrant of sequestration to a person named therein as sequestrator (*q*), which is published by being affixed on or near the door of the church or churches in the benefice (*r*). But the bishop is personally responsible for the execution of the writ, and for any wrong done by a sequestrator; and the sequestration is merely a direction by the bishop to his own agent to do what the court has ordered him to do (*s*). Possession is taken, and the property is bound, from the time when the warrant is issued and the sequestrator appointed, but publication is necessary to give priority against conflicting rights (*t*). After the warrant has been issued, the creditor cannot require the bishop to hand the writ back to enable him to indorse a claim for interest upon it (*u*).

**Several
sequestra-
tions.**

1214. As between two writs of sequestration against the same benefice, the bishop, in the absence of a direction of the court to the contrary, must issue his warrants of sequestration under them in the order in which they are delivered to him, and not in the order of their teste (*a*). But where several judgments are entered against an incumbent, and writs of sequestration are granted in aid of them, the court can require the bishop to issue sequestration in the order in which the judgments are entered (*b*). Where a benefice is under sequestration at the suit of a judgment creditor, a subsequent judgment creditor who has taken out sequestration can obtain in the Chancery Division of the High Court an account of the surplus profits in the hands of the first sequestrator, and an order for payment of his debt thereout (*c*).

**Continuance
of a seques-
tration.**

1215. A writ of sequestration is a continuing execution, and remains in force without reference to the date on which it is nominally returnable, until the debt and costs to be levied under it are realised, or until the bishop is ruled to return it, in which case

(*p*) *Anon.* (1552), Jenk. 206, 207; *Harding v. Hall* (1842), 10 M. & W. 42, 52, 53; R. S. C., Appendix H, Forms Nos. 5, 6, 7 (Statutory Rules and Orders Revised, Vol. XII, Supreme Court, England, pp. 353, 354).

(*q*) For forms of the warrant, see Chitty's King's Bench Forms, 13th ed., pp. 584, 587, and *Lawrence v. Edwards*, [1891] 1 Ch. 144, at pp. 145, 146.

(*r*) Parish Notices Act, 1837 (7 Will. 4 & 1 Vict. c. 45), ss. 2, 4. Before that Act it was read in church (Watson, Clergyman's Law, 4th ed., p. 308; Burn, Ecclesiastical Law, Vol. III., p. 595). The warrant is sometimes itself called a writ. The bishop either names one or more sequestrators himself, or grants the sequestration to the person or persons named by the party who obtained the writ (Burn, Ecclesiastical Law, Vol. III., p. 590).

(*s*) *Harding v. Hall*, *supra*. The bishop is responsible to the creditor for the amount levied under the sequestration; and the creditor has a right to an account in respect of it against the bishop's legal personal representatives after his death (*Hogg v. Garrett* (1849), 12 I. Eq. R. 559).

(*t*) *Doe d. Morgan v. Bluck* (1813), 3 Camp. 447; *Bennett v. Apperley* (1827), 6 B. & C. 630, 634; *Waite v. Bishop* (1834), 1 Cr. M. & R. 407.

(*u*) *Watkins v. Tarpley* (1847), 5 Dow. & L. 226.

(*a*) *Sturgis v. London (Bishop)* (1857), 7 E. & B. 542.

(*b*) *E. v. London (Bishop)* (1822), 1 Dow. & Ry. (K. B.) 486.

(*c*) *Cuddington v. Withy* (1818), 2 Swan. 174.

the return puts an end to the writ. If the bishop to whom the writ is directed dies during its continuance, his successor is bound to return it (*d*). Where a sequestration is granted to levy the amount of a mortgage debt, and the mortgaged property is foreclosed and sold for a sum not sufficient to satisfy the debt, the sequestration will not be set aside, but will continue for the levy of the balance (*e*). The sequestration need not be published before the day on which the writ is nominally returnable (*f*). Until the full amount is levied, the return of the writ should not be moved for, but an account should be demanded from the bishop from time to time as to the amounts which he has levied (*g*). If the bishop returns the writ before the execution is satisfied, it will be sent back to him to take the return off it and to certify instead what has been done under it (*h*). The sequestrator ought to make payment to the creditor at the earliest possible moment (*i*).

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1216. The usual allowance to a sequestrator is a commission of 5 per cent. on the gross amount of profits collected by him. He may be allowed the expense of audit dinners and payment of the rates on the house of residence while in the occupation of a curate in charge, if these items are at the time knowingly acquiesced in by the incumbent (*k*). Allowance of sequestration.

1217. A receiver may be appointed where the right to the sequestration is disputed (*l*), and on the application of a second incumbrancer where a third incumbrancer has obtained sequestration (*m*). A receiver can also be appointed in an action in the Chancery Division of the High Court, instituted by a mortgagee of tithe rentcharge against an incumbent and a creditor who has obtained sequestration (*n*). Appointment of receiver.

1218. If, during a sequestration in pursuance of a writ, the incumbent is suspended and a sequestration is issued under the suspension, the suspension deprives not only the incumbent, but also his creditors, of any right to the profits of the benefice, and the second sequestration accordingly overrides the first (*o*). Sequestration superseded.

1219. The return to the writ must not only set forth accounts of the sums received, but must also state that no other sums have been Return to the writ.

(*d*) *Marsh v. Fawcett* (1795), 2 Hy. Bl. 582; *Phillips v. Berkeley* (1836), 5 Dowl. 279; *Phelps v. St. John* (1855), 10 Exch. 895.

(*e*) *Long v. Williams* (1872), 26 L. T. 878.

(*f*) *Bennett v. Apperley* (1827), 6 B. & C. 630.

(*g*) *Marsh v. Fawcett*, *supra*. The incumbent cannot institute an action in the Chancery Division of the High Court for an account, as it is a matter for the court out of which the writ of sequestration has issued (*Williams v. Ivimey* (1870), 23 L. T. 100).

(*h*) *Disney v. Eyre* (1831), Alc. & N. 34; *Alderton v. St. Aubyn* (1840), 6 M. & W. 150.

(*i*) *Re Sanders v. Penlease* (1859), 1 L. T. 54.

(*k*) *Ibid.*

(*l*) *Silver v. Norwich (Bishop)* (1816), cited 3 Swan. 112, n. A receiver of the profits of a benefice will not be appointed where no sequestration has issued (*McCurdy v. Chichester* (1837), 2 Jo. Ex. Ir. 358).

(*m*) *White v. Peterborough (Bishop)* (1818), 3 Swan. 109.

(*n*) *Kenny v. Cumming* (1841), Fl. & K. 321.

(*o*) *Bunter v. Cresswell* (1850), 14 Q. B. 825, 830.

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received by the bishop under the sequestration (*p*). A bishop who has succeeded since the issue of a writ of sequestration can only be called upon to return what has been levied since he came into office; and when the creditor's solicitor in the cause has been changed, the bishop cannot be called upon to make a return until the order for the change has been served upon him (*q*). On the application of the incumbent the court will refer the accounts to a master to ascertain whether the deductions contained in them ought to be allowed (*r*). But when the accounts have been filed and the writ paid off, the incumbent cannot, some years afterwards, require the bishop to certify what has been done under the writ (*s*).

Bankruptcy
of judgment
creditor or of
incumbent.

1220. If a judgment creditor who has obtained a sequestration becomes bankrupt, his trustee in bankruptcy succeeds to his rights under the sequestration (*t*).

Where the incumbent of a benefice becomes bankrupt, the trustee in bankruptcy may apply for a sequestration of the profits of the benefice (*a*).

Sequestration
under bank-
ruptcy of the
incumbent.

1221. Where a benefice is sequestered under the bankruptcy of the incumbent, the bishop may, if he thinks fit, appoint to the incumbent such or the like stipend as he might by law have appointed to a curate licensed to serve the benefice in case the incumbent had been non-resident (*b*); and the sequestrator is to pay the stipend so appointed out of the profits of the benefice to the incumbent, by quarterly instalments, while he performs the duties of the benefice (*c*). And where, either on the bankruptcy of an incumbent, or under a judgment recovered against him, a sequestration of his benefice issues and continues for six months, the bishop, after the expiration of such six months and so long as the sequestration continues, is to take order for the performance of the services of the church of the benefice, and may appoint and license for that purpose one or more curates or additional curates,

(*p*) *Elchin v. Hopkins* (1838), 7 Dowl. 146.

(*q*) *Phillips v. Berkeley* (1836), 5 Dowl. 279.

(*r*) *Dawson v. Symonds* (1848), 12 Q. B. 830; *Morris v. Phelps* (1850), 4 Exch. 895. The incumbent cannot obtain an account against the judgment creditor and the sequestrator by proceedings in equity (*Williams v. Ivimey* (1870), 23 L. T. 100).

(*s*) *Billing v. St. Aubyn* (1861), 7 Jur. (N. S.) 775.

(*t*) *Re Iveson, Ex parte Hall* (1835), 1 Deac. 87.

(*a*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 189. The profits do not vest in the trustee in bankruptcy until sequestration is issued (*Hopkins v. Clarke* (1864), 5 B. & S. 753, Ex. Ch.). A sequestration may be issued notwithstanding that the incumbent has obtained an order of discharge under the bankruptcy (*Re Meredith, Ex parte Chick* (1879), 11 Ch. D. 731, O. A.); and, if issued previously, it will continue in force while any debts remain to be satisfied, in spite of the incumbent's obtaining an order of discharge (*Re Lawrence*, [1896] P. 244; *Lawrence v. Adams* (1896), 75 L. T. 410). But the official receiver can agree to a relaxation or withdrawal of the sequestration in consideration of payment of a sufficient sum of money, and a registrar in bankruptcy can authorise him to accept the sum (*Re Barratt* (1906), 22 T. L. R. 427).

(*b*) See Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 83, 85—87; Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), s. 9.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 52 (2), (4).

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as the case may require, with such stipend in each case, specified in the licence, as the bishop thinks fit. Every such stipend is to be paid by the sequestrator out of money coming to his hands under the sequestration, so long as it continues, in priority to all sums payable by virtue of the bankruptcy or the judgment under which the sequestration has issued, but not in priority of liabilities in respect of charges on the benefice (*d*). Where any such sequestration continues for more than six months, the bishop, if it appears to him that scandal or inconvenience is likely to arise from the incumbent continuing to perform the services of the church while the sequestration continues, may, after the expiration of such six months, inhibit the incumbent from performing any services of the church within the diocese during the continuance of the sequestration, and he may at any time withdraw such inhibition (*e*).

(iii.) *Sequestration in Proceedings in Ecclesiastical Courts.*

1222. Where a spoliation is brought in an ecclesiastical court to try which of two clerks presented to a benefice is the rightful incumbent, a sequestration will be granted, on the application of either of them, to the churchwardens, or some other sequestrator, to collect the profits and keep them for the use of the clerk who shall be found to have the right to them (*f*). On a spoliation

1223. Where an incumbent is punished with suspension *ab officio et beneficio*, he loses, during its continuance, the right to the profits of the benefice (*g*). The court will direct sequestration of them, and the sequestered profits belong to the bishop, who must, either in his own person, or by a substitute paid out of the profits, discharge the duties of the benefice during the suspension (*h*). The sequestration is enforceable by the bishop and not by the court which has directed it (*i*). On suspension generally.

1224. Sequestration will not ordinarily be issued by an ecclesiastical court, until a monition to show cause against it has been decreed and the incumbent has failed to appear or to show cause (*j*). After monition.

1225. Where the incumbent of a benefice is found guilty in proceedings against him for unlawful trading or dealing and is sentenced to be suspended, the bishop, during such suspension, is to sequester the profits of the benefice, and may in his discretion order the application of the sequestered profits, after deducting the necessary expenses of serving the cure, either in whole or in such proportions as he thinks fit, first in payment of the proceedings and the sequestration, and next, if the benefice is also under sequestration On suspension for unlawful trading or dealing.

(*d*) Sequestration Act, 1871 (34 & 35 Vict. c. 45), ss. 1—4. See pp. 615, 616, *ante*.

(*e*) *Ibid.*, s. 5.

(*f*) Ayl. Par. 495; Watson, Clergyman's Law, 4th ed., p. 308. A spoliation is a suit brought in a spiritual court for the fruits of a church or for the church itself (*Termes de la Ley*, pp. 511, 512).

(*g*) *Morris v. Ogden* (1869), L. R. 4 C. P. 687.

(*h*) *Re Thakeham Sequestration Moneys* (1871), L. R. 12 Eq. 494

(*i*) *Trower v. Hurst* (1847), 1 Rob. Eccl. 597.

(*j*) *Abbott v. Gurney* (1843), 2 Notes of Cases, 75.

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at the suit of a creditor, towards the satisfaction of such sequestration, and after satisfaction thereof towards the augmentation or improvement of the benefice or the house of residence or any of the lands or buildings thereof; or may order the profits or any portion thereof to be paid to Queen Anne's Bounty for the purposes of the Bounty (*k*).

(iv.) *Sequestration in Cases of Default by Incumbent.*

Under mortgage for providing house of residence, or on neglect to insure against fire.

1226. If, after a mortgage has been effected under the Clergy Residences Repair Act, 1776 (*l*), or any of the Acts extending the provisions of that Act, or under the Pluralities Act, 1838 (*m*), for the purpose of providing a house of residence for a benefice, the incumbent makes default in payment of either the principal or the interest on the mortgage, or if, after a mortgage for that purpose has been effected under the Pluralities Act, 1838 (*m*), he neglects to insure and keep insured the house and other glebe buildings against fire, the bishop may sequester the profits of the benefice until such payment or insurance is made (*n*).

For non-residence of the incumbent.

1227. Where it appears to a bishop that the incumbent of a benefice in the diocese, not having a licence to reside elsewhere than in the house of residence of the benefice, nor having a legal cause of exemption from residence (*o*), does not sufficiently, within the meaning of the Pluralities Act, 1838 (*p*), reside on the benefice, his residence thereon may be enforced by monition, and, if necessary, by an order, instead of, or after, proceedings for the statutory penalties for non-residence (*q*); and in case of non-compliance with the order the bishop may sequester the profits of the benefice until it is complied with, or sufficient reasons for non-compliance are stated and proved (*r*). The incumbent may, within one month after service

(*k*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 31, 54.

(*l*) 17 Geo. 3, c. 53. See pp. 755 *et seq.*, *post*.

(*m*) 1 & 2 Vict. c. 106.

(*n*) Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53), s. 6; Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 67; *Bluck v. Hodgson* (1847), 5 Notes of Cases, 167.

(*o*) Inability to reside in consequence of being imprisoned for a crime has been held to be not a legal cause of exemption from residence (*Ex parte Bartlett* (1848), 12 Q. B. 488; *Re Bartlett* (1848), 3 Exch. 28, 33)

(*p*) 1 & 2 Vict. c. 106. See pp. 610 *et seq.*, *ante*.

(*q*) See p. 510, *ante*.

(*r*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 54. The bishop may in his discretion order the application of the sequestered profits, after deducting the necessary expenses of serving the cure, either in whole or in such proportions as he thinks fit, first in payment of the penalties proceeded for, if any, and of the expenses of the monition and sequestration, and next, if the benefice is also under sequestration at the suit of a creditor, towards the satisfaction of such sequestration, and, after satisfaction thereof, towards the augmentation or improvement of the benefice or the house of residence or any of the lands or buildings thereof; or may order the profits or any portion thereof to be paid to Queen Anne's Bounty for the purposes of the Bounty. The bishop may also, within six months after the order for sequestration or after any money has been actually levied by the sequestration, remit to the incumbent any proportion of the sequestered profits, or cause the same or any part thereof, whether remaining in the hands of the sequestrator or paid to Queen Anne's Bounty, to be paid to the incumbent (*ibid.*).

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upon him of the order for sequestration, appeal to the archbishop of the province, who must make such order as may seem just in relation to the sequestration, or to the sequestered profits, for the return thereof or of any part thereof to the incumbent, or to a sequestrator appointed at the suit of a creditor or otherwise; but the sequestration is to be in force during the appeal (s). If, in obedience to a monition or order requiring him to reside, whether a sequestration has issued or not, the incumbent begins to reside, but within twelve months after commencing residence wilfully absents himself from the benefice for one month, either at one time or in the aggregate, the bishop may, without any further monition or order, sequester and apply the profits of the benefice in the same manner as in the case of a sequestration to enforce an original order for residence; and may proceed in like manner in similar circumstances as often as occasion requires. And in this case, too, the incumbent may, within one month after service upon him of the order for sequestration, appeal to the archbishop of the province, who is to make such order as may seem just in relation to the sequestration or to the sequestered profits; but the sequestration is to be in force during the appeal (t). If a benefice continues for a whole year (u) under sequestration for the incumbent's disobedience to a monition or order requiring his residence thereon, or if the incumbent incurs two such sequestrations in the space of two years and is not relieved with respect to either of such sequestrations on appeal, the benefice becomes void (a).

1228. In certain cases of non-residence of the incumbent the bishop may enforce delivery of possession of the house of residence to a curate by sequestration, and may enforce payment of the taxes, rates, and assessments in respect thereof by monition and sequestration (b).

For possession of house of residence and payment of taxes.

1229. If an incumbent wilfully neglects or refuses to pay the stipend of a curate, or the arrears thereof, the bishop may enforce payment by monition and sequestration of the profits of the benefice (c).

For paying curate's stipend.

1230. In proceedings by monition and sequestration for non-residence and for non-payment of curates, the monition issues under the hand and seal of the bishop and is served personally on the incumbent (d), and immediately after service is returned into the

Mode of proceedings by monition and sequestration.

(s) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 54, 110—113. The monition need not be preceded by a citation, but the instrument of sequestration ought to recite the delinquency in respect of which it issues and the bishop's adjudication thereon; and sequestration must not issue without giving the incumbent an opportunity of showing cause why it should not issue (*Bonaker v. Evans* (1850), 16 Q. B. 162, Ex. Ch.; *Bartlett v. Kirwood* (1853), 2 E. & B. 771).

(t) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 56, 110—113.

(u) This means twelve months, and not a calendar year from 1st January to 31st December (*Bartlett v. Kirwood* (1853), 2 E. & B. 771, 784, 786).

(a) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 58, 110—113; *Re Bartlett* (1848), 3 Exch. 28, 33, 34.

(b) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 93, 94.

(c) *Ibid.*, ss. 83, 90, 110—113; *Sharpe v. Bluck* (1847), 10 Q. B. 280.

(d) Service is to be effected by showing the original to the incumbent and

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consistorial court of the bishop, and is there filed with an affidavit of the time and manner of the service. The incumbent may thereupon show cause by affidavit or otherwise why a sequestration should not issue according to the terms of the monition; and if he does not show sufficient cause to the contrary within the time assigned by the monition, the sequestration issues under the seal of the consistorial court of the bishop and is served and returned into the registry of the court in the same manner as is required with respect to the monition (e). Where a monition has been served on an incumbent requiring him to reside on his benefice, no sequestration is to issue until an order, requiring him to proceed and reside upon his benefice within thirty days, has been served upon him in the same manner as is required with respect to the monition (f).

For payment
 to Queen
 Anne's
 Bounty.

Where a new incumbent on entering upon a benefice, or an incumbent on a building insufficiently insured being destroyed or damaged by fire, does not, within the time specified in the Ecclesiastical Dilapidations Act, 1871(g), pay to the Governors of Queen Anne's Bounty the money payable under that Act for the repair of dilapidations or reinstatement of the building, the Governors are to give notice to the bishop, and the bishop may raise the amount thereof by sequestration of the profits of the benefice (h).

(v.) *During Vacancy.*

Sequestration
 on avoidance
 of benefice
 usually
 issued to
 church-
 wardens.

1231. On a benefice becoming void, sequestration is issued, usually to the churchwardens, to receive the profits, and pay thereout the cost of serving the cure during the vacancy (i), and to account for the net balance to the succeeding incumbent (j), who can maintain an action against the sequestrators for this balance (k). If the profits received by the sequestrators during the vacancy are not sufficient to pay the assigned stipend or stipends, the deficiency is to be paid by the succeeding incumbent out of the profits of the benefice; and the bishop may, if necessary, enforce such payment by monition and sequestration of these profits (l).

leaving a true copy with him, or, in case he cannot be found, by leaving a true copy at his usual or last known place of residence and by affixing another copy upon the church door of the parish in which such place of residence is situate, and by leaving another copy with the officiating minister or one of the churchwardens of that parish, and by affixing another copy on the door of the church of the incumbent's benefice (Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 112). Where the incumbent has no other usual or last known place of residence, service by leaving a copy at the house of residence of his benefice will be sufficient (*Green v. Cobden* (1836), 2 Bing. (N. C.) 627).

(e) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 112.

(f) *Ibid.*, s. 113.

(g) 34 & 35 Vict. c. 43.

(h) *Ibid.*, ss. 43, 57. See p. 772, *post*.

(i) See pp. 635, 636, 644, *post*.

(j) Ayl. Par. 495, 496; Gib. Cod. 749; stat. (1536) 28 Hen. 8, c. 11, ss. 1—3; Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 100.

(k) *Jones v. Barrett* (1724), Bunb. 192; *Russell v. Lay* (1897), 66 L. J. (Q. R.) 582.

(l) Stat. (1536) 28 Hen. 8, c. 11, s. 8; Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 101.

(vi.) *Rights of Parties during Sequestration.*SECT. 3.
**Beneficed
Clergy.**Possession of
bishop.Position of
sequestrator.

1232. The issue of a warrant of sequestration puts the bishop in possession of the benefice and the profits thereof, except the house of residence (*m*).

1233. The sequestrator is a bailiff or agent to the bishop, and gives security for duly accounting for the money received by him. His office does not pass to his executors, administrators or assigns (*n*). He is bound to provide out of the profits of the benefice for the repairs of the chancel, if the benefice is a rectory, and of the house of residence and glebe buildings, and for their reinstatement in case of fire, as well as for the performance of divine service; in fact, for all such outgoings as are inseparable from the benefice. But under the Ecclesiastical Dilapidations Act, 1871 (*o*), he will not be allowed any expenditure on the repair of glebe buildings beyond the amount estimated as sufficient by the diocesan surveyor (*p*). And where the incumbent dies during the sequestration, and the buildings are inspected under that Act during the vacancy, and an order is made under s. 84 stating the repairs and the cost thereof for which the executors or administrators of the deceased incumbent are liable, the sequestrator is not liable for this cost, and is not entitled to deduct it out of the profits of the benefice in his hands (*q*). A sequestrator who has been appointed merely to secure payment to curates is not a necessary party to a suit to recover arrears of an annuity charged on the benefice (*r*).

A sequestrator may bring an action, levy a distress, and take any other proceeding in his own name as sequestrator of the benefice for recovering any profits of the benefice, or dues or fees, or rent issuing out of land of the benefice, payable to the incumbent, either against the incumbent himself, or against third parties to the same extent as the incumbent might have done if the benefice had not been under sequestration; but in the case of a sequestration issued at the instance of a creditor, he is not bound to commence any such proceeding until security to his satisfaction is given by the creditor for indemnifying him and the bishop or other ordinary, or the court by whom he was appointed, from all costs, charges, and expenses in connection with the proceeding (*s*).

Proceedings
by seques-
trator for
recovery of
profits.

1234. The payment or render to a sequestrator, with or without suit, by the party liable thereto of any profits of the benefice, or dues or fees or rent issuing out of land of the benefice, payable to the

Profits to be
received by
sequestrator.

(*m*) *Pack v. Turpley* (1839), 9 Ad. & El. 468.

(*n*) *Harding v. Hall* (1842), 10 M. & W. 42, 50, 52; *Watson, Clergyman's Law*, 4th ed., p. 308; Sequestration Act, 1849 (12 & 13 Vict. c. 67), s. 2; *Noble v. Reast*, [1904] P. 34, 38, 39.

(*o*) 34 & 35 Vict. c. 43.

(*p*) *Hubbard v. Beckford* (1798), 1 Hag. Con. 307; *Whinfield v. Watkins* (1812), 2 Phillim. 1; Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), ss. 12—21, 45, 46, 48, 57; *Kimber v. Paravicini* (1885), 15 Q. B. D. 222.

(*q*) *Jones v. Dangerfield* (1875), 1 Ch. D. 438.

(*r*) *Stannus v. Robinson* (1837), 2 Jo. Ex. Ir. 498.

(*s*) Sequestration Act, 1849 (12 & 13 Vict. c. 67), s. 1. The expense of the security is to be deducted or allowed out of any money received by the creditor by virtue of the proceeding (*ibid.*).

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incumbent, effectually discharges the party from all liability to the incumbent in respect thereof (*t*). A sequestrator is entitled to receive, as part of the profits of a benefice, the income of a fund bequeathed in augmentation of the benefice (*u*). But a sequestration does not extend to rent previously accrued or to arrears of tithes (*x*).

Priority of
sequestra-
tions.

1235. A sequestration issued under the Pluralities Act, 1838 (*a*), has priority over all other sequestrations, except a sequestration under the Clerical Residences Repair Act, 1776 (*b*), which has been previously issued (*c*).

Appointment
of curates
during
sequestration.

1236. Where a benefice is under sequestration, except for the purpose of providing a house of residence (*d*), the bishop is empowered, and, if the incumbent does not perform the duties of the benefice, is required, to appoint and license one or two more curates thereto, with stipends payable by the sequestrator out of the profits of the benefice and not exceeding in the case of any one curate the highest rate of stipend allowed by the Pluralities Act, 1838 (*e*), nor exceeding, where more than one curate is appointed, £100 a year to each; but not more than one curate is to be appointed to a sequestered benefice where there is not more than one church and the population does not exceed 2,000 (*f*).

Service of
cure by
incumbent.

1237. The sequestration of a benefice does not of itself interfere with the service of the cure by the incumbent or with his duty to reside on the benefice (*g*). But if the sequestration remains in force for more than six months, and scandal or inconvenience appears likely to arise from the incumbent continuing to perform the services of the church, the bishop may, as stated above, inhibit him (*h*).

Right of
presentation
during seques-
tration.

1238. While a benefice is under sequestration the incumbent is incapable of presenting or nominating to a vacant benefice of which he is patron in right of the sequestered benefice; and the right of so presenting or nominating is to be exercised by the bishop of the diocese in which the vacant benefice is situate (*i*). But the incumbent of a benefice under sequestration is not precluded from appointing the parish clerk (*k*).

Position of
incumbent.

1239. While a benefice is under sequestration, the incumbent cannot accept or be instituted or licensed to any other benefice or preferment, the holding of which would avoid or vacate the sequestered benefice, unless with the written consent of the bishop of the

(*t*) Sequestration Act, 1849 (12 & 13 Vict. c. 67), s. 2.

(*u*) *Re Parker's Charity* (1863), 32 Beav. 634.

(*x*) *Waite v. Bishop* (1834), 1 Cr. M. & R. 507.

(*a*) 1 & 2 Vict. c. 106.

(*b*) 17 Geo. 3, c. 53, s. 6.

(*c*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 110.

(*d*) See p. 622, *ante*.

(*e*) 1 & 2 Vict. c. 106, ss. 85, 86.

(*f*) *Ibid.*, s. 99.

(*g*) *Doe d. Rogers v. Mears* (1774), 1 Cowp. 129; *Lawrence v. Edwards*, [1891] Ch. 144, *per* CHITTY, J., at pp. 149, 150.

(*h*) See p. 521, *ante*.

(*i*) Sequestration Act, 1871 (34 & 35 Vict. c. 45), s. 6.

(*k*) *Lawrence v. Edwards*, *supra*. See p. 476, *ante*.

diocese in which the sequestered diocese is situate and of the sequestrator (*l*).

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SUB-SECT. 9.—*Avoidance of Benefices.*

(i.) *Modes and Effect of Avoidance.*

1240. A benefice is avoided by death, resignation, exchange, cession, and deprivation (*m*). Modes of avoidance.

The interest of the incumbent in the profits and emoluments and property of the benefice ceases on the day when he vacates it; and his successor, when admitted, becomes entitled to them as from that day, so far as they have not been applied in providing for the service of the cure of souls and for the costs of sequestration during the vacancy (*n*). Effect

(a) *Death.*

1241. Where an incumbent farms glebe land of the benefice himself and dies after sowing the land and before harvest, the crops sown form, as emblements, part of his personal estate (*o*). Emblements

If the incumbent occupies at his death a house of residence annexed to the benefice and leaves a widow, she may continue in occupation of the house for a further period of not more than two calendar months (*p*). Continuance of widow in house of residence.

(b) *Resignation.*

1242. Resignation of a benefice must be made to the bishop, either in person or by a deed attested by two witnesses. The presence of a notary public at the execution of the deed and his attestation of it are usual but not essential (*q*). Except on an exchange, the resignation must be unconditional, but it may be made to take effect at a future fixed date (*r*). It may be made at the request of the bishop to avoid scandal or legal proceedings; and the bishop may agree to postpone the declaration of the vacancy until a future fixed date, in order to enable the incumbent to receive the tithe rent-charge accruing before that date or for any other reason (*s*). The bishop is not obliged to accept the resignation (*t*), and his acceptance of it need not be in any particular form or in Mode of resignation.

(*l*) Sequestration Act, 1871 (34 & 35 Vict. c. 45), s. 7.

(*m*) Co. Litt. 120 a. The cognisance of the avoidance of benefices belongs to the ecclesiastical courts (stat. (1351) 25 Edw. 3, stat. 6, c. 8).

(*n*) Stat. (1536) 28 Hen. 8, c. 11; *Farchild v. Gayre* (1605), Cro. Jac. 63; *Hallon v. Cove* (1830), 1 B. & Ad. 538. For sequestration during the vacancy, see p. 624, *ante*; and for the performance of the duties, see p. 635, *post*.

(*o*) Stat. (1536) 28 Hen. 8, c. 11, s. 4.

(*p*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 36.

(*q*) Gib. Cod. 822, 823; Ayl. Par. 467—469; Burn, Ecclesiastical Law, Vol. III., pp. 540—544; *Reichel v. Oxford (Bishop)* (1887), 35 Ch. D. 48, 74 75, C. A., affirmed in (1889), 14 App. Cas. 259, 265, H. L. For forms of deeds of resignation, see S. C. 35 Ch. D. 48, at pp. 50, 51; Encyclopædia of Forms, Vol. III., p. 602.

(*r*) *Reichel v. Oxford (Bishop)* (1889), 14 App. Cas. 259, 268, 269.

(*s*) *Ibid.*

(*t*) Burn, Ecclesiastical Law, Vol. III., p. 543; *Rockingham (Marchioness) v. Griffith* (1755), 7 Bac. Abr. 246, tit. Simony (D); *Fletcher v. Soudes (Lord)* (1820), 3 Bing. 501, H. L., *per HULLOCK, B.*, at p. 544.

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Beneficed
Clergy.

Illegal
agreements
to resign.

Penalty for
corrupt
resignation.

Resignation
bonds.

writing. It is implied if the resignation was made at his request (*a*). The resignation takes effect upon its acceptance by the bishop, and cannot afterwards be revoked (*b*).

1243. The declaration against simony to be taken before admission to a benefice (*c*) contains a statement that the clerk has not entered, nor, to the best of his knowledge and belief, has any person entered, into any agreement or engagement otherwise than as allowed by ss. 1 and 2 of the Clergy Resignation Bonds Act, 1828 (*d*), that he should at any time resign the benefice (*e*). Any agreement, on the transfer of a right of patronage of a benefice, for the resignation of a benefice in favour of any person is invalid (*f*).

If an incumbent corruptly resigns his benefice or corruptly takes, directly or indirectly, any pension, sum of money, or other benefit for resigning it, both the giver and taker are liable to the penalty of losing double the amount or value (*g*).

1244. A bond or contract for the resignation of a benefice or ecclesiastical preferment entered into by a clerk either before or after his admission thereto is void (*h*), and if entered into in connection with his presentation or appointment thereto is simoniacal (*i*), unless it comes within the terms of the Clergy Resignation Bonds Act, 1828 (*k*). By that Act an engagement in writing entered into by a clerk before his presentation or appointment to a benefice or preferment in private patronage (*l*) for his resignation thereof, expressly to the intent that any one specified person whosoever, or one of two specified persons both being within the degrees of relationship to the patron or one of the patrons permitted by the Act, shall be presented or appointed thereto, is valid and may be enforced (*m*), provided that the instrument containing the engagement is deposited within two months in the registry of the diocese or peculiar jurisdiction in or to which the benefice or preferment is situate or subject (*n*). Where two persons are specified in the

(*a*) *Heyes v. Exeter College, Oxford* (1806), 12 Ves. 336; *Reichel v. Oxford Bishop* (1887), 35 Ch. D. 48, 69, O. A., affirmed (1889) 14 App. Cas. 259, H. L.

(*b*) *Fane's Case* (1607), Cro. Jac. 197; *Reichel v. Oxford Bishop* (1889), 14 App. Cas. 259. Whether a resignation can be revoked before it is actually accepted by the bishop is not clear (*ibid.*, per Lord HERSCHELL, at p. 271). After the resignation of a benefice has been held effectual in an action to which the patron was a party, the resigning incumbent cannot set up the invalidity of the resignation as against a successor instituted and inducted on the patron's presentation (*Magrath v. Reichel* (1887), 57 L. T. 850).

(*c*) See p. 594, ante.

(*d*) 9 Geo. 4, c. 94.

(*e*) Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1 (4), sched.

(*f*) *Ibid.*, s. 1 (3) (e).

(*g*) Stat. (1689) 31 Eliz. c. 6, s. 7. A bond given to an incumbent to secure to him an annuity equal to the income of his benefice as an inducement to him to resign is void (*Young v. Jones* (1782), 3 Doug. (K. B.) 97).

(*h*) *Fletcher v. Soudes (Lord)* (1826), 3 Bing. 601, H. L.

(*i*) *Ibid.*

(*k*) 9 Geo. 4, c. 94.

(*l*) *Ibid.*, s. 6.

(*m*) *Ibid.*, ss. 1, 3.

(*n*) *Ibid.*, s. 4. The instrument is to be open to inspection, and an office copy certified by the registrar is legal evidence thereof; and the registrar may

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engagement, each must be either by blood or marriage an uncle, son, grandson, brother, nephew or grandnephew of the patron or one of the patrons beneficially interested in the patronage (*o*) or of a married woman whose husband in her right is patron or one of the patrons (*p*). A resignation made in pursuance of any such engagement must refer to the engagement and state the name of the person for whose benefit it is made, and the ordinary cannot refuse the resignation except for good and sufficient cause. But it is only valid for the purpose of allowing that person to be presented or appointed to the benefice or preferment, and is void unless he is presented or appointed thereto within six months after notice of the resignation has been given to the patron or patrons (*q*).

1245. An incumbent who has held a benefice for seven years at least continuously may represent to the bishop in the prescribed form that he desires to resign the benefice under the provisions of the Incumbents Resignation Act, 1871 (*r*), on the ground of being incapacitated by permanent mental or bodily infirmity from the due performance of his duties; and the bishop may thereupon, if he sees fit, issue a commission to inquire and report upon the truth of the alleged ground and the expediency of the resignation. The commissioners are to be five in number, and are to be (1) either the archdeacon or rural dean; (2) an incumbent of the diocese nominated by the retiring incumbent; (3) an incumbent of the diocese nominated by the bishop; (4) a justice of the peace of the county who is a member of the Church of England, nominated by the presiding chairman at the last preceding quarter sessions for the county or division, or, if there is no such person, by the lord lieutenant of the county; and (5) a person nominated by the patron (*s*). A month's previous notice of the intended commission and of the required nomination of commissioners is to be sent to the incumbent, patron, chairman of quarter sessions or lord lieutenant, as the case may be, and churchwardens of the benefice; and if the patron, or the chairman of quarter sessions or lord lieutenant, neglects to nominate within the month, the bishop may nominate a commissioner instead (*t*). On receiving notice of the issue of the commission the commissioners are to cause seven days' notice of their first meeting to be affixed to the usual place of public notices in the church of the benefice. Three are to be a quorum, and they may, if they see fit, examine on oath persons desirous of giving evidence before them. In their return to the commission they are to certify all material

Resignation
with a
pension on
account of
infirmity.

charge the fees fixed by the Act for the deposit of the instrument and for searches and office copies (*ibid.*).

(*o*) 9 Geo. 4, c. 94, s. 2. Where the patronage is held in trust or in the right of another, the relationship must be with a *cestui que trust* or a person in whose right it is held (*ibid.*).

(*p*) *Ibid.*, s. 2.

(*q*) *Ibid.*, s. 5.

(*r*) 34 & 35 Vict. c. 44.

(*s*) *Ibid.*, ss. 5, 6. If the patronage is alternate, the nomination is to be by the patrons jointly, or, in case of difference, by the patron entitled to the next presentation (*ibid.*, s. 6).

(*t*) *Ibid.*, s. 7.

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Clergy.

matters, with their opinion as to the expediency or otherwise of the proposed resignation; and if at least three of them deem it expedient, they are to specify the amount of pension which in their opinion ought to be allowed out of the revenues of the benefice to the retiring incumbent (*a*). In the case of an incumbent who is found a lunatic by inquisition the committee of his estate may in his name and on his behalf exercise the right of resignation and of doing any act in connection therewith given to an incumbent by the Act (*b*).

Limit of
pension.

1246. No benefice is at any time to be subject to the payment of more than one pension (*c*), and the pension must not exceed one third part of the annual value of the benefice (*d*), nor be an amount which will not leave sufficient income to secure the due performance of the services of the church (*e*).

Declaration
of pension.

1247. If the return certifies the resignation to be expedient and the patron consents to it in writing, or does not within one month in writing refuse his consent (*f*), or if after the patron has refused his consent the archbishop decides that the resignation should be accepted, the bishop is to sign in triplicate a declaration in the prescribed form, stating the amount of pension allowed (*g*), the day of the avoidance of the incumbency and commencement of the pension, not being less than one month after the date of the declaration, and the times of payment, not being oftener than twice a year. The declaration is to be sent to the patron and the retiring incumbent and to be filed in the diocesan registry, and is the title deed of the retired clerk to the pension, which is thenceforth a charge upon the revenues of the benefice and is recoverable as a debt at law or in equity from the incumbent of the benefice for the

(*a*) Clergy Resignation Bonds Act, 1828 (9 Geo. 4, c. 94), s. 8. The Act makes provision for the expenses of the inquiry and for the fixing of the costs of the bishop's secretary and the diocesan registrar in carrying into execution the provisions of the Act (*ibid.*, ss. 16, 17).

(*b*) *Ibid.*, s. 18.

(*c*) *Ibid.*, s. 9.

(*d*) *Ibid.*, s. 8. The annual value is the net annual value, exclusive of the house of residence, after deducting all rates, taxes, and charges assessed upon and payable out of the benefice, including in such charges the salary of any curate who is compulsorily employed and any annual payments in respect of a mortgage created for securing the repayment of a loan by annual instalments, payments in the nature of a rentcharge, or otherwise, in a limited number of years, and having at the time of the sitting of the commission more than two years to run (Incumbents Resignation Act, 1871, Amendment Act, 1887 (50 & 51 Vict. c. 23), ss. 3, 5).

(*e*) Incumbents Resignation Act, 1871, Amendment Act, 1887 (50 & 51 Vict. c. 23), s. 5, which provides that the sufficiency of the income is to be calculated according to the scale of stipends set forth in the Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 85.

(*f*) If the patron refuses his consent, the return is to be laid before the archbishop, who is within one month to give a final decision whether the resignation should or should not be accepted (Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44), s. 9).

(*g*) The amount of pension fixed by the declaration cannot be impeached on the ground of its exceeding the statutory limit (*Maning v. Hardy* (1904), 20 T. L. R. 776).

time being by the retired clerk, his executors, administrators, or assigns, but is not transferable at law or in equity (*h*).

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Beneficed
Clergy.

Subsequent
alteration or
cesser of
pension.

1248. In the case of pensions awarded after 8th August, 1887, where any part of the income of the benefice is derived from tithe rentcharge or glebe lands, the amount of each half-yearly payment varies and is from time to time regulated in accordance with the averages published under the provisions of the Tithe Act, 1836 (*i*), in the month of January next preceding the date of such half-yearly payment; but in other cases the amount of the pension, after being fixed by the declaration of the bishop, is not liable to alteration owing to the subsequent diminution of the income of the benefice from any cause (*k*). The right to the pension, however, ceases upon the enrolment by the retired clerk of a deed of relinquishment under the Clerical Disabilities Act, 1870 (*l*), or on the day on which he is admitted to another benefice. And if he undertakes clerical duties elsewhere than within the benefice from which he retired, the bishop, on the fact being brought to his notice by the incumbent of the benefice, is to make inquiries, and, upon being satisfied that the retired clerk has been undertaking such duties and receiving remuneration for them, may determine whether the pension shall cease or be diminished in any and what proportion and for any and what period. But the retired clerk has an appeal to the archbishop, who may confirm, annul, or vary the bishop's decision as he thinks proper (*m*).

1249. A pensioned clerk remains amenable to ecclesiastical discipline and liable to suspension from or forfeiture of pension for offences which would have involved suspension from or forfeiture of the benefice if he had remained incumbent; and proceedings under the Church Discipline Act, 1840 (*n*), may be taken against him for an offence in the same manner as if he had remained incumbent and as if he had committed the offence within the benefice. If he resides elsewhere than in England or Wales or the Channel Islands, he may be required, by a letter or summons signed by the bishop and countersigned by the archbishop in token of consent thereto, and posted to his last known place of residence, to attend in England and appear to any proceedings instituted against him in respect of such offence, and to appoint a place in England for the service upon him of all subsequent process and documents. And if he neglects to appear to the proceedings and appoint such place for

Status and
liability of
pensioned
clerk.

(*h*) Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44), ss. 9, 10. The incumbent cannot set off against the pension a debt due to him from the retired clerk (*Gathercole v. Smith* (1881), 17 Ch. D. 1, O. A.; *Gathercole v. Smith* (1881), 7 Q. B. D. 626, C. A.), except in respect of dilapidations (see p. 768,).

(*i*) 6 & 7 Will. 4, c. 71.

(*k*) *Robinson v. Dand* (1886), 17 Q. B. D. 341; Incumbents Resignation Act, 1871, Amendment Act, 1887 (50 & 51 Vict. c. 23), s. 4.

(*l*) 33 & 34 Vict. c. 91.

(*m*) Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44), s. 15. The cessation or any alteration of the pension is to be indorsed on the declaration filed in the registry; and a copy of the indorsement, signed by the bishop, is to be delivered on application to the incumbent and patron of the benefice (*ibid.*).

(*n*) 3 & 4 Vict. c. 86.

SECT. 9.
Beneficed
Clergy.

Rights of
 succeeding
 incumbent.

service within three months after the date of the letter or summons, the proceedings may be prosecuted in his absence (o).

1250. On the filing of the bishop's declaration the benefice will become *ipso facto* vacant on the day fixed in the declaration, and the patron may present a clerk thereto as if it had been vacated by the death of the incumbent. The clerk who is instituted, collated, or licensed to the benefice becomes entitled to the revenues thereof, subject to the payment of the pension to the retired clerk (p), and to the house of residence belonging to the benefice, free from any claim by the retired clerk; and he has the same right and claim in respect of dilapidations as if the benefice had been vacated by the death of the incumbent (q). And if a pensioned clerk has on retirement become liable to the payment to the succeeding incumbent of any sum on account of dilapidations under the Ecclesiastical Dilapidations Act, 1871 (r), and has not paid such sum in the manner prescribed by that Act, the incumbent for the time being of the benefice may withhold the amounts due from time to time in respect of the pension and apply the same in discharge of the sum due for dilapidations until the whole debt has been discharged. But the amount so withheld in any one year is not to exceed one-half of the total amount of the pension for such year without the consent of the bishop (s).

Emblements.

An incumbent who resigns his benefice is not entitled to emblements (t).

(c) *Exchange.*

Consents to
 exchange.

1251. Two incumbents may exchange benefices with the consents of the patrons and of the bishops of the dioceses in which the benefices are situate. These consents are necessary because the exchange is effected by each incumbent resigning his own benefice and obtaining a presentation or collation to the other (a), and the bishop is not bound to accept the incumbent's resignation of the one, nor can the patron of the other be compelled to present or, in the case of the bishop being the patron, to collate such incumbent to it.

Mode of
 exchange.

1252. Having obtained the licence of the bishops to treat of the exchange and secured the concurrence of the patrons, the incumbents by an instrument in writing agree to exchange their benefices, and then each of them resigns his benefice into the hands of the bishop for the purpose of the exchange and not otherwise (c). The

(o) Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44), s. 13.

(p) *Ibid.*, s. 12.

Ibid., s. 14.

34 & 35 Vict. c. 43.

Incumbents Resignation Act, 1871, Amendment Act, 1887 (50 & 51 Vict. c. 23), s. 6.

(t) *Bulwer v. Bulwer* (1819), 2 B. & Ald. 470.

(a) Watson, Clergyman's Law, 4th ed., p. 28.

(b) Degge, Parson's Counsellor, Part I., ch. 14, pp. 202—204. Where patrons have alternate turns of presentation to a benefice, a presentation on an exchange of benefice is reckoned as a turn (*Keen v. Denny*, [1894] 3 Ch. 169).

(c) Gib. Cod. 821; Watson, Clergyman's Law, 4th ed., p. 28; Burn, Ecclesiastical Law, Vol. II., pp. 242, 243. The resignation may be made expressly

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exchange only takes effect if and when both incumbents are instituted and inducted, or licensed, to the benefices taken in exchange. If one is instituted and inducted and the other is instituted but dies or refuses to complete the exchange before induction, the whole proceedings are void, and the survivor, or each of them, if both are living, will be restored to his former benefice (*d*).

1253. If an incumbent corruptly exchanges his benefice or corruptly takes, directly or indirectly, any pension, sum of money, or other benefit for resigning it, both the giver and taker are liable to the penalty of losing double the amount or value (*e*). This does not preclude incumbents from stipulating on an exchange, with the assent of their patrons and diocesan bishops, that the dilapidations of the one benefice shall be set off against the dilapidations of the other (*f*). In the absence of such a stipulation dilapidations are recoverable on either side (*g*).

Penalty for
corrupt
exchange.

(d) *Cession.*

1254. A benefice becomes void by cession if the incumbent is created a diocesan bishop or takes another benefice or ecclesiastical dignity or preferment which he cannot lawfully hold therewith (*h*).

Vacation by
cession.

The incumbent of a benefice may not hold another benefice with it except under the circumstances in which the holding together of two benefices is authorised by the law as to pluralities (*i*); and an incumbent holding two benefices, or holding with his benefice a preferment in a cathedral or collegiate church, may not hold in addition another benefice or a preferment in a cathedral or collegiate church (*j*), except that an archdeacon may hold with his archdeaconry either two benefices, of which one is within the diocese containing his archdeaconry, under the circumstances in which such joint holding is permitted by law (*k*), or one preferment

conditional on the exchange being carried out, and may contain a proviso that it shall otherwise be void (Gib. Cod. 821). This condition, even if not actually inserted, is annexed by law to a resignation expressed to be made for the purpose of an exchange (Watson, Clergyman's Law, 4th ed., p. 28). But it is otherwise if no such purpose is expressed and the resignation is in terms absolute (*Rumsey v. Nicholl* (1877), 2 C. P. D. 294, C. A.).

(*d*) *Cromwel's (Lord) Case* (1601), 2 Co. Rep. 69 a, 74 b; *Colt v. Coventry and Lichfield (Bishop)* (1617), Hob. 140, 152, Ex. Ch.; Burn, Ecclesiastical Law, Vol. II., p. 243.

(*e*) Stat. (1589) 31 Eliz. c. 6, s. 8.

(*f*) *Goldham v. Edwards* (1856), 18 C. B. 389, Ex. Ch.; *Wright v. Davies* (1876), 1 C. P. D. 638, C. A.

Downes v. Craig (1841), 9 M. & W. 166.

(*h*) *Termes de la Ley*, p. 103; *Edes v. Oxford (Bishop)* (1667), Vaugh. 18; *Burder v. Mavor* (1848), 1 Rob. Ecol. 614. The practice of a bishop or the incumbent of another benefice holding a benefice *in commendam* (*Termes de la Ley*, p. 136; Godolphin, Repertorium Canonieum, pp. 230 *et seq.*; *Le Case de Commenda* (1611), Dav. Ir. 68; *Colt v. Coventry and Lichfield (Bishop)*, *supra*, was abolished by the Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 18.

(*i*) Pluralities Acts Amendment Act, 1855 (48 & 49 Vict. c. 54), s. 14.

(*j*) Pluralities Act, 1836 (1 & 2 Vict. c. 106), ss. 2, 124.

(*k*) See p. 604, *ante*.

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Clergy.

in a cathedral or collegiate church of that diocese and one benefice within that diocese (*l*); and except also that the holding of a preferment in a cathedral or collegiate church may carry with it the holding of any office in the same cathedral or collegiate church the duties of which are statutably or accustomably performed by the person holding such preferment (*m*). Moreover, these restrictions do not extend to an honorary canonry or to a prebend, dignity, or office unendowed or endowed to an amount not exceeding £20 a year (*n*). And a suffragan bishop may hold a benefice or, under the circumstances permitted by law (*o*), two benefices (*p*).

Avoidance
of benefice.

1255. If the incumbent of a benefice or benefices is admitted to a benefice or to preferment in a cathedral or collegiate church which he cannot lawfully hold therewith, his previous benefice or benefices will become *ipso facto* void, as if he had died or resigned the same (*q*), except that if an incumbent holding two benefices or holding with his benefice a preferment in a cathedral or collegiate church accepts in addition a benefice or a preferment in a cathedral or collegiate church, and before he is admitted thereto declares in writing to the bishop of the diocese in which each benefice and preferment previously held by him is situate, which preferment and benefice or which two benefices, being by law capable of being held together, he proposes to hold together, then only such previous preferment and benefice as he does not declare his intention of continuing to hold or such benefice as is not by law tenable with the newly accepted benefice will become *ipso facto* void, as if he had died or resigned the same. A duplicate of the declaration is to be transmitted by the clerk making it to the registry of the diocese to be there filed (*r*).

Special
provision as
to deans.

1256. The dean of a cathedral or collegiate church can only hold with his deanery a benefice situate within the city or town of the cathedral or collegiate church and having an annual income not exceeding £500; and an incumbent who is appointed a dean and whose benefice does not fulfil these conditions *ipso facto* vacates the benefice at the expiration of six months from the time of his

(*l*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 2, 124; Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 10.

(*m*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 2, 124. The head of a college or hall in the Universities of Oxford and Cambridge and the warden of the University of Durham, if he holds a benefice, cannot also hold another benefice or a preferment in a cathedral or collegiate church; and, if he holds such preferment, cannot also hold a benefice; but this restriction does not extend to any benefice or preferment which is permanently attached to or forms part of the endowment of his office (Pluralities Act, 1850 (13 & 14 Vict. c. 98), s. 6).

(*n*) Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 3; Pluralities Act, 1850 (13 & 14 Vict. c. 98), s. 11.

(*o*) See p. 604, *ante*.

(*p*) Stat. (1534) 26 Hen. 8, c. 14, s. 7.

(*q*) *Apperley v. Hereford (Bishop)* (1833), 9 Bing. 681; *Betham v. Gregg* (1834), 10 Bing. 352; Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 11, 124; Pluralities Act, 1850 (13 & 14 Vict. c. 98), s. 7. An incumbent of a parish who presents himself to a district church thereby vacates the benefice of the parish (*Storie v. Winchester (Bishop)* (1850), 9 O. B. 62).

(*r*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 11, 124.

admission as dean (*s*). But this does not apply to a benefice expressly annexed to a deanery by statute (*t*).

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(*e*) *Deprivation.*

1257. A benefice becomes vacant by the deprivation of the incumbent either (1) where there has been simony in connection with his presentation, institution, collation, or admission to the benefice, whether he was party to it or not (*u*); or (2) where the incumbent is otherwise by law disqualified from holding it; or (3) where he has been guilty of some other offence or conduct owing to which he is deprived of it by law or by a definitive sentence (*a*).

Avoidance of
benefice by
deprivation
of the
incumbent.

If a person who is not in priest's orders is instituted or admitted to a benefice, he cannot retain possession of it (*b*).

Not in priest's
orders.

If the ordination of a clerk has been corruptly procured, and within seven years after such corrupt ordination he is admitted into a benefice, it becomes void upon his admission (*c*).

Corrupt
ordination.

If a clerk who is admitted to a benefice wilfully fails to comply with the law as to publicly reading the Thirty-nine Articles and making the declaration of assent in the church of the benefice in the presence of the congregation (*d*), he absolutely forfeits the benefice (*e*).

Neglect to
read Thirty-
nine Articles

(ii.) *Cure of Souls and Income of Benefice during Vacancy.*

1258. When a benefice becomes vacant a sequestration is issued (*f*), and the duties are performed by a curate or curates appointed by the bishop (*g*) or, in default of any appointment by him, employed for the purpose by the sequestrators (*h*). But any stipendiary curate who is licensed to the parish continues in office and his stipend is paid out of the income of the benefice during the vacancy (*i*), and this may sometimes render the employment of any other clerk unnecessary. The bishop may assign to every curate appointed to perform the duties a stipend during the vacancy at the rate of not above £200 per annum, but so that the rate of the stipend or aggregate of the stipends does not exceed the net annual income of the benefice (*k*). The sequestrators

Performance
of duties
during
vacancy.

(*e*) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 19.

(*f*) *R. v. Champneys* (1871), L. R. 6 O. P. 384.

(*u*) See pp. 593, 594, *ante*.

(*a*) See pp. 535 *et seq.*, *ante*.

(*b*) 17 Vin. Abr. 338; *Costard v. Winder* (1600), Oro. Eliz. 775; *Slader v. Smalbrooke* (1664), 1 Lev. 138, where a layman had obtained a benefice under forged letters of orders. But his spiritual as well as temporal acts, while he holds the benefice, are valid (*Costard v. Winder, supra*; *Hawkes v. Corri* (1820), 2 Hag. Con. 280, *per* Lord STOWELL (then Sir WILLIAM SCOTT), at p. 288).

(*c*) Stat. (1589) 31 Eliz. c. 6, s. 9.

(*d*) See p. 603, *ante*.

(*e*) Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 7; see note (*r*), p. 603, *ante*.

(*f*) Gib. Cod. 749.

(*g*) Gib. Cod. 750; Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 100; and see p. 644, *post*.

(*h*) *Dahins v. Seaman* (1842), 9 M. & W. 777.

(*i*) See p. 644, *post*.

(*k*) Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), s. 10.

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pay the amount out of the profits of the benefice which come to their hands, and if these are not sufficient, the incoming incumbent is liable to pay the balance out of the profits received by him (*l*). If, on the other hand, the sequestrators have a balance of profits after paying for the services and for the costs of the sequestration, the new incumbent is entitled to it (*m*).

SECT. 4.—Unbeneficed Clergy.

SUB-SECT. 1.—Position and Ministrations.

Classes, and
condition of
ministration.

1259. The unbeneficed clergy consist of clerks who are unattached and have no definite parochial or other ministerial charge, curates or ministers in charge of a parish or district, assistant curates, lecturers and preachers, ministers of chapels of ease, ministers of proprietary chapels, and chaplains. Whether they are unattached or have an appointed sphere of duty, they require, as a rule, in order to enable them to officiate anywhere, the licence or permission of the bishop of the diocese (*n*) and the consent of the incumbent of the parish (*o*).

Restrictions
and excep-
tions.

An unbeneficed clerk who holds a curacy or lectureship, or who is licensed or otherwise allowed to perform the duties of any ecclesiastical office, enjoys the same exemption from tolls when in

(*l*) Stat. (1536) 28 Hen. 8, c. 11, ss. 3, 8; Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 100, 101. An unlicensed clerk not appointed by the bishop, but employed by the sequestrators, can recover a reasonable sum for his services from the new incumbent (*Dakins v Seuman* (1842), 9 M. & W. 777).

(*m*) Stat. (1536) 28 Hen. 8, c. 11, ss. 1—3; *Hallon v. Cove* (1830), 1 B. & Ad. 538; *Betham v. Gregg* (1834), 10 Bing. 852; *Russell v. Lay* (1897), 66 L. J. (Q. B.) 582.

(*n*) *Canones Ecclesiastici* (1603), 48—50; Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 15; *Finch v. Harris* (1701), 12 Mod. Rep. 641; *Trebec v. Keith* (1742), 2 Atk. 498; *Smith v. Lovegrove* (1755), 2 Lee, 162; *Barton v. Wells* (1789), 1 Hag. Con. 21; *Carr v. Marsh* (1814), 2 Phillim. 198, per Sir JOHN NICHOLL, at p. 206; *Hodgson v. Dillon* (1840), 2 Curt. 388, 392; *Barnes v. Shore* (1846), 1 Rob. Eccl. 382; *Freeland v. Neale* (1848), *ibid.*, 643; *Kitson v. Drury* (1865), 11 Jur. (N. S.) 272. No stamp duty is payable in respect of a licence to preach or exercise any other spiritual function, where no emolument or salary is attached to the functions and the licence is not to hold the office of lecturer, reader, or chaplain (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I.). The bishop need not assign any cause for refusing his licence or permission, even though the clerk is beneficed or licensed in another diocese (*Down' (Bishop) v. Miller* (1861), 11 I. Ch. R., Appendix, pp. i., ix.). Except in the case of stipendiary curates (as to whom, see pp. 638 *et seq.*, post), the licence is revocable at the discretion of the bishop (*Hodgson v. Dillon*, *supra*; *Re Sinyanki* (1864), 12 W. R. 825; *Sedgwick v. Manchester (Bishop)* (1869), 38 L. J. (Eccl.) 30). Where an incumbent or churchwardens engage the ministrations of an unattached clerk, they are bound to ascertain that he is duly licensed (*Canones Ecclesiastici* (1603), 60). But a clergyman authorised to officiate elsewhere and not actually inhibited from officiating in the diocese, may give assistance in ministrations on exceptional occasions without obtaining the permission of the bishop (*Gates v. Chambers* (1824), 2 Add. 177, 191; *Dakins v. Seaman* (1842), 9 M. & W. 777, per PARKE, B., at p. 780).

(*o*) *Carr v. Marsh*, *supra*; *Farnworth v. Chester (Bishop)* (1825), 4 B. & C. 555, 568—570; *Hodgson v. Dillon* (1840), 2 Curt. 388, per Dr. LUSHINGTON, at pp. 392, 393; *Molyneux v. Bagshaw* (1863), 9 Jur. (N. S.) 553, per Dr. LUSHINGTON, at p. 554; *Jones v. Jelf* (1863), 8 L. T. 399, 401; *Richards v. Fincher* (1874), L. R. 4 A. & E. 255. For exceptions, see pp. 609, 614, 626, *ante*, and 640—643, *post*.

the performance of his duty he is going to or from a place of worship or is engaged in some parochial business, and is subject to the same restrictions as to farming and trading, as the incumbent of a benefice (*p*).

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Unbeneficed
Clergy.

SUB-SECT. 2.—*Curates or Ministers in Charge.*

1260. Curates or ministers-in-charge include clerks who are (a) in charge of an ecclesiastical district not constituted a parish, or (b) in charge of a parish either (1) during a vacancy in the benefice, or (2) during a sequestration of the benefice when the incumbent is inhibited (*q*), or (3) during the non-residence of the incumbent (*r*), or (4) where the incumbent has been negligent in the performance of his duties and is inhibited (*s*). In the last three cases the clerk is appointed as a stipendiary assistant curate and acquires his position of curate in charge by the permitted or enforced withdrawal of the incumbent. An assistant curate may be also temporarily in charge of a parish during a short absence of the incumbent, but in that case acts as the representative of the incumbent and under his directions (*t*).

Curates or
ministers in
charge.

(i.) *Ministers in Charge of a District.*

1261. Where a Peel district is constituted under the New Parishes Act, 1843 (*a*), a minister is nominated to it under the provisions of that Act (*b*), and when licensed thereto by the bishop (*c*) performs within it, independently of the incumbent of any parish out of which the district has been taken, all such pastoral duties of a minister of the Church as are specified in his licence, and also, when a building is licensed in the district for divine worship, all such services and offices as are specified in that or any further licence granted by the bishop, and to that extent has the cure of souls in the district; but no burials are to be performed in the licensed building, nor is the licence to include the solemnisation of marriages (*d*). He is in all respects subject to the jurisdiction of the bishop and arch-deacon, and is styled the minister of the district, and is a body politic and corporate with perpetual succession and power notwithstanding the statutes of mortmain to hold grants of endowment and augmentation made to him under the provisions of the Act, and any real or personal estate which may be given to him according to law; and is only removable from his office of minister for the like reasons and in the same manner as a perpetual curate is removable (*e*). When the district becomes a new parish, the

Ministers
appointed to
Peel districts.

(*p*) See pp. 556 *et seq.*, *ante*.

Pinder v. Barr (1854), 4 E. & B. 105, 115, 116.

See p. 640, *post*.

See p. 642, *post*.

Martyn v. Hind (1785), *Rothery's Precedents*, No. 178, p. 89; *Purnell v. Roughton* (1874), L. R. 6 P. C. 46, 53.

(*a*) 6 & 7 Vict. c. 37. See pp. 448, 449, *ante*.

(*b*) *Ibid.*, ss. 20, 21.

(*c*) New Parishes Act, 1844 (7 & 8 Vict. c. 94), s. 10.

(*d*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), ss. 11—14.

(*e*) *Ibid.* s. 12.

SECT. 4. church becomes a perpetual curacy and a benefice, and the minister becomes perpetual curate thereof (*f*).
Unbeneficed Clergy.

(ii.) *Ministers in Charge of a Parish.*

Powers of
minister in
charge.

1262. A curate who by reason of a vacancy in the benefice or of the absence of the incumbent (*g*) is the minister in charge of a parish has, while so in charge, the rights and duties of the incumbent with reference to the services in the church and the cure of souls of the parish (*h*). He has power to make a presentment (*i*), and occupies the same position as the incumbent in the choice of churchwardens and sidesmen (*k*). If the benefice is vacant, he has the right which the incumbent possesses of appointing the parish clerk (*l*); but not if the benefice is under sequestration owing to the bankruptcy of the incumbent (*m*).

SUB-SECT. 3.—Assistant Curates.

(i.) *Licence, Stipend, and Status generally.*

Admission to
office of
assistant
curate.

1263. A clerk is admitted to the office of assistant curate in a benefice by the licence of the bishop on the nomination, except where there is a clear custom or a statutory enactment to the contrary, of the incumbent (*n*). Before he is licensed, the bishop must be satisfied by examination as to his personal fitness for the cure to which he is nominated; and if he comes from another diocese he must produce a testimonial from the bishop or ordinary of the place from which he comes as to his honesty, ability, and conformity to the law of the Church (*o*). Before obtaining a licence to a stipendiary curacy the clerk must present to the bishop a declaration, signed by himself and by the incumbent of the benefice

(*f*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), ss. 15, 16.

(*g*) The mere fact of a benefice being under sequestration does not render the curate who is appointed to serve the cure (see p. 643, *post*) the minister in charge (*Laurence v. Edwards*, [1891] 1 Ch. 144). But he is in charge if the incumbent is suspended (*Pinder v. Barr* (1854), 4 E. & B. 105).

(*h*) *Pinder v. Barr*, *supra*. But if there is an incumbent, who is not inhibited by the bishop or restrained by statute from interfering with the discharge of the duties of the benefice, the curate represents the incumbent and is subject to any lawful directions which the incumbent may give as to the discharge of those duties (*ibid.*, at pp. 115, 116).

(*i*) *Canones Ecclesiastici* (1603), 113; *Grove v. Elliot* (1670), 2 Vent. 41.

(*k*) *Hubbard v. Penrice* (1746), 2 Stra. 1246.

(*l*) *Pinder v. Barr*, *supra*.

(*m*) *Lawrence v. Edwards*, *supra*.

(*n*) *Canones Ecclesiastici* (1603), 48; Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 15; Johnson, *Clergyman's Vade Mecum*, Vol. I., pp. 94 *et seq.*; Watson, *Clergyman's Law*, 4th ed., p. 209; Burn, *Ecclesiastical Law*, Vol. II., p. 61; *R. v. Oxford (Bishop)* (1806), 7 East, 345; *Arnold v. Bath and Wells (Bishop)* (1829), 5 Bing. 316, 325. The fee for the licence is 10s. (Pluralities Act, 1831 & 2 Vict. c. 106), s. 82). The licence is exempt from stamp duty (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I.). A curate is frequently engaged on trial in the first instance with the mere permission of the bishop without a licence; see note (*g*), p. 644, *post*.

(*o*) *Canones Ecclesiastici* (1603), 48; Gib. Cod. 896; *Exeter (Bishop) v. Marshall* (1868), L. R. 3 H. L. 17, 54. The bishop's refusal of the licence, after inquiry upon grounds which appear to him sufficient, cannot be questioned

to which he is to be licensed, to the effect that the incumbent *bonâ fide* undertakes to pay to him a specified annual sum as a stipend for his services as curate, and that he *bonâ fide* intends to receive the whole of it without any deduction or abatement in respect of rent or consideration for the use of the glebe house, or on any other account (*p*). On being licensed he must take the oath of canonical obedience to the bishop (*q*), and if he has not done so on ordination on the same day, must make and subscribe in the presence of the bishop by whom he is licensed, or the commissary of such bishop, the declaration of assent contained in the Clerical Subscription Act, 1865 (*r*), and must, on the first Lord's Day on which he officiates in the church or in one of the churches of the benefice to which he is licensed, make the same declaration at the time of divine service in the presence of the congregation (*s*).

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Unbeneficed
Clergy.

Every licence granted to a stipendiary curate, whether the incumbent is resident or non-resident, specifies the amount of the stipend to be paid to the curate (*t*). Any agreement made between him and the incumbent in fraud or derogation of the law as to curates' stipends, or whereby a curate undertakes or binds himself to take a stipend less than that which is assigned to him by his licence, is void; and, notwithstanding his acceptance of a less sum and any discharge given by him for it, he and his personal representatives remain entitled to the full amount specified in the licence; and on application to the bishop within twelve months after the curate has quitted the curacy or died, payment of the unpaid portion, together with full costs of recovering the same, is to be enforced by monition and sequestration of the profits of the benefice (*u*).

Stipend specified, agreement to take less void.

1264. The selling of a curacy is simony, and renders the incumbent liable to deprivation (*a*).

Sale of curacy.

1265. A difference between a curate and his incumbent as to his stipend, or the payment thereof, is to be summarily decided by the bishop without appeal; and in case of wilful neglect to pay the stipend or any arrears thereof, the bishop may enforce payment by monition and by sequestration of the profits of the benefice (*b*).

Decision on differences as to stipend.

(Johnson, Clergyman's Vade Mecum, Vol. I., p. 95; *R. v. London (Bishop)* (1743) cited 13 East, 420, n.; *R. v. Canterbury (Archbishop)* (1812), 15 East, 117; *Down (Bishop) v. Miller* (1861), 11 L. Ch. R., Appendix, pp. i., ix.; *R. v. Liverpool (Bishop)* (1904), 20 T. L. R. 485).

(*p*) Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), ss. 3, 6, where the declaration is called the Stipendiary Curate's Declaration. Whether there is such an office as that of honorary assistant curate is doubtful (*R. v. Liverpool (Bishop)*, *supra*).

(*q*) Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 12.

(*r*) *Ibid.*, s. 1. See p. 551, *ante*.

(*s*) *Ibid.*, s. 8; Canon Ecclesiasticus (1865). Wilful default in respect of making the declaration of assent renders the licence void (Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 8).

(*t*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 83.

(*u*) *Ibid.*, ss. 90, 112.

(*a*) *St. David's (Bishop) v. Lucy* (1699), Carth. 484.

(*b*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 83, 112. A curate of a non-resident incumbent may be appointed sequestrator to recover payment of his own stipend (*Daniel v. Morton* (1850), 16 Q. B. 198). A curate cannot bring an

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**Unbeneficed
Clergy.**

Appointment
of curate
where
incumbent is
resident and
duly performs
the duties.

1266. Where the incumbent of a benefice is resident and duly performs the duties of the cure, the bishop cannot compel the appointment of a curate or assign to a curate a larger stipend than the incumbent is willing to pay(c), except where the benefice exceeds £500 in annual value, and either the population amounts to 3,000 or there is a second church or chapel with a hamlet or district containing 400 persons. In that case the bishop may require the incumbent to nominate a person to be licensed as curate to assist in performing the duties of the benefice and to be paid by the incumbent, and may, if such nomination is not made within three months, appoint and license a curate with a stipend not exceeding £150; but an appeal from the requisition or appointment lies within one month to the archbishop(d).

1267. Unless the incumbent is suspended or inhibited, a curate must act in accordance with his directions(e), and he is responsible for what is done by a curate under his directions or with his consent(f).

(ii.) *During an Incumbent's Non-Residence or Neglect of Duty.*

Appointment
of curate
where
incumbent is
non-resident.

1268. Where the incumbent of a benefice does not either actually reside thereon nine months in each year, or, with the written consent of the bishop, perform the duties thereof while resident on another benefice of which he is incumbent, or while having a legal exemption from residence, or a licence to reside out of the benefice or out of the usual house of residence thereof, the bishop may appoint one or more curates to the benefice if the incumbent either (1) absents himself from the benefice for a period or periods amounting together to more than three months in one calendar year(g), without having one or more curates licensed or approved by the bishop to perform the duties, or (2) for one month after the death, resignation, or removal of a curate neglects to notify the fact to the bishop, or (3) for four months after such death, resignation, or removal neglects to nominate to the bishop a proper curate(h). A curate actually employed by a non-resident incumbent may be licensed, although not expressly nominated to the bishop(i). The licence must specify whether the curate is required to reside within the benefice or not. If the incumbent does not reside or does not satisfy the bishop of his intention to reside during four months in the year, the curate must reside within the

action against his incumbent for arrears of his salary in cases where the Act has placed the matter in the hands of the bishop (*West v. Turner* (1837), 6 Ad. & El. 614), nor where the chancellor has ordered a writ of sequestration to issue, and has allowed the sequestrator's accounts, can the incumbent obtain an order from a civil court to reopen them (*Burrow v. Tilson* (1898), 14 T. L. R. 214). But where an incumbent contracts to provide a curate with board and lodging in addition to his salary, an action will lie for damages for breach of the contract (*Fraser v. Denison* (1888), 57 L. J. (Q. B.) 550).

(c) *R. v. Peterborough (Bishop)* (1824), 3 B. & C. 47, 50.

(e) *Martyn v. Hind* (1785), Rothery's Precedents, No. 178, p. 89.

(d) Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), s. 13, 15; and see note (w), p. 661, *post*.

(f) *Parnell v. Roughton* (1874), L. R. 6 P. O. 46, 53.

(g) Between 1st January and 31st December (*Sharpe v. Bluck*) (1847), 10 Q. B. 280).

(h) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 75.

benefice, if a convenient residence can be procured within it, and the licence must specify the place of residence. Under other circumstances the bishop may permit the curate to reside outside the benefice on grounds specified in the licence. But under all circumstances the curate must reside within three miles of the church or chapel of the benefice, except in cases of necessity approved by the bishop and specified in the licence (*k*).

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1269. If the population of the benefice exceeds 2,000, or there are two or more churches belonging thereto not less than a mile apart, the bishop may require the non-resident incumbent to nominate two or more persons to be licensed as curates, and may, if such nomination is not made within three months after the requisition, appoint and license two or more curates with stipends; but an appeal from such requisition or appointment lies within one month to the archbishop (*l*).

Two curates
in certain
cases.

1270. Where the incumbent is not resident for four months in each year, the bishop may require the curate to reside in the house of residence of the benefice, and may, during his service of the cure or the non-residence of the incumbent, assign to him the house with all or any part of the gardens and buildings belonging thereto, free of rent, and also not more than four acres of glebe land adjacent to the house at a rent to be fixed by the archdeacon or rural dean and a neighbouring incumbent; and the profits of the benefice may be sequestered to enforce delivery of possession of the assigned premises to the curate (*m*). If the bishop has assigned to the curate a stipend not less than the whole value of the benefice and has directed him to reside in the house of residence, he is liable, while serving the cure, to the same taxes and parochial rates and assessments as if he were the incumbent. In other cases where the curate is directed so to reside, the bishop may order the incumbent to pay to him all or any part of the amount of such taxes, rates, and assessments during the year ending at the Michaelmas day before the date of the order; and such payment may be enforced by monition and sequestration of the profits of the benefice (*n*). He must at any time give up possession of the house on six months' notice either from the incumbent with the written permission of the bishop or from the bishop himself; or, in case of the benefice becoming vacant, on six weeks' notice from the new incumbent, if given within six months after admission to the benefice (*o*).

Residence of
curate in
house of
residence.

Where an incumbent is non-resident, the bishop is to appoint to the curate licensed to serve the benefice a stipend according to the prescribed scale (*p*).

Stipend of
curate.

(*k*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 75, 76.

(*l*) *Ibid.*, s. 86; Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), ss. 9, 15.

(*m*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 93.

(*n*) *Ibid.*, s. 94.

(*o*) *Ibid.*, s. 96. If he refuses to give up the house, he is liable to pay to the incumbent 40s. for every day of wrongful possession (*ibid.*).

(*p*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 83; *Daniel v. Morton* (1850), 16 Q. B. 198. The yearly stipend is to be not less than £80 or the annual value

SECT. 4.

**Unbeneficed
Clergy.**

Stipend when
curate
serving two
benefices.

1271. Where an incumbent of two benefices resides on one or other of them in different proportions for the full requisite period and employs a curate to serve interchangeably in the benefice from which he is absent during his residence on the other, the bishop may assign to the curate a reasonable stipend not exceeding the rate of stipend for the larger of the benefices nor less than the rate for the smaller. If the incumbent so residing employs one or more curates for the whole year on each of the benefices, the bishop may assign to each of them a stipend less than the prescribed rate (*q*).

Appointment
of curate
when duties
of benefice
are inade-
quately
performed.

1272. Where the duties of a benefice are duly reported to the bishop to be inadequately performed (*r*), he may require the incumbent, although resident and engaged in performing the duties, to nominate one or more curates with sufficient stipends to be licensed to perform or assist in performing the duties; and, if the incumbent does not within three months make such nomination, the bishop may appoint and license to the benefice one or more curates, and may assign to them stipends not exceeding by £70 the stipends allowed to curates in the case of a non-resident incumbent; but so that if the whole net income of the benefice does not exceed £800 a year, the stipend or aggregate of stipends must not exceed

Special
circum-
stances.

1273. Where, however, an incumbent is non-resident or incapable of performing the duties of the benefice from age, sickness, or other unavoidable cause, and owing to these or other special circumstances hardship or inconvenience would arise if the full stipend were allowed to the curate, the bishop may assign to him a less stipend with the consent of the archbishop of the province, notified upon

of the benefice if it does not amount to £80; nor less than £100 or the annual value if it does not amount to £100, where the population amounts to 300; nor less than £120, or the annual value if it does not amount to £120, where the population amounts to 500; nor less than £135 or the annual value if it does not amount to £135, where the population amounts to 750; nor less than £150 or the annual value if it does not amount to £150, where the population amounts to 1,000 (Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 85). Where the annual value of the benefice exceeds £400, the bishop may assign to a resident curate serving no other cure a yearly stipend of £100, although the population does not amount to 300, and, if it amounts to 500, any larger yearly stipend not exceeding by more than £60 the respective amounts prescribed as above-mentioned (*ibid.*, s. 86). Where the population exceeds 2,000, or the benefice has two or more churches not less than a mile apart, the bishop may require the incumbent to nominate two or more persons to be licensed as curates, and, in case of his not doing so within three months, may appoint and license two or more curates and assign to them yearly stipends not exceeding by £70 the respective stipends allowed as above mentioned; but so that the whole of the yearly stipends of the curates serving the benefice do not exceed altogether two-thirds of the net annual income of the benefice. The incumbent within one month after he is served with the requisition or with notice of the appointment of the curates may appeal to the archbishop of the province (*ibid.*, s. 86; Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), s. 9).

(*q*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 88.

(*r*) See pp. 613, 614, *ante*.

(*s*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 77; Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), s. 8. An incumbent has a right to be heard by the bishop before he is required to appoint a curate on account of neglecting his duties (*Capel v. Child* (1832), 2 Cr. & J. 558).

the curate's licence, whereon it must also be stated that for special reasons the full stipend has not been assigned (*t*).

Unbeneficed
Clergy.
—
Deductions.

1274. Where a stipend equal to the whole value of the benefice is assigned, it is to be subject to deduction in respect of all charges and outgoings legally affecting the value of the benefice and of any diminution of its value not owing to the wilful default or neglect of the incumbent (*a*).

Retention for
repairs.

1275. Where a stipend equal to the whole value of the benefice is assigned, the bishop, upon the application of the incumbent, may allow him to retain in each year so much of the annual value of the benefice, not exceeding one fourth part thereof, as has been actually expended during the year in the repair of the chancel and house of residence in respect of which he or his estate would be liable for dilapidations to his successor. And where the annual value of a benefice does not exceed £150, the bishop, upon the application of the incumbent, may allow him to deduct from the stipend assigned to a curate in each year any money actually expended in such repairs above the amount of the surplus of such value remaining after payment of the stipend; but so that the deduction shall not in any one year exceed one fourth part of the stipend (*b*).

Licence to
serve
additional
parish.

1276. Where in order to obtain the proper performance of ecclesiastical duties the bishop licenses an incumbent to serve as curate in an adjoining or other benefice, the stipend assigned to him may be less than the prescribed rate by a sum not exceeding £80. And where the bishop finds it necessary or expedient to license the same curate for two parishes, he may direct that the stipend for serving in each shall be less than the prescribed rate by a sum not exceeding £80 (*c*).

Incumbent a
lunatic.

1277. Where an incumbent has been found a lunatic or a person of unsound mind, and the bishop assigns a stipend to a curate serving in the benefice, the committee of the incumbent's estate is to pay the stipend to the curate out of the profits of the benefice which come to his hands (*d*).

(iii.) *In certain Cases of Sequestration.*

Appointment
of curate
when
benefice
sequestered.

1278. When a sequestration has issued under a judgment recovered against the incumbent of a benefice or under his bankruptcy, and remains in force for six months, the bishop may thereafter, so long as it remains in force, appoint and license for the due performance of the church of the benefice one or more curates or additional curates as the case may require, with such stipend as he thinks fit, specified in the licence and payable by the sequestrator out of money arising under the sequestration, and may at any time revoke any such appointment and licence (*e*).

(*t*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 87.

(*a*) *Ibid.*, s. 91.

(*b*) *Ibid.*, s. 92.

(*c*) *Ibid.*, s. 89.

(*d*) *Ibid.*, s. 79.

(*e*) Sequestration Act, 1871 (34 & 35 Vict. c. 45), ss. 1—4. The yearly stipend

SECT. 4.

Unbeneficed
Clergy.Curate's
stipend
during
vacancy of
benefice.

Curacy during Vacancy of Benefice.

1279. The bishop may assign to any or each curate appointed to perform the duties of a vacant benefice (*f*) a stipend not exceeding for each curate £200 a year for the period of the vacancy; but so that the stipend or aggregate of stipends does not exceed the net annual value of the benefice (*g*).

(v.) Duration and Termination of Curacy.

By incumbent
with bishop's
permission.

1280. A stipendiary curate does not gain a settlement in a parish under the poor laws by officiating therein under the bishop's licence (*h*). After a vacancy in a benefice, the incoming incumbent, within six months after his admission thereto, can by six weeks' notice determine the curacy of any curate who has been serving the benefice; and in all other cases an incumbent, whether resident or non-resident, can, with the previous permission in writing of the bishop, determine the curacy of any curate by six months' notice; and, if the bishop refuses such permission to a resident incumbent or a non-resident incumbent who desires to reside on his benefice, he may within one month appeal to the archbishop of the province, who will confirm the refusal or grant the permission as may seem proper (*i*). But the bishop may at any time summarily revoke a curate's licence and remove him after having given him an opportunity of showing reason to the contrary, subject to the right of the curate to appeal against the revocation within one month to the archbishop of the province (*k*). On the other hand, a curate, at the expiration of three months after he has given notice of his intention so to do to the incumbent of the benefice

By revocation
of licence.

on aggregate of the stipends is not to exceed in the whole two-thirds of the annual value of the benefice as defined by the Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44), s. 11 (see note (*d*), p. 630, *ante*), nor £200 if the population does not exceed 500, or £300 if it exceeds 500 but not 1,000, or £500 if it exceeds 1,000 but not 3,000, or £600 if it exceeds 3,000 (Sequestration Act, 1871 (34 & 35 Vict. c. 45), s. 1). See also p. 620, *ante*.

(*f*) See p. 635, *ante*.

(*g*) Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), s. 10.

(*h*) *R. v. Over (Inhabitants)* (1773), Burr. S. O. 746; *R. v. Wantage (Inhabitants)* (1801), 2 East, 65.

(*i*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 95. The notice by the incumbent need not be in any particular form or be formally served, and, apparently, need not be in writing (*Tunner v. Scrivener* (1888), 13 P. D. 128). Where a curate is temporarily employed without a licence (see note (*n*), p. 638, *ante*), he is removable at pleasure (*Martyn v. Hind* (1776), Cowp. 437, *per* Lord MANSFIELD, C.J., at p. 440). The licence of a curate appointed to serve the church or chapel of a district chapelry is not affected by the avoidance of the church of the parish or district parish in which the chapelry is situate (Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 13; Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 11).

(*k*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 98, 102, 111; *Poole v. London (Bishop)* (1859), 5 Jur. (N. S.) 522. The licence may be revoked for a felony without the curate having been convicted of it in a temporal court (*Re Synnanki* (1864), 12 W. R. 825). The archbishop's decision is final (*Poole v. London (Bishop)* (1861), 14 Moo. P. O. O. 262). It ought to be given on the same ground as that on which the licence was revoked by the bishop (*Re Synnanki, supra*), and before giving it the archbishop must hear the curate personally, or, if desired, by counsel (*R. v. Canterbury (Archbishop)* (1859), 1 E. & E. 545).

PART IV.—CLERGY.

and the bishop, or sooner with the written consent of the bishop, may quit his curacy (*l*).

SECT. 4.
Unbeneficed
Clergy.

(vi.) *Record of Licences and Revocations.*

1281. Copies of all licences and revocations of licences to stipendiary curates are to be entered in the diocesan registry, and copies thereof are to be transmitted to the churchwardens of the parish to which they relate, to be deposited in the parish chest (*m*).

To be entered
in diocesan
registry and
deposited in
parish chest.

SUB-SECT. 4.—*Lecturers or Preachers.*

1282. A lecturer or preacher is a person in holy orders, elected or otherwise appointed for the special purpose of delivering lectures or preaching sermons in the church or chapel of a parish. He must be licensed by the bishop or the archbishop of the province (*n*); but where there is a right to elect or appoint a lecturer or preacher, the bishop is bound to license him, if he is orthodox, an honest liver, and loyal (*o*). Unless there is an immemorial custom to the contrary, he cannot be elected or appointed without the consent of the incumbent (*p*).

Status

1283. A clerk, before being licensed to a lectureship or preacher-ship, must, in the presence of the bishop or his commissary, make and subscribe the same declaration of assent and declaration against simony, and take the same oath of allegiance as is required of an incumbent before he is admitted to a benefice (*q*).

Requisites
before licence.

1284. If a lecturer or preacher, who has a right to the office, is not permitted to exercise it, his remedy is by mandamus (*r*).

Mandamus.

1285. Where an endowment is provided for a lecture in a church during the afternoon of Sunday, the lecturer cannot prescribe the hour (*s*).

Cannot fix
hour of
lecture.

(*l*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 97. If he quits earlier, he is liable to pay to the incumbent such sum not exceeding his stipend for six months as the bishop, in his discretion, specifies in writing; and the incumbent may deduct the sum from his stipend or recover it by action of debt (*ibid.*).

(*m*) *Ibid.*, s. 102. The list is open to inspection on payment of a fee of 3s., and the incumbent of the parish must pay a like fee for the copy transmitted to the churchwardens (*ibid.*). If the revocation of a licence is annulled by the archbishop, the copies of the revocation are to be withdrawn from the registry and the parish chest (*ibid.*).

(*n*) Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 15; *R. v. London (Bishop)* (1811), 13 East, 419; *R. v. Canterbury (Archbishop) and London (Bishop)* (1812), 15 East, 117. The stamp duty on the licence is 10s. (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I.).

(*o*) *St. Bartholomew's (Churchwardens) Case* (1700), 3 Salk. 87; *R. v. London (Bishop)* (1743), 1 Wils. 11, 15; 13 East, 420, n. The archbishop or bishop can refuse to license him on the ground of unfitness (*R. v. London (Bishop)* (1811), 13 East, 419; *R. v. Canterbury (Archbishop)*, *supra*).

(*p*) *R. v. London (Bishop)* (1743), 1 Wils. 11; *R. v. London (Bishop)* (1786), 1 Term Rep. 331; *R. v. Field* (1791), 4 Term Rep. 125; *R. v. Exeter (Bishop)* (1802), 2 East, 462; *Clinton v. Hatchard* (1822), 1 Add. 96.

(*q*) Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 5; Canon Ecclesiasticus (1865). See p. 601, *ante*.

(*r*) *R. v. Barker* (1762), 1 Wm. Bl. 352, *per* Lord MANSFIELD, C.J.

(*s*) *R. v. Bathurst* (1760), 1 Wm. Bl. 210, where the incumbent and the

SECT. 4.
Unbeneficed
Clergy.

1286. Where under the Union of Benefices Act, 1860 (t), the parish church, in which the lectures of an endowed lectureship have been customarily preached, is taken down or ceases to be a parish church, they are to be preached in the church which becomes the church of the parish; or the transfer of the lectures to other churches may be effected by schemes prepared by the bishop and approved by the Charity Commissioners and by the vestries of the parishes affected thereby, and assented to by the incumbents of such other churches (a).

Obligation to
perform other
duties.

1287. With the assent of the incumbent, the bishop may require a lecturer or preacher to perform other clerical or ministerial duties as assistant curate or otherwise within the benefice. If he neglects to perform such duties, the bishop may require him to appear, and, with the assistance of the chancellor and one or more of the archdeacons of the diocese, may summarily inquire into and adjudicate upon the facts, and, if necessary, suspend or remove him and declare the office vacant. But he has an appeal within fourteen days to the archbishop of the province. If there is no appeal, or, upon appeal, the sentence or declaration is affirmed, it is to be published in the church or chapel where the office has been exercised, and the office becomes thereupon vacant and the right of the lecturer or preacher thereto ceases; and a new election or appointment thereto is to take place as if he were dead (b).

SUB-SECT. 5.—Ministers of Chapels of Ease.

Chapels of
ease.

1288. Chapels of ease (c) are served either by the incumbent or a stipendiary curate of the parish, or by a minister specially appointed thereto by the incumbent of the parish and removable by him, or appointed by some other person or persons in whom, in exceptional instances, the appointment is vested (d). In some cases, by a private Act of Parliament, a chapel of ease is made representative (e). The minister is then instituted and inducted by the bishop on the presentation of the patron (f). In all other cases he is licensed by the bishop to the chapel (g).

trustees of the endowment were held to be justified in fixing the lecture at 7 p.m.

(t) 23 & 24 Vict. c. 142.

(a) *Ibid.*, s. 26. The bishop has no power to license a lecturer without the consent of the incumbent of the church in which he is to officiate (*ibid.*).

(b) Lecturers and Parish Clerks Act, 1844 (7 & 8 Vict. c. 69), s. 1. The fact of a lecturer or preacher being required to perform other clerical or ministerial duties in a parish does not relieve an incumbent from any legal obligation which may rest upon him to employ a curate or other assistant (*ibid.*, s. 4).

(c) See pp. 788, 789, *post*.

(d) Gib. Cod. 209, 210; Burn, Ecclesiastical Law, Vol. II., pp. 56–61; *Dixon v. Kershaw* (1766), Amb. 528; *R. v. Oxford (Bishop)* (1806), 7 East, 600; *R. v. Davis* (1837), 6 Ad. & El. 374.

(e) *R. v. Foley* (1846), 2 O. B. 664.

(f) *Ibid.*

(g) Burn, Ecclesiastical Law, Vol. II., p. 58. The incumbent of a parish has a right, and it is his duty, to nominate a minister to officiate in a consecrated building in the parish, and the bishop may be compelled by mandamus to license such minister (*R. v. London (Bishop)* (1838), 1 Will. Woll. & H. 151).

SUB-SECT. 6.—*Ministers of Proprietary Chapels.*

SECT. 4.

Unbeneficed
Clergy.Proprietary
chapels.

1289. The minister of a proprietary chapel (*h*) is appointed by the owner of the chapel or the persons having the right of appointment under the terms of any trust under which the chapel is held. He must be licensed by the bishop to perform service therein with the consent of the incumbent of the parish in which the chapel is situate (*i*), and the bishop can at any time revoke the licence (*j*). A succeeding incumbent may refuse consent to his officiating under a licence granted by the bishop with the consent of the previous incumbent (*k*).

SUB-SECT. 7.—*Chaplains.*

1290. A chaplain is a clerk who performs divine service in a chapel (*l*). Besides the ministers of chapels of ease (*m*) and proprietary chapels (*n*), who in a sense are chaplains, there are chaplains in England (*o*) of the army, the territorial force, the navy, cemeteries, asylums, gaols, workhouses, other institutions, and the Sovereign and other individuals.

Different
kinds of
chaplains.

1291. The duties of chaplains and officiating clergymen in the army are laid down in the "Instructions for the guidance of chaplains of the Church of England in their ministrations to the troops," and in the King's Regulations and Orders for the army (*p*). Under the directions of the general officer commanding in chief of the command in which they are located, they carry out the orders contained in the Army School Regulations as to the religious instruction of children (*q*).

Army
chaplains.

The army chaplains are under the supervision of the Chaplain-General of the Forces (*r*).

1292. Where the precinct of an army camp, barrack, hospital, or arsenal is constituted an extra-parochial district by an Order in Council with the consent of the bishop of the diocese (*s*), the Secretary of State may from time to time appoint any army chaplain to be the chaplain of the district and perform the

Army
precincts.

(*h*) As to proprietary chapels, see pp. 789, 790, *post*.

(*i*) *Moysey v. Hillcoat* (1828), 2 Hag. Ecc. 30; *Hodgson v. Dillon* (1840), 2 Curt. 388; *Richards v. Fincher* (1874), L. R. 4 A. & E. 255.

(*j*) *Sedgwick v. Manchester (Bishop)* (1869), 38 L. J. (ECC.) 30.

(*k*) *Richards v. Fincher, supra*.

(*l*) *Termes de la Ley*, p. 110. The title is commonly used of one who depends upon the King or other man of quality for the instruction of him and his family, and the reading of prayers and preaching in his private house where there is a chapel for that purpose (*ibid.*). It is not generally used of the minister of a chapel of ease or other chapel in which public worship is conducted.

(*m*) See p. 646, *ante*.

(*n*) See *supra*.

(*o*) For chaplains abroad, see pp. 497 *et seq.*, *ante*.

(*p*) King's Regulations and Orders for the Army (1908), pars. 1320—1331. See also pars. 162, 1619, 1767.

(*q*) *Ibid.*, par. 1332. See also title EDUCATION.

(*r*) *Ibid.*, par. 1333; and see Clode, *Military Forces of the Crown*, Vol. II., pp. 371, 384.

(*s*) See p. 443, *ante*.

SECT. 4. functions of an army chaplain therein (*t*). If the district is by
Unbeneficed Order in Council declared to be during the pleasure of the
Clergy. Sovereign under the exclusive jurisdiction of an archbishop or
 bishop named in the Order, he exercises over an army chaplain
 appointed to officiate therein all the powers and authority which
 a bishop can by law exercise over any clerk holding preferment in
 his diocese, to the exclusion of all other ecclesiastical jurisdiction in
 respect of the district (*a*).

Where a building has been certified by the Secretary of State to
 the bishop of the diocese as used or intended to be used by the
 army as an unconsecrated chapel for the purpose of divine worship,
 the Secretary of State may from time to time appoint any army
 chaplain to perform all the functions of an army chaplain therein
 so long as the building is so used (*b*).

**Territorial
 force
 chaplains.**

1293. There is a chaplains' department of the territorial force
 to which ministers of all denominations may be appointed as
 chaplains to the force, being attached for duty to a unit of a battalion
 or its equivalent (*c*). The president of the county association
 forwards recommendations to the general officer commanding in
 chief for submission to the Secretary of State for War, after first
 obtaining, in the case of Church of England chaplains, the con-
 currence of the chaplain-general in their nomination (*d*). Their
 ranks are similar to those in the army chaplains' department, and
 their duties are determined by the officer commanding the unit to
 which they are attached (*e*).

(*t*) Army Chaplains Act, 1868 (31 & 32 Vict. c. 83), ss. 2—7.

(*a*) *Ibid.*, ss. 9, 10.

(*b*) *Ibid.*, s. 8.

(*c*) Special Army Order of 14th January, 1909 (Army Order 30 of February, 1909). The appointment of each chaplain to a unit is contingent on whether the number of men belonging to his denomination amounts to at least 15 per cent. of the establishment of the unit; but the number of chaplains of any particular denomination appointed to a unit cannot exceed one for every 300 men of that denomination. If at any time the number of a denomination falls below the required strength, the officer commanding the unit is to report the fact with a view to the chaplain's appointment being cancelled. Additional appointments may be made to the staff of brigades or divisions, or in special cases at the discretion of the Army Council on the recommendation of the general officer commanding in chief (*ibid.*, pars. 1, 2).

(*d*) *Ibid.*, par. 1. The nomination is made by the bishop of the diocese (War Office Circular Memorandum No. 153 (Instructions relative to the Appointment of Chaplains to the Territorial Force), 25th March, 1909).

(*e*) Special Army Order of 14th January, 1909 (Army Order 30 of February, 1909), pars. 3—7. When called up for active service they are to receive the pay and allowances of chaplains to the forces. At other times their remuneration is that laid down in par. 419 of the Territorial Force Regulations (*ibid.*). By par. 419 of the Territorial Force Regulations the remuneration to officiating ministers appointed to perform divine service in camp on Sunday mornings and Good Friday is for each day on which service is performed £1 1s. where the number of their particular denomination is 100 and upwards, and 10s. 6d. where it is 25 and upwards but under 100, and *nil* if it is below 25. A chaplain cannot draw pay for more than one service on each Sunday in camp and is not entitled to any allowances, but is conveyed to camp by the county association which administers his unit (Special Army Order of 14th January, 1909 (Army Order 30 of February, 1909)).

1294. The qualifications of a clerk for appointment as a naval chaplain are that he must have been ordained deacon and priest in the Church of England, or the Church of Ireland, or the Episcopal Church of Scotland, is not above thirty-five years of age, and is unbeneficed. He must produce testimonials from the bishop of the diocese in which he was last licensed, and must have been examined and approved by the Chaplain of the Fleet, and must receive a special ecclesiastical licence from the Archbishop of Canterbury (*f*).

SECT. 4.
Unbeneficed
Clergy.
Naval
chaplains.

Clerks in priests' orders without restriction as to age can take temporary employment in the navy as acting-chaplains for temporary service (*g*).

Chaplains in the navy do not hold any naval rank, but retain when afloat the position to which their office would entitle them on shore (*h*).

The Chaplain of the Fleet is the head of the naval chaplains (*i*).

The duty of a naval chaplain is so to behave as to inspire the officers and the ship's company with reverence and respect towards him, to conduct the daily morning prayers and perform the duties of the Lord's day (*k*), to provide opportunities for receiving the Holy Communion regularly, and, when practicable, at least once a month, and to keep the books of devotion and the communion plate (*l*). He is to visit the sick (*m*), to conduct funerals (*n*), to arrange for prayer and consultation with men or boys who desire to meet him for the purpose (*o*), and to give religious instruction to young officers put under his care by the captain, and to all the boys in the ship, and to any men who voluntarily attend for the purpose (*p*); and is to supervise the naval schoolmaster and the ship's library and any ministrations of scripture readers (*q*). He is to be at all times treated with respect and regarded as a friend and adviser by all on board, and is not to be required to perform any executive duties (*r*). He is not to undertake duty in parishes on shore for which payment is received, but may assist in churches on shore occasionally without remuneration (*s*).

1295. Where a cemetery company are established under a special Act of Parliament which incorporated the provisions as to Chaplains of cemeteries.

(*f*) King's Regulations and Admiralty Instructions for the Government of His Majesty's Naval Service (1906), arts. 231, 272, 324. The pay of naval chaplains is regulated by arts. 656, 1390, 1470.

(*g*) *Ibid.*, art. 272.

(*h*) *Ibid.*, art. 217.

(*i*) *Ibid.*

(*k*) *Ibid.*, arts. 645, 646. Divine service with a sermon is to be performed according to the liturgy of the Church every Sunday, unless otherwise ordered, or prevented by the ship's duties or the weather. Short prayers from the same liturgy are to be read every weekday after morning quarters or divisions (*ibid.*, arts. 705, 706).

(*l*) *Ibid.*, art. 647; Addenda (1908), art. 1713 a.

(*m*) *Ibid.*, arts. 648, 709.

(*n*) *Ibid.*, art. 649.

(*o*) *Ibid.*, art. 650.

(*p*) *Ibid.*, art. 651.

(*q*) *Ibid.*, arts. 652—655.

(*r*) *Ibid.*, art. 704.

(*s*) *Ibid.*, art. 657.

SECT. 4.
Unbeneficed
Clergy.

chaplains contained in the Cemeteries Clauses Act, 1847 (*t*), they from time to time appoint, with the approval of the bishop of the diocese, a clerk to officiate as chaplain in the consecrated part of their cemetery (*a*).

In certain cases a chaplain may be appointed to perform the burial service in the consecrated part of a burial ground provided by a local authority (*b*).

Chaplains of
asylums.

1296. The visiting committee of every lunatic asylum are required from time to time to appoint as chaplain a clerk in priest's orders licensed by the bishop of the diocese, and to fix his salary (*c*). He, or his substitute approved by them, is to perform in the chapel of the asylum or some other convenient place belonging thereto, divine service on every Sunday, Christmas Day, and Good Friday, and also divine service and such other Church services as the visiting committee direct, at such times as they appoint (*d*). His licence is revocable by the bishop (*e*); but the visiting committee may dismiss him without the bishop's consent (*f*). They may grant to him, if he is incapacitated by confirmed illness, age, or infirmity, or has been chaplain for not less than fifteen years, and is not less than fifty years old, such superannuation allowance as they think fit, not exceeding two-thirds of the salary paid to him at the date of his superannuation, and, if they think fit, a further sum in respect of the value of lodgings, rations, and other allowances enjoyed by him (*g*).

Chaplains of
gaols.

1297. A chaplain is appointed by the Home Secretary to every gaol, and an assistant chaplain is appointed by him to any gaol which is sufficiently large to require the appointment (*h*). Notice of every appointment is sent to the bishop of the diocese within one month after it has been made; and no chaplain or assistant chaplain can officiate in a gaol until he has obtained a licence for the purpose from the bishop, nor for longer than while the licence continues in force (*i*). But he may also be dismissed by the Home Secretary, and receives such salary as the Home Secretary directs (*k*). The same clerk may officiate as chaplain of two gaols within a convenient distance from each other, if they are together calculated to receive

(*t*) 10 & 11 Vict. c. 65, ss. 27—34.

(*a*) See title BURIAL AND CREMATION, Vol. III., pp. 518, 519, 559, 560; and see *ibid.*, p. 425, as to notice to the chaplain of a burial under the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41).

(*b*) See title BURIAL AND CREMATION, Vol. III., pp. 472, 473, 510.

(*c*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 276 (1) (*a*), (*5*).

(*d*) *Ibid.*, s. 277 (2). See also title LUNATICS AND PERSONS OF UNSOUND MIND.

(*e*) *Ibid.*, s. 277 (1).

(*f*) *Ibid.*, s. 276 (3).

(*g*) *Ibid.*, ss. 280—282. It is not essential, in order to entitle the chaplain to a superannuation allowance, that he should have resided in the asylum or given his whole time to the duties of the chaplaincy (*R. v. Hereford County Council* (1890), 63 L. T. 245).

(*h*) Prison Act, 1865 (28 & 29 Vict. c. 126), ss. 10, 12, as amended by Prison Act, 1877 (40 & 41 Vict. c. 21), s. 5.

(*i*) Prison Act, 1865 (28 & 29 Vict. c. 126), s. 13. See also title PRISONS.

(*k*) *Ibid.*, s. 14, as amended by Prison Act, 1877 (40 & 41 Vict. c. 21), s. 5.

not more than one hundred prisoners (*l*). The chaplain of a gaol is a prison officer to whom a superannuation allowance or gratuity may be given on his retirement (*m*).

SECT. 4.
Unbeneficed
Clergy.

Chaplain of
workhouse.

1298. A chaplain of a workhouse is among the paid officers whom the Local Government Board may direct the overseers or guardians of a parish or union to appoint, with such qualifications as the Board think necessary. The Board may define and direct the execution of his duties and the mode of his appointment and dismissal, and his continuance in office, and the amount of his salary, and the time and mode of payment thereof (*n*). Before acting, he must obtain the licence or consent of the bishop (*o*), but can afterwards officiate in the workhouse without the consent and in spite of the prohibition of the incumbent (*p*). He can charge or mortgage his salary (*q*). The Board can remove him for unfitness without the consent of the bishop and without assigning any special grounds (*r*).

1299. The chapels and chaplains of the schools to which the Public Schools Act, 1868 (*s*), applies, and of any of the endowed schools subject to the Endowed Schools Act, 1869 (*t*), are free from the jurisdiction and control of the incumbents of the parishes in which the chapels are situate (*u*). And when any college, school, hospital, asylum, or public or charitable institution has a chapel, whether consecrated or unconsecrated, the bishop of the diocese may license a clerk to serve the chapel and perform such offices and services of the Church therein (other than the solemnisation of marriage) as are specified in the licence (*a*). Where this is done,

Chaplains of
schools and
institutions.

(*l*) Prison Act, 1865 (28 & 29 Vict. c. 126), s. 11.

(*m*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 36; Prison (Officers' Superannuation) Act, 1886 (49 & 50 Vict. c. 9); Prison Officers (Pensions) Act, 1902 (2 Edw. 7, c. 9).

(*n*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 46, 109; Local Government Board Act, 1871 (34 & 35 Vict. c. 70); *R. v. Braintree Union (Guardians)* (1841), 1 Q. B. 130; General Consolidated Order, arts. 153—156, 171—175, 187, 190, 193, 195—198, 211 (Statutory Rules and Orders Revised, Vol. X., Poor, England, pp. 99—116). See also title POOR LAW.

(*o*) General Consolidated Order, art. 171 (Statutory Rules and Orders Revised, Vol. X., Poor, England, p. 102).

(*p*) *Molyneux v. Bagshaw* (1863), 9 Jur. (N. S.) 553; and as to where the workhouse has a chapel, see Private Chapels Act, 1871 (34 & 35 Vict. c. 66), ss.

(*q*) *Re Mirams*, [1891] 1 Q. B. 594.

(*r*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 48; General Consolidated Order, art. 187 (Statutory Rules and Orders Revised, Vol. X., Poor, England, p. 104); *Ex parte Molineux* (1863), 7 L. T. 599.

(*s*) 31 & 32 Vict. c. 118. The Act applies to Eton, Winchester, Westminster, Charterhouse, Harrow, Rugby, and Shrewsbury (*ibid.*, preamble, and s. 3). See title EDUCATION.

(*t*) 32 & 33 Vict. c. 56.

(*u*) Public Schools Act, 1868 (31 & 32 Vict. c. 118), s. 31; Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 53.

(*a*) Private Chapels Act, 1871 (34 & 35 Vict. c. 66), s. 1. Under the Missions to Seamen, a society supported by voluntary contributions, chaplains in various ports in the United Kingdom and elsewhere are specially licensed by the bishops of the dioceses in which the ports are situate for spiritual ministrations among seamen at those ports, on board ships or in seamen's churches and institutes which have been provided by or in connection with the society. The licence, so

SMOT. 4.
Unbeneficed
Clergy.

the minister officiating in the chapel is, with respect to these offices and services, exempt from the control and interference of the incumbent of the parish or district in which the chapel is situate, and the offertory and alms collected at the chapel are at the disposal of the minister thereof, subject to the direction of the ordinary (*b*). The licence may at any time be revoked (*c*).

Royal and
official
chaplains and
private
chaplains.

1300. The Sovereign and peers of the realm, and certain other persons of position and dignity, have the right of appointing chaplains to serve in their own private chapels (*d*) and households (*e*). The Speaker of the House of Commons appoints a chaplain to read prayers each day when the House meets for business, and to attend him on state occasions (*f*).

The clerical staff of the Chapels Royal consists of a dean, sub-dean, clerk and deputy clerks of the closet, domestic chaplains, chaplains in ordinary and honorary chaplains, priests in ordinary, honorary priests and deputy priests.

A clerk serving as chaplain to the King or to a Queen Dowager or any of the King's children or brothers or sisters, or to an archbishop or bishop, or as chaplain of the House of Commons, or as clerk or deputy clerk of the King's closet, while actually attending and performing his duties, or serving as dean, sub-dean, priest or reader in any of the King's royal chapels at St. James' or Whitehall, or as a reader in the King's private chapels at Windsor or elsewhere, is not liable to any of the penalties or forfeitures imposed by the Pluralities Act, 1838 (*g*), for non-residence on a benefice, in respect of the time during which he is so in attendance or performing his duties or serving (*h*).

far as respects conducting divine service on shore in an English port, authorises the chaplain to officiate in a named chapel of the society, being an institution within the provisions of the Private Chapels Act, 1871 (34 & 35 Vict. c. 66) (The Missions to Seamen: Fifty-third Annual Report, 1909).

(*b*) Private Chapels Act, 1871 (34 & 35 Vict. c. 66), ss. 2, 3.

(*c*) *Ibid.*, s. 1.

(*d*) As to these, see p. 789, *post*.

(*e*) Gib. Cod. 908, 909. The right exists in common law (Canones Ecclesiastici (1603), 71; *Drury's Case* (1601), 4 Co. Rep. 89 b, at p. 90 a; *Acton's Case* (1603), *ibid.*, 117 a, at p. 118 a). Stat. (1529) 21 Hen. 8, c. 13, ss. 13—19, 22, 24, 25, and stat. (1541) 33 Hen. 8, c. 28, regulating the number of chaplains which archbishops, bishops, peers of different ranks, and certain commoners therein named were entitled to have, and the mode of their appointment and their power to hold benefices in plurality, were repealed by the Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 1, and the Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125), s. 1, sched. A King's chaplain may be appointed by parol (*Whetstone v. Higford* (1595), Cro. Eliz. 424; but see *contra*, *Brown v. Mugg* (1700), 1 Salk. 161). Other private chaplains were by stat. 21 Hen. 8, c. 13 (1529), s. 22, required to be appointed under hand and seal (*R. v. Savacre* (1586), Godb. 41). As to the distinction between King's chaplains ordinary and extraordinary, see *Brown v. Mugg*, *supra*. A King's chaplain or priest in ordinary is privileged from arrest on civil process (*Byrn v. Dibdin* (1835), 1 Cr. M. & B. 821; *Winter v. Dibdin* (1844), 13 M. & W. 25; *Harvey v. Dakins* (1849), 3 Exch. 266; *Swan v. Dakins*, *Ex parte Dakins* (1855), 16 C. B. 77).

) May, Parliamentary Practice, 11th ed., p. 159.

1 & 2 Vict. c. 106.

Ibid., s. 38.

1301. A private chaplain is only permitted to preach and administer the Communion in the chapel of the house in which he is chaplain (i). **SECT. 4.**
Unbeneficed
Clergy.

SECT. 5.—Ecclesiastical Offences (k).

SUB-SECT. 1.—Offences in respect of Doctrine.

1302. Offences in respect of doctrine are either heresy, avowing blasphemous and impious opinions contrary to the Christian religion, depraving the Book of Common Prayer, or maintaining doctrines repugnant to the Thirty-nine Articles of Religion. There are many points of doctrine which the Church has not decided and which are open to every member of the Church to decide for himself according to his own conscientious opinion (l). **Offences as**
to doctrine.

1303. Heresy, in law, is only that which has, before 1559, been adjudged so to be by the authority of the canonical scriptures, or by any of the first four General Councils, or by any other General Council wherein the same was declared heresy by the express words of the canonical scriptures, or which, since 1559 may have been, or may be, determined to be heresy by Parliament with the assent of the clergy in convocation (m). **Heresy.**

1304. The offence of avowing blasphemous and impious opinions contrary to the doctrines and principles of the Christian religion on **Blasphemy.**

(i) *Canones Ecclesiastici* (1603), 71. The penalty for his preaching or administering the Communion elsewhere is suspension for the first offence and excommunication for the second (*ibid.*). In *Kilmorey (Viscount) v. Corbett* (1634), Rothery's Precedents, No. 35, p. 14, the Court of Delegates confirmed the consecration or dedication of a private chapel attached to Lord Kilmorey's house for the use of him and his successors and family for the celebration of divine worship, administration of the sacraments, solemnisation of marriages, and performance of all other divine and religious acts whatsoever, except the sepulture and interment of the dead; saving the rights of the church of the parish in which the house was situate and all emoluments belonging thereto. They declared that a chaplain to be approved and licensed by the bishop of the diocese must be maintained at Lord Kilmorey's expense for the performance of services in the chapel; that he must not solemnise any marriage without banns published in the parish church or licence from the ordinary, and must within one month certify to the rector of the parish, or his curate, or to the churchwardens, the names of all persons married and of all infants baptized by him. They further ordered that Lord Kilmorey and his successors dwelling in the house, and their families and the chaplain for the time being, should once every year at Easter or Pentecost receive the Sacrament of the Eucharist in the parish church in token of subjection to that church. See also p. 622, *post*.

(k) For other ecclesiastical offences and procedure in respect thereof, see pp. 520 *et seq.*, *ante*; for brawling, see p. 663, *post*; for simoniacal offences, see p. 593, *ante*.

(l) *Gorham v. Exeter (Bishop)* (1850), Moore's Report, p. 464, P. C.

(m) 3 Co. Inst. 40; Gib. Cod. 351; 1 Hawk. P. C., c. 2; Burn, Ecclesiastical Law, Vol. II., pp. 304—307. Stat. (1559) 1 Eliz. c. 1, s. 20, which contains this definition of heresy, was, among other obsolete enactments, repealed by the Statute Law Revision Act, 1863 (26 & 27 V. ct. c. 125), with a saving of any principle or rule of law or equity affirmed, recognised, or derived by, in or from any enactment thereby repealed (*ibid.*, s. 1). Where a clerk is accused of heresy, the articles of charge must distinctly state the obnoxious opinions and the exact terms in which he has uttered or published them (*Williams v. Salisbury (Bishop)* (1863), 2 Moo. P. C. C. (N. S.) 375, 423).

**SECT. 5.
Ecclesi-
astical
Offences.**

the part of a person who has been educated in or has at any time made profession of the Christian religion consists in law of asserting or maintaining that there are more gods than one or denying the Christian religion to be true or the Holy Scriptures to be of divine authority, by writing, printing, teaching or advised speaking (*n*).

**Depraving
the Prayer
Book.**

1305. It is an offence to speak anything in derogation of, or by way of depraving or despising, the Book of Common Prayer or anything therein contained (*o*), and, in particular, the Sacrament of the Lord's Supper (*p*).

**Contradicting
the Articles
of Religion.**

1306. No clerk is at liberty advisedly (*q*) to maintain or affirm any doctrine directly contrary or repugnant to any of the Thirty-nine Articles of Religion (*r*).

SUB-SECT. 2.—Offences in respect of the Fabric or Ornaments of a Church or of Ritual.

**Responsi-
bility of
clergy.**

1307. Any person in holy orders legally responsible for the due performance of divine service in a church (*s*), or of the burial service

(*n*) Stat. (1697) 9 Will. 3, c. 35, s. 1, as amended by stat. (1813) 53 Geo. 3, c. 160, s. 2. "Advised speaking" means deliberate speaking (*Heath v. Burder* (1862), 15 Moo. P. O. C. 1, at p. 80). Stat. (1697) 9 Will. 3, c. 35, does not limit or affect the common law offence of blasphemy or uttering a blasphemous libel; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 530 *et seq.*

(*o*) Stat. (1548) 2 & 3 Edw. 6, c. 1, s. 3; stat. (1559) 1 Eliz. c. 2, s. 3; Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 20; *Caudrey's Case* (1591), 5 Co. Rep. (Of the King's Ecclesiastical Law), 1a; *Sanders v. Heud* (1843), 3 Curt. 565; *Canones Ecclesiastici* (1603), 27. Under this canon, which excludes from Communion common and notorious depravers of the Book of Common Prayer, the omission or even rejection of portions of the book does not constitute the offence of depraving it (*Jenkins v. Cook* (1876), 1 P. D. 80, 100, 101, P. C.).

(*p*) Stat. (1547) 1 Edw. 6, c. 1. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 532.

(*q*) That is to say, deliberately (*Heath v. Burder, supra*).

(*r*) Stat. (1571) 13 Eliz. c. 12, s. 2; *Canones Ecclesiastici* (1603), 5; *Voysey v. Noble* (1871), L. R. 3 P. O. 357. The Articles must be construed in their literal and grammatical sense (*Gorham v. Exeter (Bishop)* (1850), Moore's Report, at pp. 462, 464, P. C.). If the interpretation of an article is doubtful, the ecclesiastical courts will not fix on one meaning of it and condemn all who interpret it differently (*King's Proctor v. Stone* (1808), 1 Hag. Con. 424, *per* Lord STOWELL (then Sir W. SCOTT), at p. 429; *Gorham v. Exeter (Bishop), supra*, at pp. 463, 464). In order to constitute the offence it is not necessary to propound any intelligible heterodox doctrine. It is sufficient to propound doctrine directly contrary to that laid down in the Thirty-nine Articles (*Heath v. Burder, supra*, at pp. 82, 83, 88, 91); but any doubt as to whether the doctrine propounded is so contrary, will be construed in favour of the accused (*Sheppard v. Bennett* (second appeal) (1872), L. R. 4 P. O. 371, 418). The Articles are not contravened by maintaining mere nonsense (*Heath v. Burder, supra*, at p. 30); and in charging the offence the portion of the Articles contravened, and the doctrine which is alleged to contravene it, must be specified (*ibid.*, at p. 30; *Williams v. Salisbury (Bishop)* (1863), 2 Moo. P. O. C. (N. S.) 375, 423; *Sheppard v. Bennett* (first appeal) (1870), L. R. 4 P. O. 350, 362). But this was held unnecessary where the accused maintained all the doctrines of the Church of Rome (*Hudson v. Oakeley* (1845), 1 Rob. Eccl. 322). It is immaterial whether the doctrine is preached or published in a book (*Heath v. Burder, supra*, at p. 79).

(*s*) Including any place of public worship in which divine service according to the Book of Common Prayer is by law or by the bishop's licence required to be conducted (Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 6).

in a burial ground (*t*), is amenable under the Church Discipline Act, 1840 (*a*), or, in the alternative, under the Public Worship Regulation Act, 1874 (*b*), where (1) an alteration in or addition to the fabric, ornaments or furniture of the church has been made without lawful authority, or any decoration forbidden by law has been introduced into the church (*c*); or (2) he has used or permitted to be used in the church or burial ground an unlawful ornament of the minister of the church, or has neglected to use a prescribed ornament or vesture; or (3) he has failed to observe or cause to be observed the directions in the Book of Common Prayer as to the performance in the church or burial ground of the services, rites and ceremonies ordered by that book, or has made or permitted to be made an unlawful addition to, alteration of or omission from those services, rites and ceremonies (*d*).

SECT. 5.
Ecclesiastical
Offences.

Unlawful
ornaments.

Unauthorised
services.

Time for
proceedings.

1308. Under the Church Discipline Act, 1840 (*e*), proceedings must be commenced within two years after the commission of the offence, except where a conviction for the offence has been obtained in a court of common law, in which case they may be commenced within six months after the conviction, although the period of two years has elapsed (*f*). Under the Public Worship Regulation Act, 1874 (*g*), proceedings may be commenced in respect of an alteration or addition to the fabric of the church within five years after the completion thereof (*h*); but proceedings with respect to the use of an unlawful ornament of the minister of the church, or the neglect to use a prescribed ornament or vesture, or with respect to a matter connected with a service, or rite or ceremony, must be commenced within twelve months after the commission of the offence (*i*).

SUB-SECT. 3.—Other Offences.

1309. It is an ecclesiastical offence for the incumbent of the parish or any other person, whether clerical or lay, to alter, add to,

Alterations.

(*t*) Including any churchyard or consecrated burial ground.

(*a*) 3 & 4 Vict. c. 86. See pp. 526 *et seq.*, *ante*.

(*b*) 37 & 38 Vict. c. 85. See s. 18, and pp. 529 *et seq.*, *ante*.

(*c*) For the general law as to faculties, and as to making unauthorised additions to or alterations in a church or churchyard, see pp. 640 *et seq.*, *ante*, and pp. 667 *et seq.*, *post*.

(*d*) Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 8. A minister who does not use the prescribed form of prayer or of administering the sacrament when he ought so to do, or wilfully uses any other form, is also liable to be indicted and convicted thereof; and for a first offence is to be imprisoned for six months and forfeit one year's income of all his preferment; and for a second offence is to be imprisoned for a year and is deprived *ipso facto* of all his preferment, and for a third offence is to be similarly deprived and be imprisoned for life; or, if he is not beneficed, he is to be imprisoned for a year in case of a first offence and for life in case of a second offence (Act of Uniformity, 1559 (1 Eliz. c. 2), s. 2; Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 20; *Flemming's Case* (1584), 1 Leon. 295). See further as to ritual offences, pp. 529, 530, *ante*, and pp. 665 *et seq.*, *post*.

(*e*) 3 & 4 Vict. c. 86. See p. 526, *ante*.

(*f*) *Ibid.*, s. 20.

(*g*) 37 & 38 Vict. c. 85. See p. 529, *ante*.

(*h*) *Ibid.*, s. 8.

SMO. 5.
Ecclesi-
Offences.

Preventing
entrance to
church.

Offences in
connection
with clerical
duties.

or take away, anything in, to, or from the fabric, fittings or ornaments of a church or a churchyard, without a faculty for the purpose (*k*).

1310. An incumbent who, by bolting and barring the doors of the church, prevents the churchwardens from entering it to keep it cleaned and in order, commits an ecclesiastical offence (*l*).

1311. The following are offences connected with the performance of a clerk's ecclesiastical duties (*m*):—Taking or demanding illegal or extortionate fees for performing any office of the Church (*n*); wittingly administering the Communion to a person who does not kneel (*o*); publishing banns of marriage, or solemnising marriage, in a parish between persons neither of whom is a parishioner (*p*); celebrating a marriage without banns or licence or registrar's certificate (*q*); lecturing or preaching in a place of public worship without having been approved or licensed by the archbishop of the province or the bishop of the diocese or, during a vacancy in the see, by the guardian of the spiritualities, under his seal (*r*); officiating in an unconsecrated building without a licence (*s*); officiating in a diocese against the inhibition or without the licence of the bishop (*t*); officiating in a parish without the consent of the incumbent (*a*); assuming to exercise the episcopal function of ordination (*b*), or keeping

(*k*) *Musgrave v. Russell* (1777), Rothery's Precedents, No. 175, p. 87; *Sievehing v. Kingsford* (1866), 36 L. J. (ECL.) 1; *Vincent v. Eyton*, [1897] P. 1. Unless the ecclesiastical courts are invoked to interfere with his discretion, the incumbent has the control over the erection of gravestones in the churchyard in ordinary cases and the inscriptions thereon (*Hepper v. Davis* (1754), 1 Lee, 640, 648; *Keet v. Smith* (1875), L. R. 4 A. & E. 398, per Sir ROBERT PHILLIMORE, at pp. 413, 414; S. C., reversed on appeal (1876), 1 P. D. 73, P. C.). But he may not disturb the graves; though he may level the mounds on the top of the graves, laying down the same turf after so doing (*Bennett v. Bonaker* (1828), 2 Hag. Ecc. 25; (1830) 3 Hag. Ecc. 17, 51, 52).

(*l*) *Bellars v. Graist* (1741), Rothery's Precedents, No. 157, p. 77.

(*m*) As to ritual offences, see also pp. 529, 530, *ante*, and pp. 665 *et seq.*, *post*.

(*n*) *Burgoynne v. Free* (1829), 2 Hag. Ecc. 456, 464–466, 493; Burn, Ecclesiastical Law, Vol. II., p. 145.

(*o*) *Canones Ecclesiastici* (1603), 27. The penalty for the offence is suspension (*ibid.*). See p. 691, *post*.

(*p*) *Nicholson v. Squire* (1809), 16 Ves. 259, per Lord ELDON, L.C., at p. 261; *Wynn v. Davies* (1835), 1 Curt. 69; *Tuckniss v. Alexander* (1863), 32 L. J. (CH.) 794, per KINDERSLEY, V.-C., at p. 801.

(*q*) *Canones Ecclesiastici* (1603), 62, 63. The penalty is suspension for three years (*ibid.*; *Lewys v. Clester* (1678), Rothery's Precedents, No. 67, p. 31). See also note (*m*), p. 693, and p. 703, *post*.

(*r*) Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 15 (repealed in part by the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 15, *sched.*). The offence is punishable by three months' imprisonment (Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 17).

(*s*) *Wilcox v. White* (1833), Rothery's Precedents, No. 192, p. 99; *Kitson v. Drury* (1865), 11 Jur. (N. S.) 272. Except in the case of sickness, a clerk is not to preach or administer the Communion in a private house in which there is not a lawful chapel (*Canones Ecclesiastici* (1603), 71). The penalty for the first offence is suspension, and for the second, excommunication (*ibid.*).

(*t*) *Meefatt v. Newcomb* (1704), 2 Ld. Raym. 1205; *Smith v. Lovegrove* (1755), 2 Lee, 162; *Barnes v. Shore* (1846), 8 Q. B. 640; *Nesbitt v. Wallace*, [1901] P. 354.

(*a*) *Richards v. Fincher* (1873), L. R. 4 A. & E. 107; *Wood v. Headingley-cum-Burley Burial Board*, [1892] 1 Q. B. 713, per Lord COLERIDGE, O.J., at p. 729; *Nesbitt v. Wallace*, *supra*.

(*b*) *St. Albans (Bishop) v. Fillingham*, [1906] P. 163.

unauthorised fasts or practising unauthorised prophecies or exorcisms (c); wearing a graduate's hood when not entitled so to do (d).

A stipendiary curate who acts in defiance of the incumbent is guilty of an ecclesiastical offence (e).

1312. A clerk who holds ecclesiastical preferment is guilty of an ecclesiastical offence if he neglects duly to perform the duties attaching to that preferment (f) or commits a breach of the law as to residence in respect of it (g), or neglects to attend a visitation (h), or to keep in repair the chancel, house of residence, and other property maintainable by him by law (i).

Generally, all violations of Church order, and breaches of the canons and other laws ecclesiastical, and disobedience to the lawful commands of the bishop, are ecclesiastical offences, and punishable as such (k).

SECT. 5.
Ecclesiastical
Offences.

Neglect of
or refusal
to perform
duties.

Part V.—Public Worship and Church Ministrations.

SECT. 1.—*Divine Service in General.*

SUB-SECT. 1.—*Duties of the Clergy.*

1313. All ministers in all places of public worship are to use in the morning and evening prayers, in the celebration and

Performance
of divine
service.

Canones Ecclesiastici (1603), 72.

Ibid., 58. The penalty for the offence is suspension (*ibid.*).

(e) *Martyn v. Hind* (1785), Rothery's Precedents, No. 178, p. 89.

(f) *Pullen v. Clewer* (1684), 1 Hag. Ecc. 354, Appendix B, p. 2; *Davies v. Pope* (1797), Rothery's Precedents, No. 82, p. 92. In *Jones v. Jones* (1671), Rothery's Precedents, No. 63, p. 29, an incumbent was suspended for refusing to obey a condition to read divine service in the old accustomed and most convenient place or desk. The following particular instances of neglect of duty are punishable as distinct ecclesiastical offences:—Refusing or delaying to baptize the child of a parishioner duly brought to be baptized on a Sunday or holy day (Canones Ecclesiastici (1603), 68), for which the penalty is suspension for three months (*ibid.*): Refusing or delaying to go and baptize an infant lying in weakness, and in danger of death (*ibid.*, 69), for which the penalty, if the child dies unbaptized, is suspension for three months and until acknowledgment of the fault and promise not to repeat it (*ibid.*): Refusing to bury a baptized parishioner who is not excommunicate for a serious crime (*ibid.*, 68; *Kemp v. Wickes* (1809), 3 Phillim. 264; *Escott v. Mastin* (1842), 4 Moo. P. C. C. 104; *Titchmarsh v. Chapman* (1844), 3 Notes of Cases, 370; *Cooper v. Dodd* (1850), 2 Rob. Eccl. 270), for which the penalty is suspension for three months (Canones Ecclesiastici (1603), 68): Refusing to administer the Communion to a confirmed parishioner who is not disqualified from receiving it (*Jenkins v. Cook* (1876), 1 P. D. 80, P. C.; *Swayne v. Benson* (1889), 6 T. L. R. 7; *Banister v. Thompson*, [1908] P. 362; S. C., on rule for prohibition, *sub nom. R. v. Dibdin, Ex parte Thompson* (1909), 26 T. L. R. 150, C. A.): Refusing to marry persons entitled to be married (*Argar v. Holdsworth* (1758), 2 Lee, 515).

(g) *Mugg v. Ley* (1708), Rothery's Precedents, No. 124, p. 60; *Pawlet v. Head* (1728), 2 Lee, Appendix, 566; *Bluck v. Rackham* (1846), 5 Moo. P. C. C. 305, at pp. 312, 313; and see pp. 610 *et seq.*, ante, and p. 661, post.

(h) *Clewer v. Pullen* (1684), Rothery's Precedents, No. 79, p. 36.

(i) *King v. Aylesbury* (1635), Rothery's Precedents, No. 40, p. 16; *Mugg v. Ley*, *supra*.

(k) *Ayl. Par.* 208; Godolphin, Repertorium Canonieum, pp. 306, 307; *Philéps v. Bury* (1694), 1 Ld. Raym. 5, 9; *Rugg v. Winchester (Bishop)* (1868), L. R. 2 P. C. 223, 235, 236; *Combe v. De La Bere* (1881), 6 P. D. 157, 163—166, 169, 170.

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administration of both sacraments (*a*), and in all other public and common prayer, the form set forth in the Book of Common Prayer (*b*); and the morning and evening prayers therein contained are to be openly and solemnly read on every Lord's Day and on all other days and occasions therein appointed, and at the times therein prescribed, by all ministers or curates in every place of public worship of the Church of England (*c*). But the shortened order for morning prayer or for evening prayer specified in the schedule to the Act of Uniformity Amendment Act, 1872 (*d*), may on any day, except Sunday, Christmas Day, Ash Wednesday, Good Friday, and Ascension Day, be used, in a cathedral in addition to, and in a church in lieu of, the order for morning prayer or for evening prayer prescribed by the Book of Common Prayer (*e*); and the tables of lessons and directions as to lessons and proper psalms contained in Part II. of the schedule to the Prayer Book (Tables of Lessons) Act, 1871 (*f*), were by that Act substituted for the lessons

(*a*) *Flemming's Case* (1584), 1 Leon. 295.

(*b*) The full title of the book is "The Book of Common Prayer and Administration of the Sacraments and other Rites and Ceremonies of the Church according to the use of the Church of England, together with the Psalter or Psalms of David pointed as they are to be sung or said in churches and the Form or Manner of making, ordaining and consecrating of Bishops, Priests and Deacons" (Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 1).

(*c*) Act of Uniformity, 1559 (1 Eliz. c. 2), s. 2; Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 1; *Canones Ecclesiastici* (1603), 14. All the clergy are to say daily the morning and evening prayer, either privately or openly, unless prevented by sickness or some other urgent cause; and the minister of every parish church or chapel, if at home and not reasonably hindered from so doing, is to say the same in such church or chapel, and cause a bell to be tolled for a convenient time before he begins, that the people may come to hear God's Word and to pray with him (Book of Common Prayer (Rubric after the Preface Concerning the Service of the Church)). But where under a trust deed the income of a fund was payable to the incumbent of a church for conducting the services of the church in strict and literal accordance with the order of the Book of Common Prayer, so long and during such time as he should so conduct the same, Lord (then Sir JOHN) ROMILLY, M.R., declined to hold that the terms of the deed required daily service (*Re Hartshill Endowment* (1861), 30 Beav. 130). The Litany is to be said or sung when and as set down in the Book of Common Prayer, and in particular on Wednesdays and Fridays weekly, by the ministers or curates in all churches and chapels in some convenient place according to the discretion of the bishop or other ordinary (*Canones Ecclesiastici* (1603), 15). In all parish churches and chapels where the sacraments are to be administered, the Holy Communion is to be administered by the minister so often and at such times as that every parishioner may communicate at least three times in the year (of which the feast of Easter is to be one) (*ibid.*, 21); and he is to give public warning of every such administration to the parishioners on the previous Sunday (*ibid.*, 22).

(*d*) 35 & 36 Vict. c. 35.

(*e*) *Ibid.*, s. 2. The order and form prescribed in the Book of Common Prayer is to be used in divine service and administration of the Holy Communion in the colleges and halls of the Universities of Oxford and Cambridge (*Canones Ecclesiastici* (1603), 16); but on the request of the governing body of any college subsisting on 16th June, 1871, in any of the Universities of Oxford, Cambridge, and Durham, the visitor of the college may from time to time in writing authorise the use on weekdays of an abridgment or adaptation of morning and evening prayer in the college chapel, instead of the order set forth in the Book of Common Prayer (Universities Tests Act, 1871 (34 & 35 Vict. c. 26), s. 6).

34 & 35 Vict. c. 37.

previously prescribed by the book, and for the directions on the subject previously therein contained (*g*).

If evening prayer is said at two different times in the same place of worship on any Sunday (except a Sunday in which alternative second lessons are specially appointed in the table) the second lesson at the second time may at the discretion of the minister be any chapter from the four gospels or any lesson appointed in the table of lessons from the four gospels (*h*). Upon occasions to be approved by the ordinary other lessons may with his consent be substituted for those appointed in the calendar; and upon occasions to be appointed by the ordinary other psalms may with his consent be substituted for those appointed in the psalter (*i*).

The law as to uniformity of service does not preclude the addition or interpolation of hymns, or the discretion of the minister as to what portions of the service shall be sung (*k*).

1314. The order for morning prayer, the Litany, and the order for Holy Communion, or any of them, may be used together or in varying order as separate services; and the Litany may be said after the third collect in the order for evening prayer, either in lieu of or in addition to, the use of the Litany in the order for morning prayer; and any of them may be used with or without the preaching of a sermon or lecture or the reading of a homily (*l*). And a sermon or lecture may be preached without the prayers or services appointed by the Book of Common Prayer being read before it is preached, provided that it is preceded either by a service authorised by the Act of Uniformity Amendment Act, 1872 (*m*), or by the bidding prayer (*n*), or by a collect taken from the Book of Common Prayer, with or without the Lord's Prayer (*o*).

1315. In the declaration of assent (*p*) every clerk promises to use in public prayer and administration of the sacraments the form prescribed in the Book of Common Prayer, and no other, except so far as shall be ordered by lawful authority; and the Act of Uniformity, 1662 (*q*), directs that in those portions of the Book of Common Prayer which relate to the King, Queen, or royal progeny, the names shall be altered from time to time as occasion requires according to the direction of lawful authority (*r*).

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Substitution
in certain
cases of
other lessons
and psalms.

Interpolation
of hymns
and singing.

Order of
services.

Variation by
lawful
authority.

Prayer Book (Tables of Lessons) Act, 1871 (34 & 35 Vict. c. 37), s. 2.

Ibid., sched., Part II.

⁽ⁱ⁾ *Ibid.*, s. 2, and sched., Part II.

^(k) *Hutchins v. Denziloe* (1792), 1 Hag. Con. 170, 175—180; *Read v. Lincoln* (Bishop), [1892] A. C. 644, 659—661, P. C.

^(l) Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 35), s. 5. The sermon is not part of the public prayers or ministering the sacraments or other rites of the Church referred to in *Canones Ecclesiastici* (1603), 58 (*Re Robinson, Wright v. Tugwell*, [1897] 1 Ch. 85, 96, C. A.).

^(m) 35 & 36 Vict. c. 35.

⁽ⁿ⁾ See *Canones Ecclesiastici* (1603), 55.

^(o) Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 35), s. 6.

^(p) See p. 551, *ante*.

^(q) 14 Car. 2, c. 4.

^(r) *Ibid.*, s. 21. The lawful authority in that case is the King in Council (Gib. Cod. 280). The law does not recognise any general *jus liturgicum* in the archbishops and bishops, collectively or severally, beyond the limits expressly

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Service
in General.

Special and
 additional
 forms of
 service.

1316. On any special occasion approved by the ordinary there may be used in any cathedral or church a special form of service approved by him, and containing nothing, except anthems or hymns, which does not form part of the Holy Scriptures or Book of Common Prayer(s). And an additional form of service varying from any form prescribed by the Book of Common Prayer may be used at any hour on any Sunday or holy day in any cathedral or church in which there are duly read, said, or sung, as required by law, at some other hours on the same day, the Order for Morning Prayer, the Litany, the part of the Order for Holy Communion required to be read if there is no Communion, and the Order for Evening Prayer; but there must not be introduced into such additional service any portion of the Order for Holy Communion, or anything, except anthems or hymns, which does not form part of the Holy Scriptures or Book of Common Prayer, and the form of service, and the mode in which it is used, must be approved by the ordinary (t).

Notices
 during
 divine service.

1317. Where banns of matrimony can lawfully be published, they are to be published on three Sundays preceding the solemnisation of matrimony during morning service or evening service (if there is no morning service) immediately after the second lesson (u). After the Nicene Creed in the Communion Office the minister is to declare what holy days or fasting days are to be observed in the following week, and (when there is occasion for so doing) is to give notice of the Communion and of the celebration of divine service and of sermons. Nothing is to be proclaimed or published during divine service but by the minister, nor anything by him but what is prescribed in the rules of the Book of Common Prayer, or by the King, or by the ordinary of the place (v).

Two services
 every Sunday
 may be
 directed.

1318. The bishop may order that there shall be two full services on every Sunday throughout the year or any part of the year in the

authorised by statute (*Kemp v. Wickes* (1809), 3 Phillim. 264, per Sir JOHN NICHOLL, at p. 268; *Read v. Lincoln (Bishop)* (1889), 14 P. D. 148, 150).

(s) Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 25), s. 3.

(t) *Ibid.*, s. 4.

(u) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 2; *Wynn v. Davies* (1835), 1 Curt. 69, per Sir HERBERT JENNER, at p. 81.

(v) Book of Common Prayer (Rubric after the Nicene Creed in the Communion Office); Parish Notices Act, 1837 (7 Will. 4 & 1 Vict. c. 45), s. 5. This Act abolished the practice of reading or publishing during or immediately after divine service decrees relating to faculties and other decrees, citations, and proceedings in ecclesiastical courts, and notices for vestry meetings and other matters, and provided that all proclamations or notices previously made or given in the church or chapel of any parish or place during or after divine service are to be affixed on or near to the doors of all the churches and chapels within the parish or place previously to the commencement of divine service on the days on which they were previously made or given, and when so affixed are to be in substitution for the proclamations and notices so previously made or given (*ibid.*, ss. 1, 2, 4). A minister cannot lawfully give notice of the Communion in unauthorised language such as "a high celebration of the Eucharist," nor declare the observance of holy days or fast days other than those which are specified in the Book of Common Prayer in the Tables and Rules for the Movable and Immovable Feasts together with the Days of Fasting and Abstinence through the whole Year (*Elphinstone v. Purchas* (1870), L. R. 3 A. & E. 66, 111, 112).

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church or chapel of every or any benefice in his diocese, whatever be its annual value or population, and also in the church or chapel of every parish or chapelry where a benefice is composed of two or more parishes or chapelries, in which there is a church or chapel, if the annual value of the benefice arising from such parish or chapelry amounts to £150 and the population thereof amounts to 400 (*w*). If the aggregate yearly value of a consolidated benefice exceeds £500, the bishop may direct that there shall be two full services in each church of the benefice (*a*).

No unauthorised alterations etc. permissible.

1319. Except as above mentioned, a clerk has generally no right in performing divine service to alter, omit, or add anything to the prescribed form, including the lessons directed to be read (*b*). If less duty in the performance of divine service than that prescribed by law is in any case required, it is to be supposed that the relaxation has been adopted with the approbation of the bishop, and has been permitted owing to the circumstances of the parish; and as the service is to be performed for the use of the parishioners, such relaxation may properly be granted in certain cases. If it is granted, the minister must strictly adhere to the terms prescribed (*c*). Any omission or irregularity should, if possible, be avoided; but irregularities arising from reasonable causes and accidents are not to be criminally prosecuted or visited with ecclesiastical censures (*d*).

SUB-SECT. 2.—*Duties and Rights of Incumbents.*

Performance of divine service by incumbent.

1320. The incumbent of a benefice is bound to observe the legal requirements and restrictions in reference to the performance of divine service (*e*). Subject thereto and to the rights of the bishop as paramount incumbent of all the parishes in his diocese (*f*), and to any legal limitation imposed by the existence within the benefice of an ecclesiastical district (*g*), or a chapel exempt by law from his control (*h*), or by the incumbent's suspension or inhibition (*i*), an incumbent has the control of the performance of divine service, including the singing, throughout his benefice (*k*), and he has the

(*w*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 80. In certain cases the bishop may order a third or additional service with a third sermon on Sundays and the great festivals, and the appointment of a curate for its performance (Church Building Act, 1818 (58 Geo. 3, c. 45), s. 65).

(*a*) Pluralities Act, 1850 (13 & 14 Vict. c. 98), s. 8.

(*b*) *Canones Ecclesiastici* (1603), 14; *Colefatt v. Newcomb* (1704), 2 Ld. Raym. 1205; *Newbery v. Goodwin* (1811), 1 Phillim. 282. The omission of words from a lesson, though not legally justified, is greatly extenuated, if done from feelings of delicacy (*Newbery v. Goodwin*, *supra*, at p. 284).

(*c*) *Bennett v. Bonaker* (1828), 2 Hag. Ecc. 25, *per* Sir JOHN NICHOLL, at p. 27.

(*d*) *Bennett v. Bonaker* (1830), 3 Hag. Ecc. 17, *per* Sir JOHN NICHOLL, at p. 42.

(*e*) *Parnell v. Roughton* (1874), L. R. 6 P. C. 46, 53.

(*f*) See note (*a*), p. 442, *ante*.

(*g*) See pp. 443, 448, *ante*.

(*h*) See pp. 651, 652, *ante*.

(*i*) See pp. 534, 535, 612, 614, *ante*.

(*k*) *Hutchins v. Denziloe* (1792), 1 Hag. Con. 170; *Wood v. Headingley-cum-Burley Burial Board*, [1892] 1 Q. B. 713, *per* Lord COLERIDGE, C.J., at p. 729. An incumbent has the exclusive control of money collected in church, except money given at the offertory or collected for church expenses (*R. v. O'Neill*, *Ex*

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right and duty to conduct it or provide for its being conducted in all consecrated places of worship within the benefice (*l*). If the benefice contains more than one consecrated place of worship, he commits an ecclesiastical offence if he neglects to perform or provide for the performance of divine service in each (*m*), or if he closes one of them and disobeys the order of the bishop directing him to perform duty in it (*n*). Neglect of duty in the performance of divine service must, in order to constitute a criminal offence, be wilful and without just cause; but the absence of just cause will be inferred if none is shown (*o*).

Personal
duty of
resident
incumbent
who keeps a
curate.

1321. In the absence of lawful impediment allowed by the bishop, an incumbent, who resides on his benefice and keeps a curate, must himself at least once a month read prayers and administer the sacraments and other rites of the Church in the church or chapel of the benefice (*p*), and must himself preach one sermon on every Sunday in the year (*q*).

Religious
worship and
service in
unconsecrated
places.

1322. The incumbent, or, where he is non-resident, the curate in charge, of a parish or ecclesiastical district, or any person authorised by them respectively, may hold and conduct therein a congregation or assembly for religious worship in an unconsecrated place not certified and registered as by law required (*r*). But they cannot perform divine service in an unconsecrated place without the licence of the bishop (*s*).

Performance
of divine
service by
clerk.

1323. Where there is a resident incumbent not under suspension or inhibition, no clerk can perform divine service in whole or in part within the benefice without his consent (*t*), except in an

parte *Oliver* (1867), 31 J. P. 742; *Howell v. Holdroyd*, [1897] P. 198). As to money given at the offertory, see p. 472, *ante*.

(*l*) *Williams's Case* (1592), 5 Co. Rep. 72 b; *Jones v. Stone* (1700), 1 Ld. Raym. 578; *Moysey v. Hillcoat* (1828), 2 Hag. Ecc. 30, *per* Sir JOHN NICHOLL, at p. 46; *Rugg v. Winchester (Bishop)* (1868), L. R. 2 P. C. 223; see also p. 613, *ante*. The bishop cannot interfere with an incumbent's right to preach in any church in his own benefice (*Colefatt v. Newcomb* (1704), 2 Ld. Raym. 1205).

(*m*) *Llandaff (Bishop) v. Belcher* (1687), Rothery's Precedents, No. 91, p. 42; *Hancock v. Bomer* (1692), *ibid.*, No. 99, p. 47; *Jones v. Curtis* (1715), *ibid.*, No. 119, p. 58; *Rugg v. Winchester (Bishop)*, *supra*, at pp. 234, 236, 237.

(*n*) *Rugg v. Winchester (Bishop)*, *supra*, at pp. 235—237.

(*o*) *Bennett v. Bonaker* (1828), 2 Hag. Ecc. 25; (1830) 3 Hag. Ecc. 17, *per* Sir JOHN NICHOLL, at p. 39.

(*p*) Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 5. The penalty for default is £5 for the poor of the parish recoverable before two justices and leviable by distress (*ibid.*).

(*q*) *Canones Ecclesiastici* (1603), 45.

(*r*) Liberty of Religious Worship Act, 1855 (18 & 19 Vict. c. 86), s. 1. The Act also exempts from the necessity of being certified and registered the cases of a congregation or assembly for religious worship meeting in a private dwelling-house or on the premises belonging thereto, and of a congregation or assembly for religious worship meeting occasionally in one or more buildings not usually appropriated to purposes of religious worship (*ibid.*).

(*s*) *Finch v. Harris* (1702), 12 Mod. Rep. 641; *Moysey v. Hillcoat*, *supra*, *per* Sir JOHN NICHOLL, at p. 45; *Down (Bishop) v. Miller* (1861), 11 L. Ch. R., Appendix, p. i., *per* Dr. RADCLIFFE, at p. ix.; *Kitson v. Drury* (1865), 11 Jur. (N. S.) 272; *Richards v. Fincher* (1874), L. R. 4 A. & E. 255, at p. 262.

(*t*) *Carr v. Marsh* (1814) 2 Phillim. 198; *Farnworth v. Chester (Bishop)* (1825), 4 B. & C. 555, 568—570; *Hodgson v. Dillon* (1840), 2 Curt. 388, *per* Dr.

ecclesiastical district (*u*), or in a chapel exempt by law from the control of the incumbent (*v*). Where an incumbent has consented to a clerk being licensed by the bishop to minister in a proprietary chapel within his benefice, he cannot afterwards withdraw his consent, but that consent will not bind succeeding incumbents (*w*).

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SUB-SECT. 3.—*Brawling.*

1324. The object of the law against brawling being to protect the sanctity of places set apart for the worship of the Supreme Being and for the repose of the dead, and to prevent them from being converted with impunity into scenes of disturbance and violence, it is no part of the inquiry, where more than one person is implicated in such scenes, which of them began the quarrel. Each person who engages in it violates the law, whether he be the most or the least blamable; each is bound to abstain from quarrelling, chiding, or brawling in the sacred place (*a*).

Object of
the law
against
brawling.

1325. Any person who is guilty of riotous, violent, or indecent (*b*) behaviour (although such behaviour is in assertion of a *bonâ fide* claim of right (*c*)), whether during the celebration of divine service or at any other time (*d*), or who molests, lets, disturbs, vexes or troubles, or by any other unlawful means disquiets or misuses any preacher or any clergyman in holy orders ministering or celebrating any sacrament or any divine service, rite, or office (*e*) in any

Brawling in
church.

LUSHINGTON, at pp. 392, 393; *Jones v. Jelf* (1863), 8 L. T. 399, 401; *Richards v. Fincher* (1874), L. R. 4 A. & E. 255.

(*u*) See pp. 443, 448, *ante*.

(*v*) See pp. 651, 652, *ante*.

(*w*) *Richards v. Fincher*, *supra*.

(*a*) *Palmer v. Roffey* (1824), 2 Add. 141, *per* Sir JOHN NICHOLL, at p. 144; *Newbery v. Goodwin* (1811), 1 Phillim. 282, *per* Sir JOHN NICHOLL, at p. 283: "The law also, not merely the statute of Edward VI. but the general ecclesiastical law, protects the sanctity of public worship,—and still more endeavours to prevent every circumstance which may lead to the disturbance of persons engaged in solemn acts of devotion;—it prohibits all quarrelling, chiding, and brawling in the church or churchyard, and requires decent and orderly behaviour." As to the general jurisdiction of the ecclesiastical courts in cases of brawling independently of the statute law, see also *Taylor v. Morley* (1837), 1 Curt. 470; *Hutchins v. Denziloe* (1792), 1 Hag. Con. 181, where Sir WILLIAM SCOTT said that the statute of Edward VI. (1552), 5 & 6 Edw. 6, c. 4, s. 1, did not create the offence, as it subsisted by the common law before the statute was enacted. A party may proceed either upon the statute or upon the ancient law; for wherever a statute leaves an offence as it found it and only introduces additional punishment, a party may proceed on either; see also *Wenmouth v. Collins* (1702), 2 Ld. Raym. 850. As to the abolition of the jurisdiction of the ecclesiastical courts in cases of brawling over persons not in holy orders, see s. 1 of Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32).

(*b*) What amounts to indecency depends upon circumstances of time and place; see *Worth v. Terrington* (1845), 13 M. & W., 795, 796. See also *Jones v. Catterall* (1902), 18 T. L. R. 367.

(*c*) *Asher v. Calcraft* (1887), 18 Q. B. D. 607; and see *Kensit v. St. Paul's (Dean and Chapter)*, [1905] 2 K. B. 249, 257; see also *A.-G. v. St. Cross Hospital* (1854), 18 Beav. 601, where an injunction was granted.

(*d*) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 2. By s. 1 the jurisdiction of the ecclesiastical courts in cases of defamation and brawling was abolished against any person not being in holy orders.

(*e*) *Ibid.*, s. 2, draws a distinction between a person "duly authorised to

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Apprehension
of offenders.

Right to
remove
disturbers.

cathedral, church, or chapel, or in any churchyard or burial ground, may be convicted (*f*), and every person so offending (*g*) may be apprehended by any constable or churchwarden of the parish or place where the offence has been committed and taken before a justice of the peace of the county or place where the offence has been committed, to be dealt with according to law (*h*).

1326. A constable may be justified in removing a person from a church for disturbing the congregation at the time of divine service, although no part of such service was actually proceeding at the time (*i*). The duty of maintaining order and decorum in the

preach" in the church and "a clergyman in holy orders ministering or celebrating any sacrament or any divine service, rite, or office" in any church. The express provision for the case of a preacher who is not strictly ministering or celebrating any sacrament or any divine service, rite, or office shows that the legislature, in dealing with the case of a clergyman in holy orders, meant the latter words to apply to something in the course of being done which in its character could only be done by a clergyman in holy orders (*Cope v. Barber* (1872), L. R. 7 C. P. 393, *per* WILLES, J., at p. 401, where the respondents having obstructed the appellant, the incumbent, whilst he was engaged in collecting the offertory during the reading of the offertory sentences by another clergyman, "the appellant then being a clergyman in holy orders celebrating divine service in a certain parish church etc." it was held that the magistrates rightly decided that the respondents had not been guilty of the offence charged, inasmuch as the appellant was not at the time he was obstructed "ministering or celebrating any sacrament or any divine service, rite, or office," for while there is nothing improper in a priest making the collection, yet, if he does so, he is not whilst doing it "ministering etc.").

(*f*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 477—479, and Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 2.

(*g*) That is, against *ibid.*, s. 2.

(*h*) *Ibid.*, s. 3; and see p. 469, *ante*. Sect. 5 repeals c. 4 of stat. (1552) 5 & 6 Edw. 6, an Act against quarrelling and fighting in churches and churchyards, so far as relates to persons not in holy orders. By s. 6 it is provided that nothing in the Act shall be taken to repeal or alter the statutes of (1553) 1 Mar. sess. 2, c. 3 (1588) 1 Eliz. c. 2 (Act of Uniformity), or s. 18 of stat. (1688), 1 Will. & Mar. c. 18 (Ruffhead), see p. 817, *post*. By s. 7 it is provided that nothing in the Act shall limit, restrain, or abolish the power possessed by the ordinary over the fabric of the church or over the churchyard or burial ground connected therewith.

(*i*) *Williams v. Glenister* (1824), 2 B. & C. 699, where the parish clerk had refused to read in church a notice which was presented to him for the purpose and the person presenting it read it himself, and it was held on the facts that the constable had no right to detain such person in custody afterwards for the purpose of taking him before a magistrate. But this case was decided before the Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32); see *ibid.*, s. 3. And if the disturber had been found as a fact to have acted with the purpose of molesting the person celebrating divine service the detention would have been justified under stat. (1553) 1 Mar. sess. 2, c. 3, and s. 18 of stat. (1688) 1 Will. & Mar. c. 18. By the former statute, "if any person maliciously, wilfully or of purpose, molests any person saying or celebrating the mass or other such divine service as was most commonly used in the last year of King Henry VIII. or that at any time thereafter has been allowed, set forth or authorised by the Queen's majesty etc. [words wide enough to cover divine service under the present Prayer Book] every such offender may be forthwith apprehended and taken by any constable or churchwarden of the parish or by any other person then being present and be brought to any justice of the peace within the shire or city etc. where the offence was committed, who may punish the offender." By stat. (1688) 1 Will. & Mar. c. 18, s. 18, if any person shall willingly and of purpose maliciously and contemptuously come into any

church lies immediately upon the churchwardens, and if they are not present, or being present do not repress any indecency, they desert their proper duty. They are justified in removing a person from the church if they have reasonable grounds for believing that he will offer interruption during the celebration of divine service (*k*). If the minister introduces any irregularity into the service, the churchwardens have no authority to interfere; but they may complain to the ordinary of misconduct (*l*).

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SUB-SECT. 4.—*Ritual Offences.*

(i.) *In General.*

1327. In cases relating to ritual offences, it is important to establish and maintain as far as possible a clear and unvarying interpretation of rules, the stringency and effect of which ought to be easily ascertained and understood by every clerk before his admission to holy orders. Still, in such cases there are not, as a rule, any rights to the possession of property which have arisen by the course of previous decisions, such as afford strong reasons for not reopening the decisions of final courts of appeal on questions of law affecting civil rights. Moreover, in proceedings which may assume a penal form a tribunal ought to be slow to exclude any fresh light which may be brought to bear upon the subject. Accordingly, the decisions, even of the highest court, on such matters are liable to be overruled where there is fresh light, meaning some fact which has not been under the consideration of the tribunal on the previous occasion; and even where there is no such fresh light, the tribunal is at liberty to examine the reasons upon which the decisions rest, and to give effect to its own view of the law (*m*).

As to the
finality of
decisions on
matters of
ritual.

cathedral, parish church, chapel or other congregation permitted by that Act, and disquiet and disturb the same, or misuse any preacher or teacher, such person upon proof thereof before any justice of the peace, by two or more sufficient witnesses, is to find two sureties to be bound by recognisance in the penal sum of £50, and in default of such sureties is to be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence is to suffer the pain and penalty of £20 to the use of the King. Prosecutions under these statutes have been rare, but s. 6 of the Ecclesiastical Courts Act, 1860 (23 & 24 Vict. c. 32), and the Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), expressly leave the provisions above cited unrepealed and unaltered. Sect. 3 of the Ecclesiastical Courts Act, 1860 (23 & 24 Vict. c. 32), allows an offender under that Act to be apprehended and taken before a justice of the peace; see p. 664, *ante*. For other Acts relating to brawling, see stat. (1552) 5 & 6 Edw. 6, c. 4 (repealed, so far as relates to persons not in holy orders, by the Ecclesiastical Courts Act, 1860 (23 & 24 Vict. c. 32), s. 5); stat. (1559) 1 Eliz. c. 2, s. 3; Places of Religious Worship Act, 1812 (52 Geo. 3. c. 155), s. 12; Roman Catholic Charities Act, 1832 (2 & 3 Will. 4, c. 115); Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59), s. 4; Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 36. It is thought sufficient here to refer to those statutes without stating their provisions. See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 477, 478.

As to the provisions contained in the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 7, when burials take place under that Act in a churchyard, see title BURIAL AND CREMATION, Vol. III., pp. 426, 427.

(*k*) See note (*e*), p. 470, *ante*.

(*l*) See note (*f*), p. 470, *ante*.

(*m*) *Bead v. Lincoln (Bishop)*, [1892] A. C. 644, 654, 655, P. C.; *Ridsdale v. Clifton* (1877), 2 P. D. 276, 305—307 P. C.

SECT. 1.
Divine
Service
in General.

Historical
investigation.

Tests of
legality or
illegality.

The law does not exclude historical investigation in determining questions of ritual and ecclesiastical practice. Contemporaneous usage is of great value in determining such subjects, and where it is important to ascertain facts of a public nature the law permits historical works to be referred to (n).

1328. In testing the legality or illegality of ecclesiastical practices the following rules have been laid down as well founded in principle, reason, and law, namely, that what is expressly prohibited is prohibited altogether, and may not be evaded by any contrivance which, under a different name or appearance, attains the same end; and whatever is expressly ordered may not be evaded by an illusory or partial compliance; that whatever is subsidiary to what is ordered, and whatever, being in itself decent and proper and in accordance with primitive and catholic use, is not by any fair construction necessarily connected with those Roman novelties which the Church "cut away and clean rejected" (o) at the Reformation, is, generally speaking, lawful. There are, in other words, three categories of these things: (1) Things lawful and ordered; (2) things unlawful and prohibited; (3) things neither ordered nor prohibited expressly or by implication, but the doing of which must be governed by the living discretion of some person in authority (a).

Discretion
of court
when offence
proved.

1329. When an ecclesiastical offence is found to be proved, the promoters of a suit have not in all cases a right to insist on

(n) Thus, in *Ridsdale v. Clifton* (1877), 2 P. D. 276, P. C., such authorities as Hooker, Baxter's Life and Times, Collier's Ecclesiastical History, Dr. Thomas Bennett's Paraphrase, Cosin's Works, and the like were quoted and relied upon, not by counsel only, but in the judgment ultimately pronounced; and this not upon questions of doctrine or opinion, but as leading to inferences of fact as to what was usual at the time of the writers referred to (*Read v. Lincoln (Bishop)*, [1892] A. C. 644, 653, P. C.). As to the use of historical material by an ecclesiastical judge, the Privy Council in the latter case on appeal from the court of the Archbishop of Canterbury said, at pp. 653, 654: "Without considering further how far an ecclesiastical judge has a right to act upon his own historical learning, when it becomes important to ascertain what was the ecclesiastical practice or what were the views entertained by eminent theologians, in remote times, it is enough to say here, dealing with the objection generally, that it is impossible to contend that if in other respects the archbishop's judgment was well founded, it could be invalidated by his having called to his aid for this purpose his own historical researches. Nor does it make the objection better that instead of pronouncing *ex cathedra* what in his opinion was the history of such and such a practice the archbishop has disclosed in his judgment the sources from which he derived his views."

(o) Book of Common Prayer.

(a) *Martin v. Mackonochie* (1868), L. R. 2 A. & E. 116, per Sir ROBERT PHILLIMORE, at p. 191; affirmed (1868) L. R. 2 P. C. 365, 385. The person to whom such matters should be submitted is the bishop of the diocese (Book of Common Prayer, Preface, as applied in *Martin v. Mackonochie*, *supra*, per Sir ROBERT PHILLIMORE, at p. 191). The function of the bishop to whom the parties in doubt resort is not to pronounce a legal judgment, but to resolve, if possible, the doubt; and the bishop, if unable so to do, may send for the resolution thereof to the archbishop. This course was adopted in the cases of "Incense and Processional Lights" and the "Reservation of the Sacrament," upon which the archbishops pronounced their opinions at Lambeth (July 31, 1899, and May 1,

sentence being pronounced, even if it be only a monition not to repeat the offence (*b*). If the court is satisfied that the offence will not be repeated, it is entitled to accept the assurance of future submission, and is not bound to inflict a penalty, and a monition is a penalty (*c*).

SECT. 1.
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Service
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(ii.) *Ornaments and Decorations of the Church.*

1330. A bishop cannot by a sentence of consecration legalise the retention in a church of an ornament which is forbidden by law to be there (*d*). The rubric as to ornaments in the commencement of the Prayer Book is in these words: "And here is to be noted, that such Ornaments of the Church, and of the Ministers thereof, at all times of their Ministration, shall be retained, and be in use, as were in this Church of England, by the Authority of Parliament, in the Second Year of the Reign of King Edward the VIth." The rubric deals with two kinds of ornaments—the ornaments of the church and the ornaments of the minister.

Ornaments
of the church.
The orna-
ments rubric.

1331. The term "ornaments" in ecclesiastical law is not confined, as by modern usage, to articles of decoration or embellishment, but it is used in the larger sense of the word "*ornamentum*," which is used *pro quocumque apparatu, seu instrumento* (*e*). All the several articles used in the performance of the service and rites of the church are "ornaments"; in modern times, organs and bells are held to fall under this denomination (*f*).

Meaning of
"ornaments."

The term "ornaments of the church" in the rubric is confined to those articles the use of which in the services and ministrations of the church is prescribed by the first Prayer Book of Edward VI. (*g*). Thus, the rubric provides for the use, *inter alia*, of an English Bible, the new Prayer Book, a poor man's box, a chalice, a corporas, a paten, and a bell. Though there may be articles not expressly mentioned in the first Prayer Book of Edward VI. the use of which would not be restrained, they must be articles which are consistent with and subsidiary to the services,

Examples of
ornaments.

1900, respectively). These opinions, which are hereafter referred to, were not judgments in the strict sense of the term.

(*b*) *Read v. Lincoln (Bishop)*, [1892] A. C. 644, 669, P. C.

(*c*) *Ibid.*

(*d*) *Davey v. Hinde*, [1901] P. 95 (Chichester Consistory Court); see also *Markham v. Shirebrook Overseers*, [1906] P. 239. As to the rights of non-residents to promote a suit, see *Davey v. Hinde*, [1901] P. 95; [1903] P. 221. As to the institution of criminal suits against churchwardens to obtain the removal of illegal ornaments, see *Davey v. Hinde*, *supra*. In *Noble v. Reast*, [1904] P. 94, following *Lee v. Fagg* (1874), L. R. 6 P. C. 38, it was held that a non-parishioner described as a solicitor and secretary to the Archbishop of York and Ordinary of the Diocese of York, who was proved to be the sequestrator of the living in question during a vacancy thereof, had no *locus standi* to promote a suit against the churchwardens during the vacancy for a motion to remove ornaments introduced without a faculty; see also *Liddell v. Beal* (1860), 14 Moo. P. C. C. 1.

(*e*) *Elphinstone v. Purchas* (1870), L. R. 3 A. & E. 66, *per* Sir ROBERT PHILLIMORE, at p. 89, citing *Westerton v. Liddell*, as reported in Moore's Special Report, at pp. 166, 167.

(*f*) *Ibid.*

(*g*) *Ibid.*, *per* Sir ROBERT PHILLIMORE, at p. 89, citing *Martin v. Mackonochie* (1868), L. R. 2 P. C. 365, 390.

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in General.

as an organ for the singing, a credence table from which to take the sacramental bread and wine, cushions or hassocks (*h*).

Further, a distinction must be drawn between those articles which are ornaments of the church in the strict sense of the term and those which are merely decorations. The test of the legality of the latter depends upon whether or not the decorations are in danger of being abused by superstitious reverence.

Painted
windows.

1332. Painted windows or paintings will be held illegal, if the court is satisfied from the mode in which the subject is treated, the place which they occupy, or other incidents, that they are in real danger of adoration, worship, or superstitious reverence. So long as they are free from this charge, and fulfil no other function but that of fitly decorating the church, they are free from objection; the moment that from any cause, whether residing in the objects themselves or arising among those who worship in the church, the danger of their adoration is made manifest, they cease to be innocent and fall under the charge of illegality (*i*).

Stations of
the Cross.

1333. The set of delineations used in Roman Catholic churches, and commonly called the Stations of the Cross and Passion, are not mere architectural decorations. Such of them as have no warrant in gospel history (*k*) are illegal decorations in themselves, while the legality of the others depends upon whether they are likely to be abused in the particular case (*l*).

Crosses and
crucifixes.

1334. Although before the Reformation the symbol of the cross had been put to superstitious uses, yet crosses, which are to be distinguished from crucifixes (*m*), when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, may

(*h*) *Elphinstone v. Purchas* (1870), L. R. 3 A. & E. 66. The construction adopted in the cases cited is not applicable or is misleading if applied to vestments and to the ornaments of the minister (*Ridsdale v. Clifton* (1877), 2 P. D. 276, 336 *et seq.*), as to which see p. 672, *post*.

(*i*) *Clifton v. Ridsdale* (1876), 1 P. D. 316, *per* Lord PENZANCE, at p. 358.

(*k*) As, for instance, the legend of St. Veronica.

(*l*) *Clifton v. Ridsdale* (1876), 1 P. D. 316, 359—363 (affirmed *sub nom. Ridsdale v. Clifton* (1877), 2 P. D. 276, P. C.), where the Court of Arches ordered the removal of all the delineations on the ground that they had been set up by the respondent “without lawful authority,” no faculty having been granted or applied for to justify their erection, which constituted “an addition to the fabric ornaments or furniture of the church,” but left it open to the respondent to apply for a faculty to authorise the introduction into his church of such of them as might turn out to be free from objection. There was no appeal to the Privy Council on this part of the case. For cases where the removal of the Stations of the Cross has been ordered, see *Markham v. Shirebrook Overseers*, [1906] P. 239, where, however, an image of the Good Shepherd, erected without a faculty, was allowed to remain as being a decoration only, there being no proof that superstitious reverence was paid to it (*Re St. Mark's, Murylebone Road*, [1898] P. 114, following *Sieveking v. Kingsford* (1866), 36 L. J. (ECCL.) 1; compare *Re Christchurch, Ealing*, [1906] P. 289). As to the necessity of proving the general desire of parishioners to retain church ornaments not illegal in themselves on an application for a confirmatory faculty, see *Markham v. Shirebrook (Overseers)*, *supra*.

(*m*) *Westerton v. Liddell* (1857), as reported in Moore's Special Report, cited in *Clifton v. Ridsdale* (1876), 1 P. D. 316, 350; *Ridsdale v. Clifton* (1877), 2 P. D. 276, 350, P. C.

still lawfully be erected as architectural decorations (*n*). But a cross, whether movable or not, which by its position is closely connected with the communion table is forbidden by law (*o*).

Crucifixes and sculptured images are not necessarily illegal, even when placed on the top of a chancel screen (*p*). Those which have been set up for the purpose of decoration only and are not likely in the circumstances of the particular case to be abused by superstitious reverence are lawful decorations (*q*).

(*n*) In *Liddell v. Beal* (1860), 14 Moo. P. C. O. 1, a metal cross placed on the end of the east window above the communion table was held to be legal. See also *Westerton v. Liddell* (1857), as reported in Moore's Special Report, cited in *Ridsdale v. Clifton* (1877), 2 P. D. 276, 350, P. C. In *Liddell v. Westerton* (1857), 5 W. R. 470, P. C., the Privy Council decided that the wooden cross erected in that particular case "was to be considered a mere architectural ornament" (meaning "decoration"). In *Phillpotts v. Boyd* (1875), L. R. 6 P. C. 435, the Privy Council, in justifying the erection of the Exeter reredos, adhered to the position taken up in the previous case and pronounced that erection lawful, though it included many sculptured images, on the express ground "that it had been set up for the purpose of decoration only," declaring that it was "not in danger of being abused," and that "it was not suggested that any superstitious reverence has been or is likely to be paid to any of the figures upon it."

In *Ridsdale v. Clifton*, *supra*, at p. 353, the Privy Council in the circumstances of the case affirmed the decision directing the removal of the crucifix, while at the same time stating that it was important to maintain, as to representations of sacred persons and objects in a church, the liberty established in *Phillpotts v. Boyd*, *supra*, subject to the power and duty of the ordinary so to exercise his judicial discretion in granting or refusing faculties as to guard against things likely to be abused for purposes of superstition.

(*o*) *Durst v. Masters* (1876), 1 P. D. 373, P. C., where a movable wooden cross placed on a retablo or ledge above the communion table with the intention that it should remain there permanently was held to be unlawful; see the discussion of this case, and those cited in the preceding note, in *Re St. Mark's, Wimbledon, Wimbledon (Vicar and Churchwardens) v. Eden*, [1908] P. 167, where the chancellor of the diocese of Southwark was of opinion that the placing of a movable wooden cross, whether on or just above the holy table, is not illegal, stating that he was unable to reconcile *Durst v. Masters*, *supra*, with *Liddell v. Beal*, *supra*, where a movable ledge of wood with candlesticks upon it was held not to be inconsistent with the monition to provide "a flat movable table of wood." As to whether the decisions of the Privy Council bind the ecclesiastical courts, see *Re St. Mark's Wimbledon, Wimbledon (Vicar and Churchwardens) v. Eden*, *supra*; *Reid v. Lincoln (Bishop)*, [1892] A. C. 644; and p. 665, *ante*.

(*p*) See the cases cited in the following note.

(*q*) *Phillpotts v. Boyd*, *supra* (sculptured representations in high relief of the Ascension, the Transfiguration, and the Descent of the Holy Ghost on the Day of Pentecost), where the Privy Council, in holding that the reredos erected for the purpose of decoration in Exeter Cathedral was not illegal, since it was not suggested that any superstitious reverence had been or was likely to be paid to any figures forming part of it, considered the effect of the Injunctions of Henry VIII. and the 3rd and 28th Injunctions of Edward VI., stat. (1549) 3 & 4 Edw. 6, c. 10, ss. 1, 2, 6 (which Act the Judicial Committee held to remain unrepealed), the 23rd of the Injunctions of Elizabeth (1559), the Proclamation of Elizabeth (1560), the 22nd Article of Religion, and the Homilies against the Perils of Idolatry recognised in the 35th Article of Religion, and concurred in the opinion expressed by the Privy Council in *Westerton v. Liddell* (1857), Moore's Special Report, that the Act of Edward VI. "related to the destruction of images already ordered to be removed, but which either had not been removed or, having been so, were still retained for private devotion and worship"; *Ridsdale v. Clifton* (1877), 2 P. D. 276, P. C. (crucifix of metal in full relief on top of chancel screen with a row of candles on either side, which were lighted at evening service), where it was held by the Privy Council that in the absence of a proper faculty

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Service
in General.

Chancel
screen gates.

1835. The court will issue a faculty for the erection of chancel screen gates on being satisfied in its discretion that the erection would be of utility (*r*).

the crucifix was unlawfully set up and retained, and that no such faculty ought to be granted, and the crucifix was ordered to be removed, on the ground that there was a likelihood and danger of superstitious reverence, which the Privy Council in *Phillipotts v. Boyd* (1876), L. R. 6 C. P. 435, pronounced to be fatal to the lawfulness of all images and figures set up in a church. As to this case, see p. 669, *ante*; see also *R. v. London (Bishop)* (1889), 24 Q. B. D. 213, C. A., *per* LINDLEY, L.J., at p. 237. Crucifixes and sculptured images have been allowed in the following cases:—*Barsham, Suffolk (Rector etc.) v. Parishioners of the Same*, [1896] P. 256 (figures of our Lord on the Cross, the Virgin Mary and St. John on the chancel screen); *Re St. Anselm, Pinner*, [1901] P. 202, where it was held that the mere suggestion that such figures may cause offence is not sufficient ground for the ordinary refusing in his discretion to grant a faculty; *Great Bardfield (Vicar) v. All having Interest*, [1897] P. 185, where the ordinary was satisfied that the figures would be for the purpose of architectural decoration only, and that there was no ground for reasonable apprehension that they would be abused or made the subject of superstitious reverence; *Hughes v. Edwards* (1877), 2 P. D. 361, 368 (sculptured representation of the crucifixion immediately over the holy table).

In the following cases faculties have been refused:—*Re St. Lawrence, Pitlington* (1880), 5 P. D. 131 (decoration of reredos with a design to represent the Adoration of our Lord in Majesty by the Faithful), where the refusal was on the ground that there would be a danger of that representation being abused by receiving superstitious reverence; *Kensit v. St. Ethelburga, Bishopsgate Within (Rector)*, [1900] P. 80 (crucifixes), where the court held that (1) they were either in themselves illegal church ornaments or illegal architectural decorations; and (2), if not in themselves illegal as such, they were, having regard to their use in the church for superstitious purposes, articles and things the retention of which in the church it would be an unwise exercise of the discretion of the court to authorise; *Richmond (Vicar) and St. Matthias, Richmond (Chapelwardens) v. All Persons having Interest etc.*, [1897] P. 70 (crucifix with or without figures on either side placed on a chancel screen); *Paignton (Vicar) v. All having Interest*, [1905] P. 111 (sculptured group of our Lord on the Cross, the Virgin Mary and St. John), where it appeared that the court, by granting the faculty, would be authorising the restoration of the pre-Reformation screen and rood formerly in the church; *St. John the Evangelist, Clevedon (Vicar and Churchwardens) v. All having Interest*, [1909] P. 6, where the court was of opinion that the erection of a similar group was not contemplated simply and purely as a matter of decoration; *Markham v. Shirebrook Overseers*, [1906] P. 239 (crucifixes over pulpits); *Davey v. Hinde*, [1903] P. 221 (crucifixes). See also *St. Paul, Bow Common*, [1909] P. 245 (rood beam).

A confirmatory faculty to retain ornaments not illegal in themselves should always be refused, unless there is sufficient evidence of a general desire amongst the parishioners to retain them (*Markham v. Shirebrook Overseers, supra*).

(*r*) *St. James, Norland (Vicar etc.) v. Parishioners of the Same*, [1894] P. 256; *Paignton (Vicar) v. All having Interest*, [1905] P. 111; *Re St. Agnes* (1885), 11 P. D. 1; *Re St. John's Church, Isle of Dogs* (1888), Trist 67 (cited [1894] P. 258). In *Westerton v. Liddell* (1857), Moore's Special Report, at p. 77, Dr. LUSHINGTON refused to order the removal of a chancel screen with gates on the ground that they were not prohibited by ecclesiastical law, but added that he should not advise a bishop to consecrate a church with side gates, as he considered the separation of the chancel from the body of the church as objectionable. Faculties have been refused in the following cases, no reason being shown for departing from the ordinary rule laid down in *Westerton v. Liddell, supra*:—*Re St. Augustine, Haggerston* (1877), 4 P. D. 111; *Annunciation, Chislehurst (Vicar) v. Parishioners of Same* (1877), 4 P. D. 114; *Bradford v. Fry* (1878), 4 P. D. 93; *Richmond (Vicar) and St. Matthias, Richmond (Chapelwardens) v. All Persons having Interest etc.*, [1897] P. 70; *St. Andrew, Romford (Rector) v. All Persons etc.*, [1894] P. 220, where the chancellor of St. Albans, being of opinion that the grant of a faculty authorising the erection of the gates would be an exercise of his discretion in opposition to the decision

SECT. 1.
Divine Service
in General.

Reredos.

Tabernacle.

Sanctus bell.

1336. The legality of a reredos depends upon whether it is a mere architectural decoration which is not likely to be the object of superstitious reverence(s).

1337. A tabernacle for the reception of the reserved sacrament is not a lawful church ornament (a).

1338. The ringing of one of the church bells as a sanctus bell is an additional ceremony, and the court will refuse to sanction by faculty alterations to enable one of the church bells to be used from the interior of the church as a sanctus bell (b).

1339. It is lawful to place vases of flowers on the holy table and to keep them there during the performance of divine service, provided they are used as decorations only (c). It is unlawful to have the communion table wholly uncovered during divine service (d).

1340. A movable marble communion table is not a legal article of church furniture (e). A second communion table in a side chapel

Vases of flowers.

Communion table to be covered.

Marble communion table.

Second communion table.

in *Bradford v. Fry*, *supra*, refused the faculty as prayed, but intimated that, if the petitioners desired, the court would decree a faculty to issue for the erection of the chancel screen without any gates to it. The question whether a chancel screen with gates is of practical utility in modern times would usually be answered in the affirmative.

(s) See pp. 668, 669, *ante*, where the cases of the legality of crucifixes and images have been considered in connection with a reredos. In *R. v. London (Bishop)* (1889), 24 Q. B. D. 213, C. A., it was held that where a representation had been sent to the bishop requesting him to allow proceedings to have the reredos in St. Paul's removed as being unlawful, and the bishop had refused, his reason being based on his view that such litigation in his opinion entailed mischievous results, the answer of the bishop was sufficient. In *R. v. London (Bishop)*, *Leighton's Case*, [1891] 2 Q. B. 48, where the representation was the same as in the earlier case, except that it alleged that the reredos had in fact encouraged idolatrous practices, and the bishop, relying on his former consideration of the question, had refused the petition, *HAWKINS, J.*, held that the answer was sufficient. These decisions were affirmed in the House of Lords, which held in both cases that, whether the reasons of the bishop were good or bad, he had acted within his jurisdiction and honestly exercised his discretion and judgment (*R. v. London (Bishop)*, *supra*; *Allcroft v. London (Lord Bishop)*, *Lighton v. London (Lord Bishop)*, [1891] A. C. 666). See also *Great Bardfield (Vicar) v. All having Interest*, [1897] P. 185, 189.

(a) *Kensit v. St. Ethelburga, Bishopsgate Within (Rector)*, [1900] P. 80. As to the reservation of the sacrament, see p. 683, *post*.

(b) *St. John the Evangelist, Clevedon (Vicar and Churchwardens) v. All having Interest*, [1909] P. 6, where it was further decided that the tolling or ringing of one of the church bells of a parish church during the consecration prayer in the Communion Service at the moment of the elevation of each of the sacred elements as a sanctus bell is illegal.

(c) *Elphinstone v. Purchas* (1870), L. R. 3 A. & E. 66.

(d) *Ibid.* As to the covering of the communion table, see Canon 82 and the Rubric.

(e) *St. Luke's, Chelsea (Rector) v. Wheeler*, [1904] P. 257, where it was also held that a faculty may, in the discretion of the ordinary, be granted for a wooden communion table on the front and sides of which are suspended slate slabs decorated with marble mosaics and detachable at will without injury to the table, but see as to this decision *Hayes (Rector and Churchwardens) v. Fulford*, [1910] P. 18. There is nothing illegal in elevating the communion table above the floor of the church (*Re St. Andrew's, Haverstock Hill* (1909), 25 T. L. B. 408); and it is legal to fix curtains behind the communion table and at the north and south ends of it, but not so as to prevent the minister, if so desirous, officiating in the communion at the north end of the table (*Re St. Mark's, Wimbledon, Wimbledon (Vicar and Churchwardens) v. Eden*, [1908] P. 167).

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Credence
table.

Tablet
inviting
prayers for
the dead.

may be sanctioned on the ground of convenience and economy (*f*). Where necessary, a credence table may lawfully be placed in a church as subsidiary to the administration of the Holy Communion (*g*).

1341. The practice of praying for the dead is of much earlier date than the doctrine of purgatory (*h*). Prayers for the dead do not fall under the same condemnation as the Roman doctrine of purgatory; but as prayers for the dead are associated in the popular mind with the later exaggerations referred to in the 22nd Article of Religion, and a bequest made for such prayers being offered would be void by the common law as superstitious (*i*), the ordinary ought not in his discretion to grant a faculty for the introduction of a memorial tablet or window bearing an inscription inviting them (*k*).

(iii.) *Ornaments of the Minister.*

1342. The rubric as to the ornaments of the minister in the commencement of the Prayer Book, which prescribes that such ornaments of the minister at all times of their ministration shall be retained and be in use as were in the Church of England by the authority of Parliament in the second year of Edward VI., requires for the legalisation of the ornaments of the minister at the time of prayers and sacrament that they must have the parliamentary authority of the first Prayer Book of Edward VI., but it is a misapprehension to suppose that the rubric was intended to have, or did have, the effect of repealing the law as it previously stood, and of substituting for that previous law another and a different law, formulated in the words of that rubric, and of thus making the year 1662 a new point of departure in the legislation on this subject (*l*). If it were so, the rubric would not merely "authorise" the use of the vestments referred to, but would make it imperative.

(*f*) *Re Holy Trinity Church, Stroud Green* (1887), 12 P. D. 199; *St. Peter's, Eaton Square (Vicar etc.) v. Parishioners of Same*, [1894] P. 350; *St. Anne's, Limehouse (Rector) v. Parishioners of Same*, [1901] P. 73; *Paignton (Vicar) v. All having Interest*, [1905] P. 111; *Re St. James the Great, Buxton, St. John the Baptist, Buxton (Vicar) v. Parishioners of Same*, [1907] P. 368; *Re St. Mark's, Marylebone Road, St. Mark's (Vicar) v. St. Mark's (Parishioners)*, [1898] P. 114; *Re St. Michael, Bromley* (1908), 25 T. L. R. 95; *Re St. Paul's, Brentford* (1908), 25 T. L. R. 228. The circumstances which warrant the faculty and the structural and other arrangements to be made are matters to be decided by the court granting the faculty in each case (*Re St. James the Great, Buxton, St. John the Baptist, Buxton (Vicar) v. Parishioners of Same*, *supra*).

(*g*) *Westerton v. Liddell* (1857), Moore's Special Report, at p. 187, P. C., overruling *Faulkner v. Litchfield* (1845), 1 Rob. Eccl. 184.

(*h*) *Brecks v. Woolfry* (1838), 1 Curt. 880, *per* Sir HERBERT JENNER.

(*i*) See title CHARITIES, Vol. IV., pp. 120—122.

(*k*) *Egerton v. All of Odd Rode*, [1894] P. 15. The second Prayer Book of Edward VI. (1553) omitted prayer for the dead. As to inscriptions on tombstones in parish churchyards inviting them, see *Pearson v. Steud*, [1903] P. 66.

(*l*) *Ridsdale v. Clifton* (1877), 2 P. D. 276, P. C., affirming the decision of the Arches Court that the wearing during the service of Holy Communion of the vestments known as the alb and chasuble is illegal, and approving *Hibbert v. Purchas* (1870), L. R. 3 P. C. 605. As to *Westerton v. Liddell*, *supra*, everything said and done in that case to which the Rubric of 1662 was material had reference exclusively to ornaments of the church. The court "had nothing to do with the ornaments of the minister or anything appertaining thereto" (Moore's Special Report, p. 31). See *Ridsdale v. Clifton*, *supra*, at p. 336. In *Martin v. Mackonochie* (1868), L. R. 2 P. C. 365, it

The view accepted by the Privy Council is that (omitting all reference to hoods and to the ornaments of bishops) the law existing up to the year 1667 (*m*) was not inconsistent with the

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was sufficient to consider the effect of the mere words of the Rubric of 1662, repeating (as it did) in 1662 the language of the Act of the first year of Elizabeth on a point unaffected by anything done in the meantime. See *Ridsdale v. Clifton*, *supra*, at p. 338. The construction of the Rubric of 1662 in *Elphinstone v. Purchas* (1870), L. R. 3 A. & E. 68, to the effect that it authorises the use of the vestments mentioned in the first Prayer Book of Edward VI. was not accepted by the Privy Council (see the same case on appeal *sub nom. Hebbert v. Purchas* (1871), L. R. 3 P. O. 605).

Construction
of the rubric.

(*m*) Some reference to the history of this subject is rendered necessary by the fact that the legality of particular vestments depends upon the history of the question up to the year 1662.

In the first Prayer Book of Edward VI. (1549) the directions as to the vestures of the ministers officiating in the public services of the Church (omitting all that relates to hoods and the directions as to bishops) were as follows:—In the saying and singing of matins and evensong, baptizing, and burying, the minister was to use a surplice. In the administration of the Holy Communion the celebrant was to “put upon him a white alb plain, with a vestment or cope,” and the assistant ministers (priests or deacons) were to “have upon them likewise the vestures appointed for their ministry, namely, albes with tunicles.” These directions were omitted from the second Prayer Book of Edward VI. (1552); and instead a rubric was inserted immediately before the order of Morning Prayer, in these words: “And here it is to be noted, that the minister at the time of the communion and at all other times of his ministration, shall use neither alb, vestment, nor cope; but . . . being a priest or deacon, he shall have and wear a surplice only.” Upon the accession of Elizabeth after the Marian reaction no new or revised Prayer Book was annexed to Queen Elizabeth’s Act of Uniformity (1558) (1 Eliz. c. 2), but the second Prayer Book of Edward VI., with certain alterations and additions immaterial to this subject, was directed to stand and be in full force from the 24th of June, 1559. The enactment was, however, qualified by the provisos contained in ss. 25 and 26, of which the former is in these words: “Provided always and be it enacted, that such ornaments of the church, and of the ministers thereof, shall be retained and be in use, as were in this Church of England by authority of Parliament in the second year of King Edward the Sixth, until other order shall be therein taken by the authority of the Queen’s Majesty, with the advice of her commissioners appointed under the Great Seal of England for causes ecclesiastical, or of the metropolitan of this realm.” In this way the directions as to ornaments of the first Prayer Book were kept in force until the order should be taken in the way provided by the Act. The Privy Council have decided (*Ridsdale v. Clifton* (1877), 2 P. D. 276, P. C.) that the advertisements issued by Elizabeth and dealing with the vestments of ministers in 1566 (but not the Injunctions of Elizabeth) were a “taking of order” within the Act by the Queen with the advice of the metropolitan.

These advertisements were in these words: “In the ministration of the Holy Communion in cathedral and collegiate churches, the principal minister shall wear a cope, with gospeller and epistoller agreeably; and, at all other prayers to be said at that communion table, to use no copes, but surplices.

“That the dean and prebendaries wear a surplice with a silk hood in the choir; and, when they preach, to use their hoods.

“Item, that every minister saying any public prayers, or ministering the sacraments, or other rites of the Church, shall wear a comely surplice with sleeves, to be provided at the charge of the parish.”

Accordingly the Privy Council, holding that the advertisements had the force of law under stat. (1558) 1 Eliz. c. 2, s. 25, read the order as to vestures in the Book of Advertisements into the 25th section of stat. (1558) 1 Eliz. c. 2, and, omitting (for the sake of brevity) all reference to hoods, decided that that section from 1566 to 1662 had the same operation in law as if it had been expressed in these words: “Provided always that such ornaments of the church and of the ministers thereof shall be retained

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ornaments rubric and was not repealed by the Act of Uniformity of that year, and that consequently they are to be read together. Accordingly, while the general standard of ornaments of the ministers is that established by authority of Parliament by the directions contained in the first Prayer Book of Edward VI., Queen Elizabeth's Act of Uniformity and the further order taken thereunder engraft on this standard a qualification that as to the vestures of parish ministers the surplice, and not the alb, vestment, or tunicle, should be used at all times of their public ministrations, and that a cope may not be used except at the ministration of the Holy Communion in cathedral and collegiate churches (*n*).

and be in use as were in this Church of England by authority of Parliament in the second year of King Edward VI., except that the surplice shall be used by the ministers of the church at all times of their public ministrations, and the alb, vestment or tunicle shall not be used, nor shall a cope be used except at the administration of the Holy Communion in cathedral and collegiate churches"; that the 25th section of stat. (1558) 1 Eliz. c. 2 has not been repealed; that there is nothing inconsistent between the Rubric of the present Prayer Book and the section, and that the Rubric of 1662 did not make any change in the law. In arriving at this decision the Privy Council relied on evidence that after 1566 vestments, albs and tunicles (copes also in parish churches and in non-collegiate churches) are only mentioned in contemporary documents as things associated with superstition, and to be defaced and destroyed. The advertisements were accepted as law, as having the Queen's authority. They were referred to as of legal authority in several of the Canons of 1571, showing (though those canons were not confirmed by the Crown) the sense of the convocations of both provinces. The 24th and 25th canons of 1603-4 (which received the royal assent) repeated with express reference to the advertisements the substance of their directions as to the use of copes, surplices etc. in cathedral and collegiate churches; and the 58th Canon, which relates to the use of surplices at Holy Communion in parish churches, followed with scarcely any variations the exact words of the advertisements. The Canons of 1640 (also confirmed by the Crown) carry on the public evidence of the same understanding to the time of the Great Rebellion. Since the decision further light has been thrown on these points by historical research, and a large amount of evidence was laid before the Royal Commission on Ecclesiastical Discipline (Parliamentary paper, 1906, Vol. XXXIII., p. 10) in support of contentions that the decision is incorrect in substance (1) in holding that the ornaments rubric refers as a standard for ornaments to what was authorised by the first Prayer Book of Edward VI. (it being alleged that the standard should be the standard in the second year of Edward VI. before the first Prayer Book came into force), and (2) in holding that the advertisements of 1566 ought to be read with this rubric. The Commission, without dealing with the question, pointed out that the judgments of the Privy Council are open to reconsideration by the court itself, which will not only look carefully at the fresh light of facts not before it on a previous occasion, but will also examine the reasons upon which the previous decision rests and give effect to its own view of the case (see also p. 665, *ante*).

(*n*) *Ridedale v. Clifton* (1877), 2 P. D. 276, P. O., which must be taken to lay down the present state of the law as to vestments. It follows from the fact that a cope is a proper vestment at Holy Communion in cathedral and collegiate churches that the cope is not illegal in parish churches on the ground that it has any special doctrinal signification. The following extracts from the first Prayer Book of Edward VI. are taken from *Hierurgia Anglicana* (1902), Part I., pp. 135, 136, which (pp. 135-235) is a storehouse of information on the subject of ecclesiastical vestments:—"Upon the day, and at the time appointed for the ministration of the Holy Communion, the priest that shall execute the holy ministry, shall put upon him the vesture appointed for that ministration, that is to say, a white albe plain, with a vestment or cope. And where there be many priests or deacons, then so many shall be

A biretta may lawfully be used by the minister during divine service as a protection to the head when needed (o), but the use of a biretta as a vestment in the services of the church is illegal (p).

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(iv.) *Rites and Ceremonies.*

1343. The terms "rite" and "ceremony" as used in the Prayer Book are terms of ecclesiastical and ritual art, and are to be construed with reference to their use in the works of writers on ritual unless they receive a different meaning from a comparison of other passages or parts in the Prayer Book or statute in which they are found. There is a legal distinction between a rite and a ceremony; a rite consists in services expressed in words, a ceremony in gestures or acts preceding, accompanying, or following the utterance of those words (q).

Definition of
"rites" and
"ceremonies."

It is not open to a minister of the church, or even to the highest ecclesiastical tribunal of appeal, to draw a distinction, in acts which are a departure from or violation of the rubric, between those which are important and those which appear to be trivial. The object of a Statute of Uniformity is to produce an universal agreement in the worship of Almighty God (r), an object which would be wholly

Trivial
violations
of the rubric.

ready to help the priest in the ministration, as shall be requisite; and shall have upon them likewise the vestures appointed for their ministry, that is to say albes with tunicles."

"Though there be none to communicate with the priest, yet these days [Wednesdays and Fridays], after the Litany ended, the priest shall put upon him a plain albe or surplice, with a cope, and say all things at the altar (appointed to be said at the celebration of the Lord's Supper,) until after the offertory."

"And the same order shall be used all other days, whensoever the people be customably assembled to pray in the church, and none disposed to communicate with the priest."

"In the saying or singing of matins and evensong, baptizing and burying, the minister, in parish churches and chapels annexed to the same, shall use a surplice. And in all cathedral churches and colleges, the archdeacons, deans, provosts, masters, prebendaries, and fellows, being graduates, may use in the quire, beside their surplice, such hood as pertaineth to their several degrees, which they have taken in any university within this realm; but in all other places, every minister shall be at liberty to use any surplice or no. It is also seemly, that graduates, when they preach, should use such hood as pertaineth to their several degrees."

"And whensoever the bishop shall celebrate the Holy Communion in the church, or execute any other public ministration, he shall have upon him, beside his rochet, a surplice or albe, and a cope or vestment; and also his pastoral staff in his hand, or else borne or holden by his chaplain."

As to mitres, which are not mentioned in the first Prayer Book of Edward VI., see *Hierurgia Anglicana*, Part I., pp. 223 *et seq.*

(o) *Elphinstone v. Purchas* (1870), L. R. 3 A. & E. 66.

(p) In *Hebbert* (theretofore *Elphinstone*) v. *Purchas* (1871), L. R. 3 P. O. 605, p. 651, all that was said was: "With respect to the cap called a biretta, which the respondent is said to have carried in his hand, but not to have worn in church, their Lordships would not be justified, upon the evidence before them, in pronouncing that the respondent did an unlawful act." The use of a biretta as a vestment in divine service is unlawful within the principle of the later case of *Ridsdale v. Clifton* (1877), 2 P. D. 276, P. O.; see p. 672, *ante*.

(q) *Martin v. Mackonochie* (1868), L. R. 2 A. & E. 116.

(r) These are the words of the preamble cited in *Martin v. Mackonochie* (1868), L. R. 2 P. O. 365, 382, 383.

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The rubrics
 must be
 observed
 without
 omission or
 addition.

frustrated if each minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, to add to, or to alter any of those details (s). In cases where there is doubt the Preface to the Prayer Book provides that "the parties that doubt or diversely take anything should always resort to the bishop of the diocese." But in matters which involve what is expressly ordered and prohibited by the rubric the bishop can have no jurisdiction to modify or dispense with the rubrical provisions (t), and in the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted (u).

(s) *Martin v. Mackonochie* (1868), L. R. 2 P. C. 365, 383.

(t) *Ibid.*, at p. 385. In the case of Incense and Processional Lights before the archbishops at Lambeth Palace (July 31, 1899, Macmillan & Co.'s Official Report), the following opinion was expressed: "The ministration of the ministers is contained in and prescribed by the Book of Common Prayer. It is there that we find what is the form to be observed in all the offices of public worship. Every clergyman is required by the 36th Canon to use the form in the Book of Common Prayer prescribed, and none other. And the only authority which can bind or authorise the clergyman to make any variation whatever from what is contained in the Book is either an Act of Convocation, legalised when necessary by Parliament, or the order of the Crown, issued with the advice and consent of the metropolitan under the Act of 1559, or a direction of the ordinary under the Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 35)."

(u) *Westerton v. Liddell* (1857), Moore's Special Report, p. 187, adopted and approved in *Martin v. Mackonochie*, *supra*, at p. 383. The present Act of Uniformity, 1662 (14 Car. 2, c. 4), is entitled "An Act for the uniformity of public prayers, and administrations of sacraments, and other rites and ceremonies; and for establishing the form of making, ordaining, and consecrating bishops, priests, and deacons in the Church of England." S. 1, after reciting that "nothing conduceth more to the settling of the peace of the nation, nor to the honour of our religion and the propagation thereof, than a universal agreement in the worship of Almighty God, and to the intent that every person in this realm may certainly know the rule to which he is to conform in public worship and administration of sacraments, and other rites and ceremonies of the Church of England," enacts that "all ministers shall be bound to say and use the morning prayer, evening prayer, and celebration and administration of both sacraments, and all other the public and common prayer, in such order and form as is mentioned in the book annexed and joined to the Act, intituled The Book of Common Prayer and administration of the sacraments and other rites and ceremonies of the church, according to the Church of England." By s. 13 it is enacted that no form or order of common prayers, administration of sacraments, rites or ceremonies, shall be openly used in any church, chapel or other public place, or in any college or hall in either of the universities, the colleges of Westminster, Winchester or Eton, or any of them, other than what is prescribed and appointed to be used in and by that book. S. 20 enacts that statutes then in force for the uniformity of prayer and administration of the sacraments shall stand in full force and shall be applied for the punishment of all offences contrary to the said laws with relation to the present Prayer Book. By stat. (1558) 1 Eliz. 2, c. 2, s. 27 (the Act of Uniformity), it is enacted "that all laws statutes and ordinances wherein or whereby any other service, administration of sacraments, or common prayer is limited, established or set forth to be used within this realm, or any other the Queen's dominions or countries, shall from henceforth be utterly void and of none effect." It was held in *Ridsdale v. Clifton* (1877), 2 P. D. 276, P. C., that the Act of Uniformity of Charles II. expressly confirms the Act of Uniformity of Elizabeth. As to punishment by admonition, see s. 23 of the latter statute.

This general rule must be interpreted as permitting acts of the minister which are necessarily implied though not defined. Further, the doing of an act before a service cannot be treated as the addition of a ceremony to the service (*a*).

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1344. Universal and unbroken usage is of great force. And so it would be impossible now to contend that singing a hymn at all during the service, in itself, and apart from any interference with the due order of the service or anything objectionable in the hymn sung, is illegal (*b*). On this principle the use of the words "Glory be to Thee, O God" at the reading of the Gospel in the Communion Service is a lawful addition to the service (*c*). Similarly the singing of the *Agnus Dei* immediately after the prayer of consecration and while the administration is proceeding is not an illegal addition to the service (*d*).

General and
unbroken
usage.
Hymns.

1345. The rubric which is appended to the service of Holy Communion directs, with the expressed object of taking away all occasion of dissension and superstition which any person has or might have concerning the bread and wine, that it shall suffice that the bread be such as is usual to be eaten, but the best and purest wheat bread that conveniently may be gotten. In this rubric the words "it shall suffice" contain a positive direction (*e*). It is the composition of the substance employed, and not the shape, that is material, so that, although, if it is averred and proved that the wafer properly so called has been used, the court would hold that an

The Elements

(*a*) See *Read v. Lincoln (Bishop)*, [1892] A. C. 644, 657, P. C.; and p. 678, *post*.

(*b*) *Read v. Lincoln (Bishop)*, *supra*, at p. 660. Whether or not the origin of the usage is the permission given by stat. (1548) 2 & 3 Edw. 6, c. 1, s. 7, "to use openly any psalms or prayer taken out of the Bible at any due time, not letting or omitting thereby the service or any part thereof mentioned in the said book," it was, in the opinion of the Judicial Committee, immaterial to inquire.

(*c*) In the Incense Case before the archbishops the opinion expressed was that the practice is in strictness illegal. "It is quite true that there may be variations which are so brief, so long in use, so unimportant, that a bishop would be justified in refusing to allow a clergyman to be prosecuted because of his use of them. No authority has been found for the short sentences which in many churches the people are accustomed to say or sing immediately before and after the reading of the gospel in the communion office. There is no authority for the practice of the people saying the general thanksgiving aloud with the minister. There is no authority for shortening the exhortation which the minister is to read when giving notice of the Holy Communion. These practices are probably in strictness all illegal; but no bishop would be wise in allowing a prosecution for such unimportant deviations from the strict letter of the law. This, however, cannot be said of the introduction of any ceremony which is conspicuous, not sanctioned by long-continued custom in our Church, and of such a nature as to change the general character and aspect of the service" (Lambeth Opinion, July, 1899, on Incense and Processional Lights (Macmillan & Co.'s Official Report of Opinions, p. 8)). The archbishops pronounced that in their opinion the liturgical use of incense and processional lights was illegal.

(*d*) *Read v. Lincoln (Bishop)*, *supra*, at pp. 659—661, overruling *Elphinstone v. Purchas* (1870), L. R. 3 A. & E. 66, 98, and *Martin v. Mackonochie* (Second Suit) (1874), L. R. 4 A. & E. 279. In *Clifton v. Ridsdale* (1876), 1 P. D. 316, 340, counsel admitted the illegality when the case was before Lord PENZANCE.

(*e*) *Hebbert v. Purchas* (1871), L. R. 3 P. C. 605, 656.

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in General.

Mixing of
the wine with
water.

Position of
celebrant.

illegal act had been committed, yet, where it is averred and proved that "bread made in the form of circular wafers instead of bread such as is usual to be eaten" has been used, the accused will be entitled to the benefit of the ambiguity in the form of the charge (*f*).

The mixing of the wine with water in and as part of the Communion Service is against the law of the Church, but there is no ground for pronouncing the use of a cup mixed beforehand to be an ecclesiastical offence (*g*).

1346. The rubric prefixed to the Communion Service directs that the priest, standing at the north side of the table, shall say the Lord's Prayer with the Collect following, the people kneeling. This rubric, which has been the subject of much litigation, does not touch matters of doctrine (*h*). When the terms of the rubric are considered in connection with the circumstances existing at the time it was framed (*i*), it cannot be regarded as so definitely and unequivocally enjoining that the priest shall, no matter how the table may be placed, stand at that end of the table which faces the north when saying the opening prayers that no other position can be assumed without the commission of an ecclesiastical offence. It does not render obligatory on a clergyman who thinks it desirable during the prayer of consecration to stand at the side of the table, which now ordinarily faces westward, to stand during the earlier

(*f*) *Ridsdale v. Clifton* (1877), 2 P. D. 276, P. C. See also *Hebbert v. Purchas* (1871), L. R. 3 P. C. 605, and Canon 20 (1603-4), which directs that the churchwardens of every parish, against the time of every communion, shall, at the charge of the parish, with the advice and direction of the minister, provide a sufficient quantity of fine white bread, and of good and wholesome wine etc. The decision in *Elphinstone v. Purchas* (1870), L. R. 3 A. & E. 66, that it is lawful to administer to the communicants wafer bread which is not such as is usual to be eaten, provided the wafer bread be broken by the priest, is wrong.

(*g*) *Read v. Lincoln (Bishop)*, [1892] A. C. 644, 658, P. C., "the removing from the service the act of mingling, which the judgment in *Hebbert v. Purchas* (1871), L. R. 3 P. C. 605, treated as of no moment, is the removal of the very thing which as an added ceremony was unlawful"; see also *Martin v. Mackonochie* (1868), L. R. 2 A. & E. 116. In the Incense Case before the archbishops at Lambeth (Macmillan's Official Report of the Opinions, July, 1899, p. 12) the archbishops said: "Though our Lord used the wine of the Passover, which was a mixed cup, there is no record of His having mixed it afresh for the purpose of His sacrament, nor is there any reason to believe that He did so. The mixing of the chalice as part of the ceremonial was therefore omitted, though nothing was said to prevent it being mixed beforehand."

(*h*) *Read v. Lincoln (Bishop)*, *supra*, at p. 661. Whatever the position of the priest may be, it is the same whether there is or is not a celebration of the Lord's Supper (*ibid.*, at p. 661).

(*i*) At the period when the rubric was framed the table was, at the time of the Holy Communion, placed in almost all parish churches lengthwise in the body of the church or chancel, the smaller sides or ends facing east and west, and the longer sides north and south. The rubric was framed with reference to this position of the table. When at a later period the holy table came to be placed altar-wise, a controversy arose as to the position of the priest, which was still being carried on when the present Prayer Book came into force; but the rubric prescribing the position of the priest at the commencement of the Communion Service was left unaltered in its terms, and no attempt was made to solve the controversy.

part of the service at a different part of the table. This does not import that it would be contrary to the law to occupy a position at the north end of the table when saying the opening prayers. It is, however, now settled law that it is not an ecclesiastical offence to stand at the northern part of the side which faces westwards (*k*).

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in General.

Manual acts
to be visible to
the communi-
cants pro-
perly placed.

Although the rubric which directs that "When the priest, standing before the table, hath so ordered the bread and wine, that he may with the more readiness and decency break the bread before the people, and take the cup into his hands, he shall say the prayer of consecration, as followeth," taken literally as it stands applies the actual expression "before the people" to only one of the manual acts prescribed, which are five in number, yet, on its proper construction, the order of the Holy Communion requires that all the manual acts must be performed in such wise as to be visible to the communicants properly placed (*l*); and it is not a sufficient answer to a charge that they have been rendered invisible to reply that there was no wish or intention to prevent their being seen (*m*); but a court, if satisfied that the offence will not be repeated, is entitled to accept the assurance of future submission (*n*).

The celebrant during the prayer of consecration must stand, and not kneel or prostrate himself before the consecrated Elements during the reciting of the prayer; and the words "standing before the table" apply to the whole sentence in the rubric, and to all the acts directed to be done. Therefore a change of posture is a violation of the rubric which immediately precedes the prayer of consecration, and constitutes an ecclesiastical offence within the meaning of the Acts of Uniformity (*o*) and is punishable by admonition (*p*), and does not belong to the category of cases which, according to the Preface to the Prayer Book, should be referred to the bishop of the diocese for his direction (*q*).

Posture of
celebrant.

The elevation of the Elements when consecrated is illegal (*r*).

Elevation of
the Elements.

(*k*) *Read v. Lincoln (Bishop)*, [1892] A. C. 644, 663—665, P. C. (in which *Hebbert v. Purchas* (1871), L. R. 3 P. C. 605, and *Ridsdale v. Clifton* (1877), 2 P. D. 276, P. C., were considered; see also *Read v. Lincoln (Bishop)*, as reported [1891] P. 9, 23 *et seq.* (Court of the Archbishop of Canterbury).

(*l*) *Read v. Lincoln (Bishop)*, [1891] P. 9, 63.

(*m*) *Ibid.* It is probable that this decision would be followed by the Privy Council in the future, although the Privy Council in *Ridsdale v. Clifton*, *supra*, at p. 343, merely held that "he must not interpose his body so as intentionally to . . . prevent that result."

(*n*) *Read v. Lincoln (Bishop)*, *supra*, at p. 699.

(*o*) (1662) 14 Car. 2, c. 4, ss. 1, 13, 20, taken in conjunction with stat. (1558) 1 Eliz. c. 2.

(*p*) Under s. 23 of stat. (1558) 1 Eliz. c. 2.

(*q*) *Martin v. Mackonochie* (1868), L. R. 2 P. C. 365. A monition ordering the respondent to abstain from kneeling and prostrating himself before the consecrated Elements during the prayer of consecration was held to be disobeyed when the ordinary course pursued in the respondent's church was for the celebrant to bow his head down towards the table when the consecrated Elements had been placed thereon and remain some seconds in that position before administering the sacrament, although the knee was not bowed (*ibid.*, at p. 379). As to what is and is not disobedience to a monition, see also *Martin v. Mackonochie* (1869), L. R. 3 P. C. 52.

(*r*) In *Martin v. Mackonochie* (1868), L. R. 2 A. & E. 116, it was held by the Arches Court that it is unlawful for a clerk in holy orders to elevate the

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A priest who is proved to have consecrated and received the Elements when less than three persons (the number required by the rubric as a minimum (s)) communicated with him, must establish that he did in fact believe that the requisite number would communicate with him before he can set up any exculpation based on the imperfect state of his knowledge (t).

Notices.

1347. It is unlawful for a minister to announce that there will be "a high celebration of the Holy Eucharist," the epithet "high" having no sanction from the rubric; and it is unlawful for a minister to give notice that any holy days are to be observed which are not found after the Preface to the Prayer Book under the head of "A Table of all the Feasts that are to be observed in the Church of England throughout the year" (u). An omission to give notice of the holy days or fasting days to be observed in the week following is an ecclesiastical offence (a). Although in strictness it is not lawful to announce anything except that which is prescribed by the Prayer Book, without at least the authority of the ordinary, yet

paten and cup above the head after consecration of the Elements. And in *Martin v. Mackonochie* (1869), L. R. 3 P. C. 52, when it appeared that the elevation for which the respondent had been articulated and complained of in the court below was an elevation above his head, which was the only mode of elevation pleaded in the article after it had been reformed to have been practised by him, and was therefore that prohibited by the sentence of the court below, but that the respondent had substituted an elevation only to the level of his head (in the state of the pleadings the illegality of the elevation since practised not being raised), it was held by the Privy Council that the respondent had technically complied with the terms of the original sentence and order and could not be held to have disobeyed the monition in that respect. The Privy Council, however, disapproved and discountenanced any elevation of the Elements whatever. And in *Martin v. Mackonochie* (1870), L. R. 3 P. C. 409, the Privy Council seems to have considered that as the 28th of the Articles of Religion prohibits all elevation of the Elements by declaring that "the sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped," it is not necessary to article and describe a particular elevation during the prayer of consecration, but sufficient to state and prove that such elevation occurred during the administration of the Holy Communion.

(s) See p. 692, *post*.

(t) *Clifton v. Ridsdale* (1876), 1 P. D. 316, where it was proved in a proceeding under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), that a like infringement had taken place on several previous occasions during the respondent's incumbency, and that no steps were taken by him to prevent its recurrence, and the Court of Arches admonished the respondent to obey the rubric. The rubrics do not direct that non-communicants should retire from the church. Lord PENZANCE suggested (*ibid.*, at p. 348) that the most formal method of procedure would be for the clergyman to apply to his ordinary, and with his leave to read out during the service a notice describing what those who intended to communicate should do to declare themselves; but this formality would seem to be unnecessary, in spite of the judgment in *Westerton v. Liddell*, Moore's Special Report (cited in *Clifton v. Ridsdale* at p. 348), as it is improbable that any court would hold that an announcement from the pulpit, even without the leave of the ordinary, that communicants should conveniently place themselves apart from the rest was unlawful.

(u) *Elphinstone v. Purchas* (1870), L. R. 3 A. & E. 66, 111, 112, where the defendant was admonished to abstain from giving notices of such holy days as the feasts of St. Leonard, St. Martin, and St. Britius.

(a) The rubric is imperative (*ibid.*, at p. 111); see p. 690, *post*.

notices which concern the congregation and ordinary church business and are not contrary to the spirit of the Prayer Book would seem to be unobjectionable (b).

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1348. To cause lighted candles to be held one on each side of the priest when reading the gospel, such lighted candles not being required for the purpose of giving light, is illegal as an addition to the ceremonies prescribed by the law (c).

Lighted
candles.

The ceremonial lighting and burning of candles placed on a ledge or shelf over the holy table, and of candles placed on each side of the holy table, is, during the Communion Service, illegal (d). But the court will not now find sufficient warrant for declaring that the law is broken by the mere fact of two lighted candles, when not wanted for the purpose of giving light, standing on the holy table continuously through the service, nothing having been performed or done, which comes under the definition of a ceremony, by the presence of two still lights alight before it begins and until after it ends (e).

(b) Compare the decision of the Privy Council as to hymns in *Read v. Lincoln (Bishop)*, [1892] A. C. 644, 660, P. C.

(c) *Sumner v. Wix* (1870), L. R. 3 A. & E. 58, 62.

(d) *Ibid.*, at pp. 64, 65. Weight was apparently given to the Injunctions of Edward VI. in *Westerton v. Liddell* (1857), Moore's Special Report, but they were rejected in *Martin v. Mackonochie* (1868), L. R. 2 P. C. 365, where they were relied upon for the purpose of showing that the burning of two candles to represent the true light of the world was legal. The Injunctions of Edward VI. only applied to the case of lights on the "high altar."

(e) *Read v. Lincoln (Bishop)*, [1892] A. C. 644, 666, P. C.: "It is not charged that there was any act of lighting or carrying lights about, nor was there any evidence of their use as a matter of ceremony, unless it be afforded by the mere fact that they were alight during the Communion Service. If the proof corresponded with the allegation in all respects, it would be matter for grave consideration how far the archbishops' elaborate exposition of the history of the question, and in particular the decision of two learned judges in 1628" (Sir James Whitelocke; State Papers, Domestic Series, Charles I., Vol. CXIII., 19, Calendar, p. 259, cited in *Read v. Lincoln (Bishop)*, [1891] P. 9, at p. 83) "and 1629" (Sir Henry Yelverton, State Papers, Domestic Series, Charles I., Vol. CXLVII., 15, 35, Cosin, Corresp. I. lxxxvii.; cited *ibid.*, p. 84), "have afforded new materials for consideration since the decision of this Board in *Martin v. Mackonochie* (1868), L. R. 2 P. C. 365, upon the same subject; but their Lordships are unable to see that the charge against the bishop raises the same question." The Privy Council in *Read v. Lincoln (Bishop)*, *supra*, attached importance to the passage in the judgment in *Martin v. Mackonochie*, *supra*, at p. 387: "There is a clear and obvious distinction between the presence in the church of things inert and unused and the active use of the same things as a part of the administration of a sacrament or of a ceremony. Incense, water, a banner, a torch, a candle, and a candlestick may be part of the furniture or ornaments of the church, but the censuring of persons and things, or, as was said by the Dean of the Arches, the bringing in incense at the beginning or during the celebration and removing it at the close of the celebration of the Eucharist, the symbolical use of water in baptism, or its ceremonial mixing with the sacramental wine; the waving or carrying the banner; the lighting, cremation, and symbolical use of the torch or candle—these acts give a life and meaning to what is otherwise inexpressive, and the act must be justified, if at all, as part of a ceremonial law." The decision of the Privy Council in *Martin v. Mackonochie*, *supra*, was (1) that it is unlawful to place lighted candles on the communion table during Holy Communion when not required for the purpose of giving light (see also *Westerton v. Liddell* and *Deal v. Liddell* (1857), Moore's Special Report), as the use

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 Service
 in General.
 —
 Processions.
 Processional
 lights.
 Incense.

1349. Processions proceeding round the interior of the church immediately before the commencement or immediately after the conclusion of morning or evening service, so conducted as to constitute an additional rite or ceremony in connection with the service, are illegal (*f*). There is no authority for carrying lights in procession (*g*).

1350. The use of incense in the public worship and as a part of that worship is not enjoined nor permitted by the law of the Church of England. If used at all it must be used to sweeten the church and outside the worship altogether. Even now the liturgical use of incense is not by law permanently excluded from the Church's ritual. The section in the Act of Elizabeth which allows the Crown with the consent of the Archbishop of Canterbury to order new ceremonies does not forbid the inclusion of the use of incense in such new ceremonies if such are ordered (*h*).

of lighted candles, if intended as a ceremony or ceremonial act, is not among the ceremonies which are retained in the Prayer Book and must therefore be included among those that are abolished and prohibited by stat. (1558) 1 Eliz. c. 2, ss. 4, 27, which statute is applicable to the present Prayer Book, and by which the royal injunctions issued in the first year of Edward VI. (1547), even if they possessed statutable authority, were, so far as they could be taken to authorise the use of lights as a ceremony or ceremonial act, abrogated and repealed; and (2) that if candlesticks and candles were intended to be used as ornaments when lighted and used with reference to a service in which they are to act as symbols and illustrations, they are not ornaments within the meaning of the rubric, as they are not prescribed by the authority of Parliament as mentioned in the rubric to the first Prayer Book; nor are the injunctions of 1547 "authority of Parliament" within that rubric; nor are lighted candles subsidiary to the service, for they do not facilitate, much less are they necessary to, the service; nor can a separate and independent ornament, previously in use, be said to be consistent with a rubric which is silent as to it, and which, by necessary implication, abolishes what it does not retain. As to the construction of the rubric, see, however, *Ridgdale v. Clifton* (1877), 2 P. D. 276, P. O. In *Re St. Mark's, Wimbledon, Wimbledon (Vicar and Churchwardens) v. Eden*, [1908] P. 167, 173, the Chancellor of Southwark, having referred to the refusal of Dr. Lushington in *Westerton v. Liddell*, *supra*, to order the removal of candlesticks and candles placed on the holy table, stated that it was held in the court of the archbishop in *Read v. Lincoln (Bishop)*, *supra*, that such lights are lawful, and he refused to condemn as illegal church furniture which was otherwise perfectly innocent merely on the ground that it might be used in a way which that authority pronounced to be illegal. See also *Re St. Paul's, Camden Square* (1898), 14 T. L. R. 85.

(*f*) *Elphinstone v. Purchas* (1870), L. R. 3 A. & E. 66.

(*g*) See the opinion of the archbishops as to processional lights (Lambeth, 1899). "It is obvious," said the archbishops, "that precisely the same line of reasoning is applicable to the case of processions carrying lights as we have applied to the case of incense. There is no authority for such processions, and they are, therefore, neither enjoined nor permitted. To light up the church for the purpose of adding to its beauty or its dignity stands on the same footing with hanging up banners, decorating with flowers or with holly or the like. The ceremonies of carrying lights about have a different character. And in this case, as in that of incense, we are obliged to request the clergy to discontinue what the law of the Church of England does not permit: the carrying of lights in procession. And in this decision we have the support of the late Archbishop Benson in his judgment in the case of the Bishop of Lincoln" (Opinion of the Archbishops, Macmillan's Official Report, p. 14).

(*h*) The above remarks are taken from the Opinion of the archbishops on the liturgical use of incense and the carrying of lights in procession pronounced at

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Service
in General.
Ceremony of
ablation.

1351. Anything like the ceremony of ablation, such as the pre-Reformation practice, according to which the minister after receiving the communion in both kinds himself long before he gave it to other persons went through forms of washing and wiping the chalice and his own fingers with other acts and with several prayers in places and in postures prescribed for him and for other ministers, as a distinct and integral part of the service still in progress is illegal; but the reverent consumption of what remains and ablation of the vessels are contemplated by the rubric. The consumption of the remains is ordered to be done "immediately after the blessing," when, upon the true construction of the rubric, the service is at an end; and the cleansing of the vessels is not an improper completion of this act which is ordered to follow the close of the service without any break or interval (*i*).

The minister would most properly complete the consumption of the consecrated elements at the credence, or in the place where they had been prepared. But the minister, who after the service is ended and the benediction given, in order that no part of the consecrated Elements should be carried out of the church, cleanses the vessels of all remains in a reverent way, without ceremony or prayers, before finally leaving the holy table does not subject himself to penal consequences by so doing (*k*).

1352. The practice commonly spoken of as reservation takes three distinct forms. In the first place it is sometimes the practice to treat sick persons who are not in the church, but are living close by, as if they were part of the congregation, and at the time of the administration to the communicants generally to take the Elements out of the church to them as well as to those who are actually present. It has been claimed that this is not reservation at all, because the administration goes on without interruption, and it cannot be said that what is sent in this way is part of what remains after the service is over. The second form of the practice is, instead of consuming all that remains of the consecrated Elements as the rubric directs, to keep a portion back and to administer this portion to people known to be sick at some later period of the day. Thirdly, the Elements after consecration are sometimes reserved, not only to be used for those who are known to be sick at the time, but to be used for any case of sudden emergency which may occasion a demand for the sacrament in the

Reservation
of the
sacrament.

Lambeth Palace, July 31, 1899 (published by Macmillan & Co.). It had been held by the Court of Arches in *Martin v. Mackenzie* (1868), L. R. 2 A. & E. 116, 215, that "to bring in incense at the beginning or during the celebration and remove it at the close of the celebration of the Eucharist" is "a distinct ceremony, additional, and not even indirectly incident to the ceremonies ordered by the Book of Common Prayer." In *Sumner v. Wix* (1870), L. R. 3 A. & E. 58, it was held that the ceremonial use of incense immediately before the celebration of the Holy Communion, so as to be preparatory or subsidiary to the celebration of the Holy Communion, is unlawful.

(*i*) *Read v. Lincoln (Bishop)*, [1891] P. 9, 30—32; [1892] A. C. 644, 659, P. C.

(*k*) *Ibid.*

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course of the week. The Church of England does not at present allow reservation in any form (*l*).

1353. The making the sign of the cross during the absolution and the benediction is a ceremony additional to the ceremonies of

cross.

SECT. 2.—Baptism.

Nature of,
and by whom
administered

1354. Baptism is the sacrament by which a person is admitted into the Church of Christ (*a*). Like the sacrament of the Lord's

(*l*) Opinion of Archbishop Temple, Lambeth, May, 1900 (Macmillan & Co.'s Report, pp. 1, 2 and 12); see also the Opinion of Archbishop MacLagan, Lambeth, May, 1900 (Macmillan & Co.'s Report). Archbishop Temple relied chiefly on the canon which requires that every clergyman shall promise that in the administration of the sacraments he will use the form prescribed in the Prayer Book and none other, except so far as shall be otherwise ordered by lawful authority. He stated that there is no allusion to the practice of reservation except in the close of the 28th Article, where it is said that the sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped (see also Article 25, which states that "the sacraments were not ordered of Christ to be gazed upon, or to be carried about, but that we should use them," as bearing on the subject). Against this was urged the practice of the early Church, and the archbishop stated that as early as the time of Justin Martyr the first form of reservation is mentioned as common, and this not merely for the sick, but for any who were absent though in good health; and that the practice of reserving in the second and third manner can certainly be found in not much later times. He was therefore of opinion that the practice was not wrong in itself. But the Church of England by the 34th Article had authority to change the mode of administering the Holy Communion to the sick, and he was of opinion that the 28th Article abolished the practice altogether. The Archbishop of Canterbury, it seems, did not rely on the rubric that "if any remain of that which was consecrated, it shall not be carried out of the church." As to this the Archbishop of York, at p. 12, said that it is quite possible, and there may be some reason to believe, that this was partly intended to meet a possible irreverence, of which actual instances had occurred by the clergyman taking to his own home for his own use even the consecrated bread and wine which had not been used in the Communion Service. The expression therefore, he said, may not apply directly to the question of reservation, but in the absence of any provision for reservation the phrase must evidently cover the whole of the remaining consecrated bread and wine. He was of opinion that the practice of reservation was deliberately abandoned at the time of the Reformation; see *ibid.*, at p. 15. All the Prayer Books after the first Prayer Book of Edward VI. have omitted the service for the reservation for the sick. A tabernacle for the reception of the reserved sacrament is not a lawful church ornament (*Kensit v. St. Ethelburga, Bishopsgate Within (Rector)*, [1900] P. 80). The Arches Court of Canterbury decided in *Oxford (Bishop) v. Henly*, [1907] P. 88, that reservation of the sacrament is illegal, and directed a monition to issue to the incumbent requiring him to abstain from keeping or causing and permitting to be kept in his church, either over the altar or elsewhere, the consecrated Elements not consumed at or immediately after the celebration, and also from keeping burning, or causing or permitting to be kept burning, a light in front of the consecrated Elements.

(*m*) *Read v. Lincoln (Bishop)*, [1891] P. 9.

(*n*) Articles of Religion (1562), 25, 27; Gib. Cod. 359—372; Ayl. Par. 102—106. It is not only a sign and distinguishing mark of the Christian profession, but also a sign of regeneration or new birth, whereby, as by an instrument, they that receive baptism rightly are grafted into the Church, the promises of the forgiveness of sin, and of their adoption to be the sons of God by the Holy Ghost are visibly signed and sealed, faith is confirmed and grace increased by virtue of prayer to God (Articles of Religion (1562), 27; Book of

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—

Supper, it ought properly to be administered by persons in priests' orders (*b*). But the duties of a deacon include the baptizing of infants in the absence of the priest (*c*); and baptism by a dissenting minister or by a layman or a woman in the name of the Trinity is good and effectual (*d*). The normal mode of administering the sacrament is by immersion in water; but the affusion or sprinkling of water is sufficient (*e*). Except in cases of urgent necessity it should be administered in church (*f*) and upon a Sunday or other holy day, so that a large number of people may testify to the reception of the baptized person into the Church and be reminded of their own profession in baptism; but children may, if necessary, be baptized on any other day (*g*). The rite should be administered immediately after the second lesson at morning or evening prayer (*h*). The act of baptism is immediately followed by the signing of the cross on the baptized person's forehead (*i*). A person brought to be baptized who has been already baptized is conditionally rebaptized, if the validity of the former baptism is doubtful, or, if there is no doubt about it, is simply received into the Church by a formal service and with the signing of the cross (*k*).

1355. Every child brought to be baptized requires, if a male, two godfathers and one godmother, and if a female, one godfather and two godmothers (*l*). Godparents must have received Holy Communion (*m*). Their part in the baptismal service is prescribed

Common Prayer (Offices for Public Baptism of Infants, Private Baptism of Children, and Baptism of such as are of Riper Years); Ayl. Par. 104; *Gorham v. Exeter (Bishop)* (1850), Moore's Report, P. C.).

(*b*) Book of Common Prayer (Form of Ordering of Priests).

(*c*) *Ibid.* (Form of Making of Deacons); Ayl. Par. 104.

(*d*) Ayl. Par. 104; *Kemp v. Wickes* (1809), 3 Phillim. 264; *Escott v. Mastin* (1842), 4 Moo. P. C. C. 104; *Nurse v. Henslowe* (1844), 3 Notes of Cases, 272; *Titchmarsh v. Chapman* (1844), *ibid.*, 370; *Cope v. Barber* (1872), L. R. 7 C. P. 393, per WILLES, J., at p. 402.

(*e*) Book of Common Prayer (Rubric in Office for Public Baptism of Infants); Ayl. Par. 103. Public baptism must be administered at the font (Canones Ecclesiastici (1603), 81).

(*f*) The Church Building Acts and New Parishes Acts (see note (*c*), p. 444, *ante*) make provision for the administration of baptism in churches or chapels of distinct and separate parishes, district parishes, district chapelries, and consolidated chapelries (Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 27–29; Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 6, 11, 16, 17; Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 17), in extra parochial places (Church Building Act, 1822 (3 Geo. 4, c. 72), s. 18), in churches or chapels with particular districts (Church Building Act, 1831 (1 & 2 Will. 4, c. 38), ss. 10, 14; Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 18), in Peel districts (New Parishes Act, 1843 (6 & 7 Vict. c. 37), ss. 11, 13), and in churches of new ecclesiastical parishes (*ibid.*, s. 15; New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 11, 12, 14, 15).

(*g*) Book of Common Prayer (Rubrics before Offices for Public Baptism of Infants and of such as are of Riper Years).

(*h*) *Ibid.*

(*i*) *Ibid.* (Offices for Baptism); Canones Ecclesiastici (1603), 30.

(*k*) Book of Common Prayer (Office for Private Baptism of Children).

(*l*) *Ibid.* (Rubric before Office for Public Baptism of Infants).

(*m*) Canones Ecclesiastici (1603), 29.

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Baptism.

in the Book of Common Prayer (*n*). No parent is to be urged to be present at the baptism, nor can he be admitted as godfather for his own child (*o*).

Duty of
minister to
baptize.

1356. A minister must not refuse or delay either to baptize the child of a parishioner brought to him for the purpose on a Sunday or holy day (*p*), or to go and baptize, when desired so to do, an unbaptized infant in the parish who is lying weak and in danger of death (*q*).

Register to
be kept by
the minister
in every
parish.

1357. The minister of every parish (*r*) is required to keep a register of the public and private baptisms performed in the parish (*s*) in a book provided for the purpose by the King's printer at the expense of the parish (*t*), which must be preserved by the minister in a proper locked iron chest in a dry and secure place in his house of residence, if he is resident in the parish, or in the parish church (*a*). The prescribed particulars of every baptism, whether public or private, are to be entered in the register book by the minister as soon as possible after its solemnisation, and in no case later than seven days thereafter unless he is unavoidably prevented from so doing (*b*).

(*n*) *Canones Ecclesiastici* (1603), 29. They must not make any answer or speech other than what is prescribed (*ibid.*).

(*o*) *Ibid.* In 1865 the Canterbury Convocation, with the royal licence, framed a canon repealing the restriction on parents being godparents to their own children. But the York Convocation did not concur in their action, and the canon was not ratified by the Sovereign.

(*p*) *Canones Ecclesiastici* (1603), 68. The penalty for such refusal or delay is suspension for three months (*ibid.*).

(*q*) *Ibid.*, 69. If in consequence of such refusal or delay the infant dies unbaptized, the minister is to be suspended for three months, and until he acknowledges his fault and promises not wittingly to repeat it (*ibid.*). But where there is a curate or substitute, the obligation rests on him, and not on the incumbent (*ibid.*).

(*r*) Including chapelries where baptism is lawfully performed (Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 1). The provisions of the Act extend, so far as circumstances permit, to cathedral and collegiate churches and chapels of colleges and hospitals (*ibid.*, s. 20).

(*s*) *Ibid.*, s. 1, modifying *Canones Ecclesiastici* (1603), 70.

(*t*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 2.

(*a*) *Ibid.*, s. 5. As to unlawfully destroying, defacing, or injuring any register of baptisms and forging or fraudulently altering any entry therein or any certified copy thereof, or knowingly and unlawfully inserting any false entry therein or in any certified copy thereof, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 741. A minister incurs no penalty if he discovers an error in the form or substance of the entry in the register of any baptism solemnised by him and within one calendar month after the discovery corrects the erroneous entry according to the truth of the case by entry in the margin, without any alteration or obliteration of the original entry, and signs the marginal entry, adding the date of the correction, in the presence of the parent or parents of the child baptized, or, in case of their death or absence, in the presence of the churchwardens or chapelwardens, who are to attest the correction and signature (Forgery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 66), s. 21). The minister must certify the correction in the copy of the register transmitted by him to the registrar of the diocese (*ibid.*; see p. 687, *post*).

(*b*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), ss. 1, 3, Sched. A; *Canones Ecclesiastici* (1603), 70.

1358. When a baptism is solemnised by another minister elsewhere than in the church of a parish which has its own register of baptisms, he must, on the same or the next day, transmit a certificate of the baptism, in the prescribed form, to the minister of that parish or his curate, who is to make an entry of the baptism in the register noting that the entry is made according to the certificate (c).

**SECT. 2.
Baptism**

Baptism elsewhere than in parish church.

If the baptism is solemnised in an extra parochial place where there is no church or chapel, the officiating minister may within one month thereafter deliver to the minister of such adjoining parish as the ordinary directs a memorandum of the baptism signed by a parent of the child and containing the prescribed particulars, and the memorandum is to be entered by the minister to whom it is delivered in the register of his parish and is to form part thereof (d).

1359. Copies of the register are to be annually made by or under the direction of the minister of the parish, and are to be signed by him and attested by the churchwardens, or one of them, and transmitted by them on or before the 1st of June in every year to the registry of the diocese to be there recorded and kept (e).

Transmission of copies of the register to the diocesan registry.

1360. Searches of the register may be made at all reasonable times, and certified copies must be given when required; and the register can be produced as evidence in a court of law (f).

Searches and copies of the register.

(c) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 4, Sched. D. This course must be followed in the case of a Peel district under the New Parishes Act, 1843 (6 & 7 Vict. c. 37), where the minister is authorised to baptize under s. 11 of the Act, until the district becomes a new ecclesiastical parish under s. 15.

(d) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 10.

(e) *Ibid.*, ss. 6—9, 11, 12, 17, 20, Sched. E.

(f) *Ibid.*, s. 5; Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 35; *Anon.* (1733), 2 Barn. (K. B.) 269. When the birth of a child has been registered without a name or with a name which is altered at its baptism, the name given at its baptism may, within twelve months after the registration of the birth, be inserted in the register of births on delivery to the registrar or superintendent registrar of a certificate in the prescribed form signed by the minister or person who performed the baptism, who is required to deliver such certificate on demand on payment of a fee not exceeding 1s. (Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), ss. 8, 43, Sched. I.). The fees for searches and certified copies of entries in any register of baptisms are 1s. for every search extending over a period of not more than one year and 6d. additional for every additional year, and 2s. 6d. for every single certificate (Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 35). The duty of 1d., which may be denoted by an adhesive stamp, cancelled by the person signing the copy or extract before delivery thereof, is to be paid by the person requiring the same on every certified copy or extract from any register of baptisms, except (1) a copy or extract furnished pursuant to and for the purposes of an Act of Parliament, or furnished to a general or superintending registrar under any general regulation; and (2) a copy or extract, for which the person giving the same is not entitled to any fee or reward (Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 64, and schedule, Copy or Extract, Certified). The age of a person cannot be proved by the date of his birth entered in the register of his baptism (*Wihen v. Law* (1821), 3 Stark. 63; *R. v. Clapham* (1829), 4 O. & P. 29). Whether the register of the baptism of a person is evidence of the place of his birth depends upon whether it is accompanied with proof of

SECT. 2.

Baptism.

No fees.

1361. By the general ecclesiastical law, baptism, being a sacrament, was required to be administered free of charge in the absence of a special local custom to the contrary (*g*); and now, by express enactment, no fee or reward may be demanded by any minister, clerk in orders, parish clerk, vestry clerk, warden or other person, for the administration or registration of baptism (*h*).

SECT. 3.—Confirmation.

What is, and
when to be
administered.

1362. Confirmation is the laying on of hands by the bishop upon persons who are baptized and instructed in the Church Catechism and are come to years of discretion (*i*). The godparents of baptized infants are to take care that they are brought to the bishop to be confirmed so soon as they can say the Creed, the Lord's Prayer, and the Ten Commandments, and are further instructed in the Church Catechism (*j*); and persons baptized when of riper years should be confirmed by the bishop as soon as conveniently may be after their baptism (*k*). Ministers having cure of souls are to do their best to procure and prepare as many as possible for confirmation when the bishop has fixed a time for it, and are to take care

other circumstances (*R. v. Creech St. Michael's (Inhabitants)* (1774), Burr. S. C. 765; *R. v. North Petherton (Inhabitants)* (1826), 5 B. & C. 508). Where owing to the infirmity of the minister a baptism was not entered in the register at the time, but the parish clerk kept a memorandum of it on a slip of paper from which the succeeding incumbent afterwards entered it in the register, neither the entry nor the memorandum was admitted as evidence of the baptism (*Doe d. Warren v. Bray* (1828), 8 B. & C. 813). As to admitting in evidence registers not duly kept and copies of registers, see *Walker v. Wingfield* (1812), 18 Ves. 443, per Lord ELDON, L.C. In *Huet v. Le Mesurier* (1786), 1 Cox, Eq. Cas. 275, a copy of a register of a person's baptism in Guernsey was not admitted as evidence of his being of age. As to knowingly and unlawfully giving a false certificate of baptism, or certifying a writing to be a copy or extract from a register of baptisms knowing the same or the part of the register of which it is a copy or extract to be false in any material particular, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 742. As to registration of births generally, see title REGISTRATION OF BIRTHS AND DEATHS.

(*g*) Ayl. Par. 106; *Burdeaux v. Lancaster* (1698), 1 Salk. 332; *St. David's (Bishop) v. Lucy* (1699), 1 Ld. Raym. 447, per Holt, C.J., at p. 450; *Andrews v. Cawthorne* (1745), Willes, 536, 539, n.

(*h*) Baptismal Fees Abolition Act, 1872 (35 & 36 Vict. c. 36), s. 1. An exception was made by the Act in favour of the then holder of an office who was at the time of the passing of the Act entitled by statute to demand such fees (*ibid.*). The taking or demanding of an illegal fee is an ecclesiastical offence (*Burgoynne v. Free* (1829), 2 Hag. Ecc. 456, 464—466). As to fees for certificates of baptism, see note (*f*), p. 687, *ante*.

(*i*) Book of Common Prayer (Order of Confirmation); Articles of Religion (1562), 25; Canones Ecclesiastici (1603), 60; Gib. Cod. 375—379. Persons at their confirmation openly before the Church ratify and confirm what their godparents promised for them in baptism, and promise by the grace of God to endeavour faithfully to observe what they have so assented to; and the bishop lays his hands upon them, praying over them and blessing them (Book of Common Prayer (Order of Confirmation); Canones Ecclesiastici (1603), 60). They are to have as a witness of their confirmation one godfather or godmother, who must be a communicant (Book of Common Prayer (Rubric at the end of the Catechism); Canones Ecclesiastici (1603), 29).

(*j*) Book of Common Prayer (Exhortation at the end of the Office for Public Baptism of Infants; Rubric at the end of the Catechism).

(*k*) *Ibid.* (Rubric at the end of the Office for Public Baptism of such as are of Riper Years).

that those who are presented for it to the bishop can render an account of their faith according to the Church Catechism (*l*)

SECT. 8.
Confirmation.

Change of name.

1363. The bishop may at confirmation for good reason add to or alter the christian name of a person who is confirmed (*m*).

SECT. 4.—Holy Communion.

1364. Holy Communion is the sacrament of the Body and Blood of Christ and of redemption by His death (*n*). It cannot be consecrated and administered by a person who has not been episcopally ordained priest (*o*).

What is, and by whom administered.

1365. Holy Communion is to be administered in all cathedral and collegiate churches and colleges where there are many priests and deacons on every Sunday (*p*), and in all cathedral and collegiate churches upon principal feast days (*q*); and the priests and deacons in those churches are all to receive the Communion every Sunday at least, unless they have a reasonable cause to the contrary (*r*); and they and the singing men and all others on the foundation are to receive it at any rate four times in every year (*s*). And in all colleges and halls within the Universities of Oxford and Cambridge it is to be administered on the first or second Sunday of every month, and is to be received by all the masters, fellows, scholars, and other students, and all the officers and servants who are members of the Church of England (*a*), at least four times in each year (*b*).

Time of administration.

(*l*) *Canones Ecclesiastici* (1603), 61. It is the canonical duty of the bishop of every diocese, by himself or his suffragan, to administer confirmation in the course of his visitation (see p. 409, *ante*) every third year, or, if unavoidably prevented from so doing, in the following year (*ibid.*, 60).

(*m*) Co. Litt. 3 a; Watson, *Clergyman's Law*, 4th ed., p. 484. When this is desired, the bishop, in his prayer at the laying on of hands, mentions the person by the new or altered name, and at the conclusion of the rite signs a certificate of his having confirmed the person by that name, the effect of which is afterwards noted in the register of the person's baptism. As to change of name generally, see title NAME, CHANGE OF.

(*n*) It is variously called the most comfortable Sacrament of the Body and Blood of our Saviour Jesus Christ, the Sacrament of the Altar, the Supper and Table of the Lord and the Communion and partaking of the Body and Blood of Christ (stat. (1547) 1 Edw. 6, c. 1, preamble). By it those who rightly, worthily, and with faith receive the bread and the cup of blessing partake of the Body and Blood of Christ (*ibid.*, s. 1; Book of Common Prayer (Rubric at the end of the Communion Office); Articles of Religion (1562), 28–31; *Sheppard v. Bennett* (Second Appeal) (1872), L. R. 4 P. O. 371).

(*o*) Act of Uniformity, 1662 (14 Car. 2, c. 4), s. 10. The penalty for every offence against this restriction is (1) £100, payable as to one half to the Crown and as to the remaining half equally between the poor of the parish where the offence is committed and the person or persons suing for it in a court of law; and (2) disability to be ordained priest for a year thereafter (*ibid.*). As to the vesture of the priest in celebrating Holy Communion, see p. 672, *ante*.

(*p*) Book of Common Prayer (Rubric at the end of the Communion Office).

(*q*) *Canones Ecclesiastici* (1603), 24.

(*r*) Book of Common Prayer (Rubric at the end of the Communion Office).

(*s*) *Canones Ecclesiastici* (1603), 24.

(*t*) Universities Tests Act, 1871 (34 & 35 Vict. c. 26), s. 3.

(*b*) *Canones Ecclesiastici* (1603), 23. The masters and fellows, especially those who have pupils, are to be careful that all the pupils and students who

SECT. 4.
Holy
Communion.

In parish churches and chapels, where the sacraments are administered, Holy Communion is to be administered by the minister so often and at such times as that every communicant may perform his duty (c) of communicating at least three times in the year, of which Easter is to be one (d). The order for Morning Prayer, the Litany, and the Communion Office may be used together or in varying order as separate services (e).

Provision for
Communion.

1366. The churchwardens of every parish, under the direction of the minister, are to provide a sufficient quantity of fine white bread and good wine for every Communion, and the wine is to be brought to the communion table in a clean and sweet standing-pot or stoop of pewter or some purer metal (f).

Notice of
and intention
to partake.

1367. Whenever a minister intends to administer Holy Communion, he is to give warning thereof to his parishioners publicly in the church at morning prayer on the Sunday or on some holy day immediately preceding (g); and the rubric directs that so many as intend to be partakers thereof are to signify their names to him at least some time the day before (h).

Notices
during the
Communion
Service.

1368. After the Nicene Creed in the Communion Office the minister is to declare what holy days or fasting days are to be observed in the week following, and give notice of the Communion if there is occasion for it (i); and nothing is to be proclaimed or published in church during divine service but by the minister, nor anything by him but what is prescribed in the rules of the Book of Common Prayer or enjoined by the King or by the ordinary (k).

Sermon.

1369. The sermon, which follows, is not itself part of the administration of Holy Communion (l).

are members of the Church of England are carefully instructed in religion, and that they frequent divine service and sermons and receive the Communion (*ibid.*; Universities Tests Act, 1871 (34 & 35 Vict. c. 26), ss. 3—5).

(c) See p. 481, *ante*.

(d) Book of Common Prayer (Rubric at the end of the Communion Office); *Canones Ecclesiastici* (1603), 21.

(e) Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 35), s. 5.

(f) *Canones Ecclesiastici* (1603), 20; Book of Common Prayer (Rubric at the end of the Communion Office); *Franklyn v. St. Cross (Master)* (1721), Bunb. 78, 79. It suffices that the bread is such as is usually eaten; so as it be the best and purest wheat bread that can conveniently be got (*ibid.*; *Riddale v. Clifton* (1877), 2 P. D. 276, P. C.). As to the use of wafers, see p. 677, *ante*.

(g) Stat. (1547) 1 Edw. 6, c. 1, s. 8; *Canones Ecclesiastici* (1603), 22; Book of Common Prayer (Rubrics in the Communion Office).

(h) Book of Common Prayer (Rubric before the Communion Office).

(i) *Ibid.* (Rubric in Communion Office).

(k) *Ibid.*; Parish Notices Act, 1837 (7 Will. 4 & 1 Vict. c. 45), s. 5. The rubric adds that banns of matrimony are to be then published; but this has been altered by the Marriage Act, 1823 (4 Geo. 4, c. 76), s. 2 (*Wynn v. Davies* (1835), 1 Curt. 69, *per* Sir HERBERT JENNER, at p. 81). The rubric also directs that briefs, citations, and excommunications shall be then read. But this direction is abrogated by the Parish Notices Act, 1837 (7 Will. 4 & 1 Vict. c. 45), s. 4; see note (v), p. 660, *ante*. As to notices relating to ordinary church business, see p. 680, *ante*.

(l) *Re Robinson, Wright v. Tugwell*, [1897] 1 Ch. 85, 96, C. A. Therefore preaching in a black gown is not illegal (*ibid.*).

SECT. 4.
Holy
Communion.
Offerstory.

1370. While the offertory sentences are being read the deacons, churchwardens, or other fit persons appointed in that behalf (*m*) receive the alms for the poor and other devotions of the people in a decent basin provided for the purpose by the parish, and reverently bring it to the priest, who humbly presents it and places it upon the holy table (*n*). After the service the money given at the offertory is to be disposed of to such pious and charitable uses as the minister and churchwardens think fit; and if they disagree, it is to be disposed of as the ordinary appoints (*o*).

Order of
service.

1371. A minister, when he celebrates the communion, is first to receive the sacrament himself (*p*) and then to administer it to the people in both kinds, delivering both the bread and the wine to every communicant severally (*q*). He is not without lawful cause to deny it to any person who devoutly and humbly desires it (*r*). But he is not wittingly to administer it (1) to any who do not kneel, under pain of suspension (*s*); nor (2) under the like pain to any who refuse to be present at public prayer according to the order of the Church of England; nor (3) to any who are common and notorious depravers of the Book of Common Prayer and Administration of the Sacraments, or of the orders, rites and ceremonies therein prescribed, or of anything contained in the Forms of Ordering of Priests and Bishops or in the Thirty-nine Articles of Religion (*t*), or who speak against or deprave the sovereign authority of the King in causes ecclesiastical, unless in the prescribed manner they acknowledge repentance for their fault and promise not to repeat it (*u*); nor (4) to any who are open and notorious evil livers, or have wronged their neighbours by word or deed so that the congregation be thereby offended, until they have openly declared as well their repentance and amendment of living, as also, in case of

(*m*) Book of Common Prayer (Rubric in Communion Office). The appointment of another fit person may be made by the priest (*Cope v. Barber* (1872), L. R. 7 O. P. 393, *per* WILLES, J., at p. 403). The "other fit person" refers to a layman (*ibid.*, *per* WILLES, J., at p. 403), and, though a priest or bishop may make the collection (*ibid.*, *per* WILLES, J., at p. 403), he, in doing so, performs a lay function, and is not ministering or celebrating any sacrament, divine service, rite or office, within the meaning of the Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 2 (*Cope v. Barber*, *supra*).

(*n*) Book of Common Prayer (Rubric in the Communion Office).

(*o*) *Ibid.* (Rubric at the end of the Communion Office); Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 6 (as to churches of district chapelries and consolidated chapelries).

(*p*) *Canones Ecclesiastici* (1603), 21.

(*q*) *Ibid.*; stat. (1547) 1 Edw. 6, c. 1, s. 8.

(*r*) Stat. (1547) 1 Edw. 6, c. 1, s. 8; *Clovell v. Cardinall* (1661), 1 Sid. 34; *Henley v. Burstow* (1666), 1 Keb. 947; *Jenkins v. Cook* (1876), 1 P. D. 80, P. O.; *Swayne v. Benson* (1889), 6 T. L. R. 7. He cannot refuse it to parties whose marriage is valid as a civil contract under the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47) (*Danister v. Thompson*, [1908] P. 362; S. C. on rule for prohibition *sub nom.* *R. v. Dibdin* (1909), 26 T. L. R. 150, O.A.).

(*s*) *Canones Ecclesiastici* (1603), 27; Book of Common Prayer (Rubric at the end of the Communion Office).

(*t*) *Canones Ecclesiastici* (1603), 27; *Jenkins v. Cook*, *supra*.

(*u*) *Canones Ecclesiastici* (1603), 27.

SECT. 4. having wronged their neighbours, their having made, or their intention to make, compensation for the wrong (*x*).
Holy Communion. In every case of repelling an offender from Communion the minister must, upon complaint, or upon being required by the ordinary, signify the cause to him and obey his order and direction in the matter (*y*); and in case of repelling a person for open and notorious evil living, or for having wronged a neighbour, whether at the time of Communion or by warning him not to present himself at the Lord's table, the minister must within fourteen days report the circumstances to the ordinary (*a*).

Number of communicants. **1372.** There is to be no Communion unless there is a convenient number to communicate with the priest, at his discretion; nor, even if there be not more than twenty qualified communicants in the parish, unless four, or at least three, communicate with him (*b*).

Administration in private houses. **1373.** The Holy Communion is not to be administered in private houses, except in cases of necessity when anyone who is desirous of partaking of it is unable from weakness to attend the church or is dangerously ill (*c*).

Penalties for depraving Holy Communion. **1374.** A person who depraves or treats contemptuously the sacrament of the Body and Blood of Christ, either by word or in any other manner, may be indicted within three months after having committed the offence, and if found guilty when tried before the justices at quarter sessions, is liable to imprisonment and fine at the King's pleasure (*d*).

SECT. 5.—*Holy Matrimony.*

SUB-SECT. 1.—*Right of Marriage.*

Nature and conditions of. **1375.** Holy matrimony is the estate into which a man and a woman enter when they consent and contract to cohabit with each

(*x*) Book of Common Prayer (Rubric before the Communion Office); *Canones Ecclesiastici* (1603), 26; *Jenkins v. Cook* (1876), 1 P. D. 80, P. C.; *Banister v. Thompson*, [1908] P. 362; *R. v. Diddin* (1909), 26 T. L. R. 150, C. A. In such cases the minister, if he knows of the facts, is to warn the offenders beforehand not to presume to come to the Lord's table until they have made their open declaration of repentance and amendment, and, where the circumstances require it, of restitution (Book of Common Prayer (Rubric before the Communion Office)).

(*y*) *Canones Ecclesiastici* (1603), 27.

(*a*) Book of Common Prayer (Rubric before the Communion Office). The direction in *Canones Ecclesiastici* (1603), 28, that strangers from other parishes are to be forbidden to come to the Holy Communion and are to be sent back to their own parishes and ministers, to receive the Communion there with their neighbours, is practically obsolete.

(*b*) Book of Common Prayer (Rubric at the end of the Communion Office). It is an ecclesiastical offence for a priest to celebrate the Communion without at least three other communicants (*Parnell v. Roughton* (1874), L. R. 6 P. C. 46; *Clifton v. Reddale* (1876), 1 P. D. 316), except when administering to a sick person (see p. 710, *post*). As to other offences in connection with the administration of Holy Communion, see pp. 677 *et seq.*, *ante*.

(*c*) *Canones Ecclesiastici* (1603), 71; Book of Common Prayer (Rubric before the Communion of the Sick). As to administering the Communion to sick persons unable to come to the church, see p. 710, *post*. For administration of the Communion in the chapels of private houses, see p. 653, *ante*.

(*d*) Stat. (1547) 1 Edw. 6, c. 1, ss. 1—7. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 532.

SECT. 5.
Holy
Matrimony

other and each other only (e). The solemnisation of matrimony in church is on their part the attestation in the presence of God and of the Church of their consent and contract so to do, and on the part of the Church its blessing on their union (f). Persons legally qualified to intermarry (g) are in general entitled to be married according to the rites of the Church of England (h) in an authorised place (i) if one of them possesses the legal qualification of residence (k). Marriage in England (l) can only lawfully be solemnised after banns (m), or with a proper licence (n), or on a registrar's certificate (o). In the case of a party to the marriage being under twenty-one years of age and not being a widower or widow the consent is required of the person authorised by the Marriage Act, 1823 (p), to give it, unless there is no such person in existence (q).

(e) Book of Common Prayer (Office of Matrimony); *Harrod v. Harrod* (1854), 1 K. & J. 4, per Lord HATHERLEY (then PAGE WOOD, V.-C.), at pp. 15, 16). For marriage generally, see titles CONFLICT OF LAWS, Vol. VI., pp. 252—262; HUSBAND AND WIFE.

(f) Book of Common Prayer (Office of Matrimony); *Harrod v. Harrod supra*. As to reading or celebrating the marriage service where the parties have been previously married at a registry office, see title HUSBAND AND WIFE.

(g) Canones Ecclesiastici (1603), 62, 99, 100, 102; and see title HUSBAND AND WIFE.

(h) *Argar v. Holdsworth* (1758), 2 Lee, 515; *R. v. James* (1850), 3 Car. & Kir. 167, 172, C. C. R., per ALDERSON, B., at p. 175. Persons who are not members of the Church of England are entitled to be so married (*R. v. James, supra, per ALDERSON, B.*, at p. 173). The question whether unbaptized persons can claim to be so married has never been decided (*Jenkins v. Barrett* (1827), 1 Hag. Ecc. 12); but their marriage according to the rites of the Church of England, if otherwise legal, will be valid (*Jones v. Robinson* (1815), 2 Phillim. 285). Banns must be published with the true christian names as well as surnames of the parties (see p. 698, *post*); but for that purpose the names by which persons are usually known are their true christian names (see note (a), p. 699, *post*).

(i) See p. 694, *post*.

(k) See pp. 694, 701, *post*.

(l) The law as to previous publication of banns or licence does not apply out of England (*Culling v. Culling*, [1896] P. 116).

(m) A clergyman who solemnises a marriage without due publication of banns, unless by licence or on a registrar's certificate, is liable to be convicted of felony if prosecuted within three years after the commission of the offence (Marriage Act, 1823 (4 Geo. 4, c. 76), s. 21). See also p. 656, *ante*.

(n) Canones Ecclesiastici (1603), 62, 63, 101; Book of Common Prayer (Rubric in the Office of Matrimony); 1 Bl. Com. 439; *Middleton v. Crofts* (1736), 2 Atk. 650.

(o) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 4.

(p) 4 Geo. 4, c. 76.

(q) *Ibid.*, s. 16; and see title HUSBAND AND WIFE. The consent need not be express, but may be implied (*Hodgkinson v. Wilkie* (1795), 1 Hag. Con. 262; *Smith v. Huson* (1811), 1 Phillim. 287). It may be expressly retracted (*Hodgkinson v. Wilkie, supra, per Lord STOWELL* (then SIR WILLIAM SCOTT), at p. 263). The consent does not hold good if the person who gives it dies before the marriage is solemnised (*Ex parte Reibey* (1843), 12 L. J. (CH.) 436). A marriage solemnised without the requisite consent is nevertheless valid (*R. v. Birmingham (Inhabitants)* (1828), 8 B. & C. 29). Where a minor is married after publication of banns without any notice of dissent to the marriage, the requisite consent is implied (*Diddar v. Faucit* (1821), 3 Phillim. 580, 581), and the minister who solemnises it is not liable to ecclesiastical censure (Marriage Act, 1823 (4 Geo. 4, c. 76), s. 8). But if he does so after any person whose consent was requisite has openly and publicly

SECT. 5.

Holy
Matrimony.

Duty of
minister to
solemnise
marriage.
Marriage
of persons
divorced for
adultery.

Marriage
with deceased
wife's sister.

1376. A minister who without just cause refuses to marry persons entitled to be married in his church or chapel commits an ecclesiastical offence for which he is punishable in the ecclesiastical courts (a).

No clergyman is compelled to solemnise the marriage of a person whose former marriage has been dissolved on account of his or her adultery, nor is he liable to any suit, penalty, or censure for solemnising or refusing to solemnise the marriage of such person. But when an incumbent refuses to solemnise such a marriage between persons who but for his refusal would be entitled to have it solemnised in his church or chapel, he must allow it to be solemnised therein by any other clergyman entitled to officiate within the diocese (b).

A clergyman is not liable to any suit, penalty, or censure for refusing to publish banns of marriage or to solemnise marriage between a man and his deceased wife's sister. But when an incumbent refuses to solemnise such a marriage between persons who but for his refusal would be entitled to have it solemnised in his church or chapel, he may allow it to be solemnised therein by any other clergyman entitled to officiate within the diocese (c).

SUB-SECT. 2.—*Place of Banns and Marriage.*

Marriage to
be solemnised
in parish
church or
authorised
chapels.

1377. Banns must be published, and marriage, whether after banns or by licence, must, unless under a special licence from the Archbishop of Canterbury (d), be solemnised in the parish church or some public chapel authorised for the publication of banns and the solemnisation of marriages (e) of or belonging to the parish or chapelry in which one of the parties dwells (f).

expressed dissent to the marriage in the church or chapel where the banns were published at the time of the publication he incurs the penalty of three years' suspension (*ibid.*; *Canones Ecclesiastici* (1603), 62).

(a) *Argar v. Holdsworth* (1758), 2 Lee, 515. It is doubtful whether in case of refusal he is liable to an action for damages (*Davis v. Black* (1841), 1 Q. B. 900), or to be indicted (*R. v. James* (1850), 3 Car. & Kir. 167, O. C. R.), for the refusal. The offence of refusal is not committed unless a definite request for the marriage has been made to the minister by both parties (*Davis v. Black, supra*) and the parties have presented themselves to him to be married at a time when he was not engaged in some other duty (*ibid.*), and when he could legally have performed the service (*R. v. James, supra*). As to the duty of marrying by licence, see p. 703, *post*.

(b) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 57, 58.

(c) Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), s. 1; *Banister v. Thompson*, [1908] P. 362; S. C. on rule for prohibition, *sub nom. R. v. Dibdin* (1909), 26 T. L. R. 150, O. A.

(d) 1 Bl. Com. 439; Marriage Act, 1823 (4 Geo. 4, c. 76), s. 20; see p. 701, *post*.

(e) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 2. As to churches and chapels so authorised, see *R. v. Northfield (Inhabitants)* (1781), 2 Doug. (K. B.) 659; *Perreie v. Tondear* (1790), 1 Hag. Con. 136; *Taunton v. Wyborn* (1809), 2 Camp. 297; Marriage Confirmation Act, 1825 (6 Geo. 4, c. 92), s. 2. Marriage in a private house, or elsewhere than in an authorised church or chapel, except under special licence, is illegal (*Middleton v. Crofts* (1736), 2 Atk. 650), and the person solemnising it is guilty of felony (Marriage Act, 1823 (4 Geo. 4, c. 76), s. 21; Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 39).

(f) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 2; *Canones Ecclesiastici* (1603), 62, 102; *More v. More* (1761), 2 Atk. 157, per Lord HARDWICKE, L.C., at p. 159; *Nicholson v. Squire* (1809), 16 Ves. 259, per Lord ELDON, L.C., at p. 261; *Wynn v. Dames* (1835), 1 Curt. 69, 83—87; *Tuckniss v. Alexander* (1863), 32 L. J. (CH.) 794, per KINDERSLEY, V.-C., at p. 801. The word "dwell"

With the consent under hand and seal of the patron and incumbent of a parish in which a public chapel, with a chapelry annexed thereto, is situate, or of the patron and incumbent of a chapel situate in an extra-parochial place, the bishop may under his hand and seal authorise the publication of banns and solemnisation of marriages in such chapel for persons residing within the chapelry or extra-parochial place (*g*). And where a church or chapel has been provided for an extra-parochial place under the Church Building Acts, 1818, 1819, or 1822 (*h*), the law as to banns and marriages applies to such places as if the same were an ancient parish (*i*).

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1378. Banns may be published and marriages solemnised in the churches or chapels of distinct and separate parishes and district parishes (*k*), consolidated chapelries (*l*), district chapelries (*m*), particular districts (*n*), and new ecclesiastical parishes (*o*) constituted

In new
ecclesiastical
areas.

is stronger than "reside," and implies living and sleeping (*Kerr v. Haynes* (1860), 29 L. J. (Q. B.) 70; *A.-G. v. M'Lean* (1863), 1 H. & O. 750, *per* POLLOCK, C.B., at p. 761; see also p. 701, *post*). But a person may have several dwelling places at the same time (*Bailey v. Bryant* (1858), 1 E. & E. 340; *Butler v. Ablewhite* (1859), 28 L. J. (Q. P.) 292). If a person has a permanent dwelling place, he cannot be said to dwell at a place where he has lodgings for a temporary purpose only (*Macdougall v. Paterson* (1851), 11 O. B. 755, 769); but if he has no dwelling place of his own, he must be taken to dwell where he for the time abides (*Alexander v. Jones* (1866), L. R. 1 Exch. 133). It is an ecclesiastical offence on the part of a clergyman, punishable in the ecclesiastical courts, to marry, publish banns, or solemnise marriage, after banns in a church, between persons neither of whom dwells in the parish (*Wynn v. Davies, supra*); and a clergyman who solemnises a marriage without due publication of banns, unless by licence (see p. 701, *post*) or on a registrar's certificate (see p. 703, *post*), is liable to be convicted of felony if prosecuted within three years after the commission of the offence (Marriage Act, 1823 (4 Geo. 4, c. 76), s. 21).

(*g*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 3. The consent and authority are to be registered in the registry of the diocese (*ibid.*). A notice that "banns may be published and marriages solemnised in this chapel" is to be placed in a conspicuous part of the interior of the chapel (*ibid.*, s. 4). See also Church Building Act, 1822 (3 Geo. 4, c. 72), ss. 18, 19; Extra-Parochial Places Act, 1857 (20 Vict. c. 19), ss. 9, 10; Marriage Confirmation Act, 1860 (23 & 24 Vict. c. 24).

(*h*) 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 3 Geo. 4, c. 72.

(*i*) Church Building Act, 1822 (3 Geo. 4, c. 72), ss. 18, 19.

(*k*) Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 27—29; Church Building Act, 1819 (59 Geo. 3, c. 134), s. 17; Church Building Act, 1822 (3 Geo. 4, c. 72), ss. 12, 19; Marriage Confirmation Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 18), s. 3.

(*l*) Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 6, 17; Church Building Act, 1822 (3 Geo. 4, c. 72), ss. 12, 19; Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 10.

(*m*) If the Ecclesiastical Commissioners, as the successors of the Church Building Commissioners, with the consent of the bishop of the diocese, so decide (Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 11, 16, 17; Church Building Act, 1822 (3 Geo. 4, c. 72), ss. 17, 19; Church Building (Banns and Marriages) Act, 1844 (7 & 8 Vict. c. 56), s. 4.

(*n*) Under the Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 10, if the Ecclesiastical Commissioners, as the successors of the Church Building Commissioners, with the consent of the bishop of the diocese, so decide (Church Building (Banns and Marriages) Act, 1844 (7 & 8 Vict. c. 56), ss. 1, 2; Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 18).

(*o*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 15; New Parishes 1856 (19 & 20 Vict. c. 104), ss. 11, 12, 14, 15.

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Banns of marriage in certain cases in adjoining parishes or chapelries.

When church is demolished or under repair.

under the Church Building Acts and New Parishes Acts (*p*). Where any such new ecclesiastical area, with the right of publishing banns and solemnising marriages in the church or chapel thereof, has been constituted, it becomes, for the purposes of banns and marriages, the parish of the persons who dwell therein, in lieu of the ancient or other parish out of which it has been constituted (*q*).

For the purpose of publishing banns and solemnising marriages, parishes where there is no parish church or chapel, or none in which divine service is usually solemnised every Sunday, and extra-parochial places having no public chapel in which banns may be lawfully published, are to be taken as belonging to any next adjoining parish or chapelry (*a*).

1379. Where the church or chapel of a parish or area in which marriages have been usually solemnised is demolished in order to be rebuilt, or is under repair, and is on that account disused for public service, the bishop may direct that banns may be published and marriages solemnised in some consecrated chapel of the parish or area until the church or chapel is again opened for divine service; and during that period such consecrated chapel is to be deemed the church or chapel of the parish or area for all purposes relating to the publication of banns and the solemnisation of marriages (*b*). Where no such direction is given, the banns may be published in any place within the parish or area which is licensed by the bishop for divine service during the period of rebuilding or repair, or in a church or chapel of any adjoining parish or chapelry in which banns are usually proclaimed; and the marriages, whether after banns or by licence, may be solemnised in the place so temporarily licensed for divine service (*c*), or, where no place is so licensed, in the church or chapel in which the banns have been published in the adjoining parish or chapelry (*d*). All banns published and marriages solemnised in any place so licensed within a parish or area during the rebuilding or repair of the church or chapel thereof are to be considered as published and solemnised in the church or chapel of the parish or area, and are to be so registered (*e*).

Where a church or chapel in which marriages could previously be legally solemnised is rebuilt, repaired, or enlarged, marriages subsequently solemnised therein are valid without a reconsecration of the church or chapel, notwithstanding that the external walls may not have remained entire, and that the position of the communion table may have been altered (*f*).

(*p*) See note (*i*), p. 444, *ante*.

(*q*) *Jones v. Gough* (1865), 3 Moo. P. O. O. (N. S.) 1; *Tuckniss v. Alexander* (1863), 32 L. J. (OH.) 794; *Fuller v. Alford* (1883), 10 Q. B. D. 418.

(*a*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 12.

(*b*) Marriage Confirmation Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 18), s. 2.

(*c*) The place will be presumed to have been so licensed if divine service was several times performed therein (*R. v. Creswell* (1876), 1 Q. B. D. 446).

(*d*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 13; Marriage Act, 1824 (5 Geo. 4, c. 32), s. 1.

Marriage Act, 1824 (5 Geo. 4, c. 32), s. 3.

Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), s. 12.

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Licensing of
chapels for
banns and
marriages of
persons
residing
within a
limited
district.

1380. Where there is a public chapel with or without a chapelry, or a chapel which is licensed for the celebration of divine service according to the rites of the Church of England, or of which the minister is licensed to officiate therein according to those rites, the bishop of the diocese, if he thinks it necessary so to do, for the due accommodation and convenience of the inhabitants (*g*) may by a licence under his hand and seal, with the consent, under hand and seal, of the patron and incumbent of the parish or area in which the chapel is situate, or without such consent after two calendar months' notice in writing given by the registrar of the diocese to such patron and incumbent, authorise the publication of banns and solemnisation of marriages in such chapel for persons residing within a district limited in the licence (*h*), under such provisions as to the amount and appropriation or apportionment of the dues and as to other particulars as seem fit to the bishop and are specified in the licence (*i*). Where the licence is granted without the consent of the patron or the incumbent of the parish or area under hand and seal, he may appeal within one month to the archbishop of the province, who, after hearing the matter in a summary way, is to make an order confirming, revoking, or varying the licence (*k*). The licence may at any time be revoked by the bishop by writing under his hand and seal with the written consent of the archbishop of the province (*l*). Until it is revoked, marriages solemnised in the chapel are as valid as if solemnised in the parish church or in a chapel duly authorised for the solemnisation of marriages before the 17th August, 1836 (*m*). But notwithstanding the licence, persons

(*g*) *Re St. George's Chapel, Albemarle Street* (1890), Trist. 134 (licence to celebrate marriages).

(*h*) The licence authorises the publication of banns and solemnisation of marriage where only one of the persons resides within the limited district (Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 34). The licence does not make the district an ecclesiastical parish under the New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 14 (*R. v. Perry* (1861), 3 E. & E. 640).

(*i*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 26; Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 33. A notice that "banns may be published and marriages may be solemnised in this chapel" is to be placed in a conspicuous part in the interior of the chapel (*ibid.*, s. 33). A patron or incumbent who refuses or withholds consent to the granting of the licence may deliver to the bishop under hand and seal a statement of reasons for so doing, and the bishop is not to grant the licence until he has inquired into such reasons (Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 26). Instruments of consent of the patron and incumbent or, if consent is refused or withheld, a copy of the notice by the registrar, and statements of reasons delivered by a patron or incumbent, with the adjudication thereon of the bishop under hand and seal, are to be registered in the registry of the diocese (*ibid.*). No stamp or other duty is payable on the licence or on any other instrument necessary for authorising the solemnisation of marriage in the chapel.

(*k*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 28. The order is to be registered in the registry of the diocese, and is conclusive and binding on all parties (*ibid.*).

(*l*) *Ibid.*, s. 32. The revocation and consent are to be registered in the registry of the diocese, and the registrar is to give notice thereof in writing to the minister officiating in the chapel, and also public notice thereof by advertisement in some newspaper circulating in the county and in the London Gazette (*ibid.*). As to the disposal of the registers of marriages solemnised in a chapel under a licence after the licence is revoked, see p. 706, *post*.

(*m*) *Ibid.*, s. 26. The law as to marriages and registers and copies of registers

SECT. 5. residing in the district may, if they think fit, have their marriage solemnised in the parish church or in any chapel in which the marriage of them or either of them might have been legally solemnised before 17th August, 1836 (*n*).

Holy Matrimony.
List of chapels in which marriages may be solemnised to be sent yearly to the Registrar-General.

1381. The registrar of every diocese is to send yearly to the Registrar-General of Births, Deaths, and Marriages a list of all the chapels in the diocese in which marriages may lawfully be solemnised according to the rites of the Church of England, distinguishing those which have a parish, chapelry, or other ecclesiastical area annexed to them and those which are licensed by the bishop for limited districts; and the Registrar-General is yearly to make out and print a list of all such chapels (*o*).

SUB-SECT. 3.—Publication of Banns.

Place of publication.

1382. Banns of matrimony (*p*) between two persons must be published in the church or some chapel in which banns are authorised to be published of the parish or chapelry in which they dwell, and, if they dwell in different parishes or chapelries, the banns must be published in the church or some chapel in which banns are authorised to be published of each of the parishes or chapelries (*q*).

Notice of banns.

1383. No clergyman is obliged to publish the banns of matrimony between two persons unless at least seven days before the requisite time for the first publication thereof they deliver to him a notice in writing, dated on the day of the delivery, of their true christian names and surnames and of the house or houses of their abode within the parish or chapelry and of the time during which they have dwelt or lodged in such house or houses (*r*).

Register book.

A register book of banns marked and ruled in the same manner as a register book of marriages (*s*) is to be provided in all churches

of marriages solemnised in a parish church, and as to the duties of the incumbent and churchwardens of a parish church in relation thereto, extends to a chapel in which the solemnisation of marriages is authorised by licence for persons within a limited district, and to the minister and chapelwardens thereof or other persons exercising analogous duties therein, in like manner as if the chapel were a parish church (*ibid.*, s. 30). As to the fees in respect of such marriages, see p. 707, *post*.

(*n*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 31.

(*o*) *Ibid.*, s. 34.

(*p*) The word "banns" signifies a proclamation or any public notice given of a thing (*Termes de la Ley*, p. 73).

(*q*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 2; Book of Common Prayer (Rubrics in the Office of Matrimony); see pp. 695 *et seq.*, *ante*. As to publication of banns, see also title HUSBAND AND WIFE.

(*r*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 7; *Pouget v. Tomkins* (1812), 2 Hag. Con. 142, 146; *Warter v. Yorke* (1815), 19 Ves. 451, 453. A clergyman need not insist on this notice, but if, not using due diligence, he marries persons neither of whom resides in the parish, he is liable at least to ecclesiastical censure and perhaps to other consequences (*Priestley v. Lamb* (1801), 6 Ves. 421; *Nicholson v. Squire* (1809), 16 Ves. 259, *per* Lord ELDON, L.C., at p. 261; *Wynn v. Davies* (1835), 1 Curt. 69, *per* Sir HERBERT JENNER, at pp. 83, 84). As to the names, see note (*a*), p. 699, *post*. "House of abode" means dwelling place (*B. v. Hammond* (1852), 17 Q. B. 772).

(*s*) See note (*f*), p. 694, *ante*.

and chapels in which marriages are solemnised; and banns are to be published from this book by the officiating minister, and after publication are to be signed by him or by some person under his direction (t).

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1384. Banns are to be published in the form of words prescribed by the rubric prefixed to the Office of Matrimony in the Book of Common Prayer (a) on three Sundays preceding the solemnisation

Mode of
publication
of banns.

(t) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 6.

(a) *Ibid.*, s. 2. The form and the statute contemplate mention of the true names of the persons (*Wakefield v. Wakefield* (1807), 1 Hag. Con. 394, 401; *Cope v. Burt* (1809), *ibid.* 434, 438; *Pouget v. Tomkins*, *supra*, per Lord STOWELL (then Sir WILLIAM SCOTT), at p. 146; *Stante v. Farquharson* (1826), 3 Add. 282; *Tongue v. Tongue* (1836), 1 Moo. P. O. C. 90) and of the parish or parishes in which they dwell, but not of their descriptions. Mention of these is therefore not essential, and a misdescription is immaterial (*Cope v. Burt* (1811), 1 Phillim. 224; *Mayhew v. Mayhew* (1812), 3 M. & S. 266, n.; *Fendall v. Goldmid* (1877), 2 P. D. 263). The form need not be rigidly adhered to; it is sufficient that it should be followed in substance (*Standen v. Standen* (1791), Peake, 32, per Lord KENYON, C.J., at p. 34). For the purpose of banns a person's true name is not necessarily the full and exact christian name given in baptism and the original surname (*Diddear v. Fuuri* (1821), 3 Phillim. 580). If a man has adopted a new christian name in such a way as to supersede his original name, and so that it is known as his proper designation, it will be his true name for the purpose of banns (*Wyatt v. Henry* (1817), 2 Hag. Con. 215, per Lord STOWELL (then Sir WILLIAM SCOTT), at pp. 220, 221; see *Mayhew v. Mayhew*, *supra*; *R. v. Burton-upon-Trent (Inhabitants)* (1815), 3 M. & S. 537); and banns are not unduly published where part of the christian name is suppressed, not for the sake of concealment, but because the party has not been in the habit of using it (*Orme v. Holloway* (1847), 5 Notes of Cases, 267, per Sir H. JENNER FUST, at pp. 273, 274). A woman loses her maiden surname on marriage (*Bon v. Smith* (1596), Cro. Eliz. 532). If a person has acquired a name by repute, the use of the true name in the banns is an act of concealment, and not a due publication (*Frankland v. Nicholson* (1805), 3 M. & S. 259, n. (1), per Lord STOWELL (then Sir WILLIAM SCOTT), at p. 260; see also *Wilson v. Brockley* (1810), 1 Phillim. 132; *R. v. Billingham (Inhabitants)* (1814), 3 M. & S. 250; *R. v. St. Faith's, Newton (Inhabitants)* (1823), 3 Dow. & Ry. (K. B.) 348; *Orme v. Holloway*, *supra*; *Tooth v. Barrow* (1854), 1 Ecc. & Ad. 371). So, too, is the use of a surname which the person has never borne, though entered by mistake in the register of baptisms (*R. v. Tibshelf (Inhabitants)* (1830), 1 B. & Ad. 190). But the use of the true name is only wrong where another name has been so far obtained by repute as to obliterate it (*Fendall v. Goldmid*, *supra*, at p. 264). The liberty of a person to change his surname was discussed by Sir JOSEPH JEKYLL, M.R., in *Barlow v. Bateman* (1730), 3 P. Wms. 65, and by Lord STOWELL (then Sir WILLIAM SCOTT) in *Wakefield v. Wakefield* (1807), 1 Hag. Con. 394, at pp. 399—402; see also title NAME, CHANGE OF. Illegitimate children usually in practice bear the surname of their mother (*Sullivan v. Sullivan* (1818), 2 Hag. Con. 238, per Lord STOWELL (then Sir WILLIAM SCOTT), at p. 253). If, however, they have acquired a different name by repute, their banns should be published by that name; though they might be held valid if, from an innocent misapprehension of what is correct, the name of the mother was used instead of that subsequently acquired (*Tooth v. Barrow*, *supra*, per Sir JOHN DODSON, at p. 374). The name conferred on a woman by marriage becomes her actual name unless obliterated by repute (*Bon v. Smith*, *supra*; *Fendall v. Goldmid*, *supra*). The publication of banns in a wrong name from mere thoughtless levity, without fraud or any necessity for concealment, is an undue publication (*Mather v. Ney* (1807), 3 M. & S. 265, n. (3)). But a slight error in the name is immaterial (*Dobbins v. Corneck* (1813), 2 Phillim. 102). The publication will be undue or otherwise, according as the addition or omission was for the purpose

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Holy (if there is no morning service in the church or chapel on the
Matrimony. Sunday on which they are published) immediately after the second
 lesson (b).

Forbidding **1385.** In the event of the parents or guardians of a person under
banns. twenty-one years of age whose banns of marriage are published, or
 one of them, openly and publicly declaring, or causing to be declared,
 in the church or chapel where the banns are published, and at the
 time of the publication, their, his, or her dissent to the marriage, the
 publication is absolutely void (c).

Republishing **1386.** If the marriage does not take place within three lunar
of banns. months (d) after the complete publication of the banns, it must not
 be solemnised, unless by licence, until they have been duly
 republished on three several Sundays (e).

Certificate **1387.** Where persons who are to be married after banns dwell in
of banns. different parishes they are not to be married in either parish
 without a certificate from the minister of the other parish of the
 banns having been thrice asked therein (f). Where one of the
 persons dwells either (1) in a parish where there is no parish church
 or chapel, or none in which divine service is usually solemnised
 every Sunday, or (2) in an extra-parochial place having no public
 chapel wherein banns may be lawfully published, and the banns are
 accordingly published in the church or chapel of an adjoining
 parish or chapelry, the minister who publishes the banns is to
 certify the publication thereof in the same manner as if the person
 had dwelt in that adjoining parish or chapelry (g).

of fraud or concealment or was innocently made, in cases where a name is added to the true names (*Heffer v. Heffer* (1812), 3 M. & S. 265, n. (3); *Tree v. Quin* (1812), 2 Phillim. 14; *Sullivan v. Sullivan* (1818), 2 Hag. Con. 238; *Dobbins v. Corneek*, *supra*; *Fellwies v. Stewart* (1814), 2 Phillim. 238, 240; *Green v. Dalton* (1822), 1 Add. 289) or is omitted from them (*Louyet v. Tomkins* (1812), 2 Hag. Con. 142, 143; *Diddeur v. Faucit* (1821), 3 Phillim. 580; *Stanhope v. Baldwin* (1822), 1 Add. 93; *Wiltshire v. Prince* (1830), 3 Hag. Ecc. 332; *Brealy v. Reed* (1841), 2 Curt. 833; *Orme v. Holloway*, *supra*). In *Holmes v. Simmons* (1868), L. R. 1 P. & D. 523, at p. 530, Lord PENZANCE doubted whether a marriage would be invalidated by undue publication of banns if there was no one in existence who had a legal right to assent to or dissent from its solemnisation or if those who had such legal right assented to it; but see *Mather v. Ney* (1807), 3 M. & S. 265, n. (3). The fact of the banns having been published in a wrong name is not sufficiently proved by a wrong name being entered in the record of banns (*Copps v. Follon* (1794), 1 Phillim. 145, n. (b)), nor by the fact of the party having been married in a wrong name (*Heffer v. Heffer*, *supra*).

(b) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 2, modifying the rubrics on the subject in the Book of Common Prayer (Office of Matrimony) and the direction in *Canones Ecclesiastici* (1603), 62; see *Wynn v. Davies* (1835), 1 Curt. 69, *per* Sir HERBERT JENNER, at p. 81. As to fees for publication of banns, see p. 707, *post*.

(c) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 8; see p. 693, *ante*.

(d) 2 Bl. Com. 141; *Peterborough (Bishop) v. Catesby* (1607), Oro. Jac. 166, 167; *Lacon v. Hooper* (1795), 6 Term Rep. 224.

(e) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 9.

(f) Book of Common Prayer (Rubric in the Office of Matrimony).

(g) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 12.

SUB-SECT. 4.—*Marriage Licences.*

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Holy Matrimony.

Marriage licences, common and special.

1388. A common licence to solemnise a marriage without publication of banns in a lawful place in a diocese and at a lawful time can be granted by the bishop of the diocese or by the Archbishop of Canterbury (*h*). The Archbishop of Canterbury can also grant special licences for the solemnisation of marriage at any convenient time or place (*i*). With that exception, licences can only be granted to solemnise marriage in the parish church or some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married has been for fifteen days immediately before the granting of the licence (*k*), and must contain a condition that the marriage shall be solemnised between eight o'clock in the forenoon and three o'clock in the afternoon (*l*). The obtaining of a marriage licence is a matter of favour, and not of right (*m*). The licence can only be used for the

(*h*) Stat. (1533) 25 Hen. 8, c. 21, ss. 2—12; Ecclesiastical Jurisdiction Act, 1847 (10 & 11 Vict. c. 98), s. 5; Canones Ecclesiastici (1603), 101, 104; Burn, Ecclesiastical Law, Vol. II., p. 462 e; *Balfour v. Carpenter* (1810), 1 Phillim. 204. The earliest mention of a bishop's licence dispensing with the publication of banns is in the Constitutions of William la Zouche, Archbishop of York, A.D. 1347, incorporated into those of his successor, John Thoresby, A.D. 1367 (Johnson, Ecclesiastical Laws, Vol. II., A.D. MCCCXLVII.; Wilkins, Concilia, Vol. III., p. 72). A bishop's licence dispensing with the marriage taking place in church is mentioned in No. 11 of the Decrees of Archbishop Hubert Walter made in the Council of London at Westminster, A.D. 1200, and in Archbishop Simon Mepham's Constitutions, A.D. 1328 (Johnson, Ecclesiastical Laws, Vol. II., A.D. MCC., A.D. MCCCXXVIII.; Wilkins, Concilia, Vol. I., p. 507, Vol. II., p. 554). The power to grant marriage licences is not affected by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85) (see s. 2). Marriage licences can be granted by the commissary for faculties and vicars-general of the archbishops and bishops when the sees are full, and, when they are vacant, by the guardian of the spiritualities or ordinaries exercising of right episcopal jurisdiction (Canones Ecclesiastici (1603), 101). The stamp duty on a common licence is 10s. (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I.). The fees for it vary in different dioceses (Report of the Royal Commission on the Laws of Marriage (1868), p. vii.).

(*i*) Stat. (1533) 25 Hen. 8, c. 21, ss. 2—12; Marriage Act, 1823 (4 Geo. 4, c. 76), s. 20; Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 1; *Doe d. Egremont (Earl) v. Grazebrook* (1843), 4 Q. B. 406. The stamp duty on a special licence is £5 (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I.), and a heavy fee is payable for it (Report of the Royal Commission on the Laws of Marriage (1868), p. vii.). During a vacancy in the see of Canterbury licences grantable by the Archbishop of Canterbury may be granted by the guardian of the spiritualities of the see (stat. (1533) 25 Hen. 8, c. 21, s. 10). As to the power of the Bishop of Sodor and Man to grant special licences in the Isle of Man, see *Piers v. Piers* (1849), 2 H. L. Cas. 331, 362, 364.

(*k*) Marriage Act, 1823 (4 Geo. 4, c. 76), ss. 10, 14. "Place of abode" means a person's residence, where he lives and sleeps at night (*R. v. Hammond* (1852), 17 Q. B. 772). A person may have more than one place of abode (*Courtis v. Blight* (1861), 31 L. J. (o. p.) 48). See also note (*f*), p. 694. *ante*.

(*l*) Marriage Act, 1886 (49 & 50 Vict. c. 14), s. 1; Canones Ecclesiastici (1603), 2.

(*m*) See an opinion to this effect given by Sir O. PRATT, afterwards Lord CAMDEN (Forsyth's Cases and Opinions on Constitutional Law, p. 479); see also *Capua (Prince) v. De Ludolf (Count)* (1836), 30 L. J. (p. m. & a.) 71, n. Licences are only to be granted to persons of good state and quality (Canones Ecclesiastici (1603), 101). But if the Archbishop of Canterbury, or the guardian of the spiritualities of the archbishopric during a vacancy, refuses a licence without

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Affidavit
 previous to
 grant of
 licence.

marriage of the parties for whose marriage it was intended to be obtained (*n*), but their true names and addresses need not be stated in it, if it sufficiently identifies them (*o*). It must state the name of the parish in which they are to be married (*p*).

1389. Before a common marriage licence is granted, an affidavit must be made by one of the parties before a surrogate (*q*), or other person having authority to grant it, to the effect that the party believes that there is no impediment of kindred or alliance or of any other cause, nor any suit commenced in any court of competent jurisdiction to bar or hinder the marriage from proceeding according to the tenor of the licence, and that for the fifteen days immediately preceding the licence one of the parties has had his or her usual place of abode (*r*) within the parish or chapelry within which the marriage is to be solemnised, and, where either of the parties, not being a widower or widow (*s*), is under the age of twenty-one years, that the consent of the person or persons, whose consent to the marriage is required by statute (*t*), has been obtained thereto (*a*).

Caveat
 against
 grant of
 licence.

1390. The grant of a licence for a marriage may be opposed by the

reasonable cause, an appeal lies to the Lord Chancellor, who may, if it seems fit, enjoin the archbishop or guardian to grant it, and, in the event of his refusal to do so, may commission two other bishops to grant it (stat. (1533) 25 Hen. 8, c. 21, ss. 11, 12). No appeal lies against the refusal of the Archbishop of York or any other diocesan prelate to grant a marriage licence under the dispensing power reserved to them by s. 9 of the Act.

(*n*) *Cope v. Burt* (1809), 1 Hag. Con. 434, per Lord STOWELL (then Sir WILLIAM SCOTT), at p. 439; *Lane v. Goodwin* (1843), 4 Q. B. 361, per PARTESON, J., at p. 366. As to forgery of a marriage licence, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 743.

(*o*) *Cope v. Burt* (1811), 1 Phillim. 224; *Ewing v. Wheatley* (1814), 2 Hag. Con. 175; *R. v. Burton-upon-Trent (Inhabitants)* (1815), 3 M. & S. 537; *Clowes v. Jones* (1842), 8 Curt. 185; *Lane v. Goodwin* (1843), 4 Q. B. 361; *Devan v. M'Mahon* (1861), 2 Sw. & Tr. 230, where the licence was held good, although, for the purpose of concealing the woman's identity from the surrogate, one of her names was suppressed and her residence was falsely stated; *Haswell v. Haswell* (1881), 51 L. J. (P.) 15, where two christian names had been added in the licence to the man's true name. The licence is not vitiated by an immaterial alteration in it after it has been granted (*Ewing v. Wheatley, supra*).

(*p*) Marriage Act, 1823 (4 Geo. 4, c. 76), ss. 10, 14. The fact of the name of the parish not having been inserted until after the licence was issued had previously been held not to vitiate the licence (*R. v. Beck* (1741), 2 Stra. 1160).

(*q*) Before a surrogate deputed by an ecclesiastical judge grants any licences he must take an oath before such judge, or a commissioner appointed under the seal of such judge, faithfully to execute his office according to law, to the best of his knowledge, and must give security by his bond in the sum of £100 to the bishop of the diocese for the due and faithful execution of the office (Marriage Act, 1823 (4 Geo. 4, c. 76), s. 18).

(*r*) See note (*k*) on p. 701, *ante*, and note (*f*) on p. 694, *ante*.

(*s*) *Canones Ecclesiastici* (1603), 104; Marriage Act, 1823 (4 Geo. 4, c. 76), s. 14.

(*t*) See p. 693, *ante*.

(*a*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 14. No caution or security by bond or otherwise is required of any person applying for a marriage licence (*ibid.*, s. 15). A layman who makes a false affidavit in order to obtain a marriage licence is guilty of a criminal offence (*R. v. Chapman* (1849), 2 Car. & Kir. 846), but cannot be punished for it in the ecclesiastical courts (*Phillimore v. Machon* (1876), 1 P. D. 481).

entering of a caveat, signed by or on behalf of the person who enters it and stating his place of residence and the ground of objection on which it is founded (*b*). In that case no licence is to issue for the marriage until either the caveat or a copy thereof is transmitted to the judge out of whose office the licence is to issue, and he certifies to the registrar that he has examined into the matter of the caveat and is satisfied that it ought not to obstruct the grant of the licence, or until the caveat is withdrawn by the person who entered it (*c*).

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1391. Where the church of a parish or the chapel of a chapelry in which marriages have been usually solemnised is being rebuilt or is under repair, licences for the solemnisation of marriages therein are to be deemed licences for the solemnisation of marriages in any place within the parish or chapelry licensed by the bishop for divine service during the rebuilding or repair, or, if no place is so licensed, in the church or chapel wherein marriages have been usually solemnised in any adjoining parish or chapelry (*d*).

Licences
when church
is under
repair.

1392. If the marriage does not take place within three lunar (*e*) months after the grant of the licence, it is not to be solemnised, unless after due publication of banns, until a new licence has been obtained (*f*).

Issue of
new licence
if marriage
postponed.

1393. Where a marriage is solemnised by licence, the responsibility as to whether one of the parties dwells within the parish or district of the church or chapel in which it is proposed to be solemnised, and whether the marriage law is in other respects observed, rests with the bishop granting the licence, and not with the officiating minister; and if a licence is produced to a minister directing or authorising the marriage of two persons in his church or chapel, he is required both by his canonical obedience and by the rights of the parties to solemnise the marriage according to the licence (*g*). If from his knowledge of certain facts he takes the responsibility of refusing to solemnise the marriage in spite of the licence, he does so at his peril (*h*).

Responsibility
of minister
on marriage
by licence.

SUB-SECT. 5.—Registrar's Certificate.

1394. A marriage which might lawfully be solemnised in a church or chapel after publication of banns may with the consent

Marriage
with the
consent of

(*b*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 11.

(*c*) *Ibid.*

(*d*) Marriage Act, 1824 (5 Geo. 4, c. 32), s. 2.

(*e*) 2 Bl. Com. 141; *Peterborough (Bishop) v. Catesby* (1607), Cro. Jac., 166, 167; *Lacon v. Hooper* (1795), 6 Term Rep. 224.

(*f*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 19.

(*g*) *Tuckniss v. Alexander* (1863), 32 L. J. (OH.) 794, 806.

on
certificate.

(*h*) *Ibid.* But it may turn out that the bishop was misled in granting the licence (*ibid.*). A clergyman who is aware that a statement in the licence as to the name or address of a party or otherwise is not in accordance with the fact is justified in hesitating before he solemnises the marriage (*Ewing v. Wheatley* (1814), 2 Hag. Con. 175, *per* Lord STOWELL (then Sir WILLIAM SCOTT), at p. 185); and a clergyman who solemnised a marriage under a licence obtained by a false oath that the woman was of age, when she evidently appeared not to be so, was severely reprimanded in the Court of Chancery (*Millet v. Rowse* (1802), 7 Ves. 419).

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of the minister of the church or chapel (i) be solemnised in like manner without such publication, on delivery to the officiating minister of a certificate of the superintendent registrar of the district in which the church or chapel is situate (k), and also, if one of the persons resides in another district, of a certificate of the superintendent registrar of that district (l).

The marriage must be solemnised within three calendar months after the date specified in such certificates as the date of entry of notice of the marriage in the marriage notice book of the district (m).

SUB-SECT. 6.—*Solemnisation of Marriage.*

Who may
solemnise
marriage.

1398. Marriage according to the rites of the Church of England is properly solemnised by a priest (n), but may be solemnised by a deacon (o). A clergyman cannot solemnise his own marriage (p).

Hours.

1396. Marriage must be solemnised between eight o'clock in the forenoon and three o'clock in the afternoon, unless by special licence from the Archbishop of Canterbury (q).

(i) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 11.

(k) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), ss. 1, 4, 16; Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 36; Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), ss. 4, 8, 11. For the form of and the mode and conditions of obtaining the certificate, see title HUSBAND AND WIFE; and as to forgery of a certificate, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 743. A superintendent registrar has no power to grant a licence for a marriage in a church or chapel of the Church of England (Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 11).

(l) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), ss. 4, 16. If one of the parties dwells in Scotland, the delivery of a certificate of the proclamation of banns in Scotland, under the hand of the session clerk of the parish in which the proclamation was made, has the same validity for authorising the solemnisation of marriage as the production of a certificate of the superintendent registrar of the district in reference to a party residing in such district (Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 8).

(m) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 15.

(n) *R. v. Millis* (1844), 10 Cl. & Fin. 534, H. L.; *Catherwood v. Caslon* (1844), 13 M. & W. 261; *Du Moulin v. Druitt* (1860), 13 L. C. L. R. 212; *Beamish v. Beamish* (1861), 9 H. L. Cas. 274; *Culling v. Culling*, [1896] P. 116. If both parties knowingly and wilfully consent to or acquiesce in the solemnisation of their marriage by a person who is not in holy orders, the marriage is void (Marriage Act, 1823 (4 Geo. 4, c. 76), s. 22), but it would be otherwise if he pretended and was believed to be in holy orders (*Hawke v. Corri* (1820), 2 Hag. Con. 280, 288; *R. v. Millis*, *supra*, per Lord CAMPBELL, at p. 784; per Lord LYNTHURST, L.C., at p. 860; per Lord COTTENHAM, at p. 906). A person who solemnises matrimony according to the rites of the Church, falsely pretending to be in holy orders, is liable to be convicted of felony if prosecuted within three years after the commission of the offence (Marriage Act, 1823 (4 Geo. 4, c. 76), s. 21; *R. v. Ellis* (1888), 16 Cox, C. C. 469).

(o) *R. v. Millis*, *supra*, per TINDAL, C.J., at p. 656; per Lord ABINGER, at p. 748; per Lord LYNTHURST, L.C., at pp. 859, 860; *Cope v. Barber* (1872), L. R. 7 C. P. 393, per WILLES, J., at p. 403.

(p) *Beamish v. Beamish*, *supra*.

(q) Marriage Act, 1823 (4 Geo. 4, c. 76), ss. 20, 21, as amended by the Marriage Act, 1886 (49 & 50 Vict. c. 14), s. 1; *Canones Ecclesiastici* (1888), 1. A person who solemnises matrimony at any other time, unless by special licence from the Archbishop of Canterbury, is liable to be convicted of felony if prosecuted within three years after the commission of the offence (Marriage Act, 1823 (4 Geo. 4, c. 76), s. 21); but the marriage so solemnised would not

1397. Marriage is directed by statute to be solemnised in the presence of at least two witnesses besides the clergyman who performs the service (r). But in spite of this direction a marriage in the presence of only one such additional witness is not invalid (s).

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—
Witnesses.

1398. The actual marriage should take place in the body of the church, in the presence of the congregation, and the minister and the parties afterwards go up to the Lord's table and the altar rails for the conclusion of the office (t).

Solemnisation
'n body of
church.

The essential parts of the ceremony are the reciprocal agreement of the parties to take each other for wedded wife and wedded husband till parted by death, and the joining together of their hands, and the pronouncement by the clergyman that they are man and wife (a).

Essential
parts.

The marriage ceremony is sometimes performed between persons who are already married to one another (b).

Parties
already
married.

SUB-SECT. 7.—*Registration and Certificates of Marriage.*

1399. A clergyman, immediately after solemnising a marriage, must register in duplicate in two of the marriage register books furnished by the Registrar-General (c) the statutory particulars relating to the marriage (d); and each entry must be signed

Registration
of marriages.

be void (see *Catterall v. Sweetman* (1845), 1 Rob. Eccl. 304, per Dr. LUSHINGTON, at p. 317). See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 535.

(r) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 28.

(s) *Wing v. Taylor* (1861), 2 Sw. & Tr. 278, 286.

(t) Book of Common Prayer (Rubrics in Office of Matrimony); *R. v. James* (1850), 3 Car. & Kir. 167, 172, C. C. R., per ALDERSON, B., at p. 177; see p. 694, ante. But a marriage in the vestry of the church is valid (*Wing v. Taylor* (1861), 2 Sw. & Tr. 278, 286). The ceremony need not be performed during divine service (Canones Ecclesiastici (1888), 1).

(a) *Harrod v. Harrod* (1854), 1 K. & J. 4, 15, 16; *Beamish v. Beamish* (1861), 9 H. L. Cas. 274, 339. Neither the use of the language of the marriage service, nor observance of the directions of the rubric respecting the opening address to the congregation, nor the adjuration to the parties as to confessing any lawful impediment to their union, nor the demand, Who giveth this woman to be married to this man? nor the putting of the ring on the finger of the bride, nor the benediction, are absolutely essential to the validity of the marriage (*Weld v. Chamberlaine* (1683), 2 Show. 300; *Beamish v. Beamish*, supra, per WILLES, J., at pp. 329—331; per Lord CAMPBELL, L.O., at p. 339). The giving away of the woman is not essential (*More v. More* (1741), 2 Atk. 157, per Lord HARDWICKE, L.O., at p. 158); nor is the repetition by the parties of the words of the service essential (*Harrod v. Harrod* (1854), 1 K. & J. 4, per Lord HATHERLEY (then PAGE WOOD, V.-C.), at p. 16). Therefore deaf and dumb persons can legally be married (*ibid.*).

(b) *Piers v. Piers* (1849), 2 H. L. Cas. 331, per Lord CAMPBELL, at pp. 354, 384, 385; per Lord COTTENHAM, L.O., at p. 363; per Lord BROUGHAM, at pp. 371—373. In cases where a ward of court has been married clandestinely the court always directs a second marriage (*ibid.*, per Lord COTTENHAM, L.O., at p. 354). In such cases the woman is described by her maiden name (*ibid.*, pp. 354, 385). As to the addition of the marriage service to a marriage contracted at a registry office, see title HUSBAND AND WIFE. The service, if read in a church or chapel of the Church of England, can only be read by a minister in holy orders (Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119)).

(c) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 30. See title HUSBAND AND WIFE.

(d) The particulars are to be inserted according to the form in Sched. O of the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86). The

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Holy
Matrimony.

Copies for
superinten-
dent registrar.

by the clergyman and by the parties married and by two witnesses (e).

1400. In the months of January, April, July, and October the minister of every church or chapel in which marriages may lawfully be solemnised is to make and deliver to the superintendent registrar of the district in which the church or chapel is situate, on durable materials, a true copy, certified under his hand, of all the entries of marriages in the register books kept by him since the last certificate; and if no marriage has been entered therein since the last certificate, he is to certify the fact (f).

Custody of
register books.

1401. The marriage register books are to be kept safely until filled (g); and, when they are filled, one copy is to be delivered to the superintendent registrar of the district, and the other is to be kept by the minister together with the registers of baptisms and burials of the parish or chapelry (h).

Transmission
of registers.

1402. Where a licence authorising the publication of banns and solemnisation of marriages in a chapel for persons residing within

clergyman may ask the parties married the several particulars required to be registered as to the marriage (*ibid.*, s. 40), and any person who wilfully makes or causes to be made, for the purpose of being inserted in the register, any false statement as to any of the particulars, is liable to the same penalties as if he were guilty of perjury (*ibid.*, s. 41). But no penalties are incurred by the clergyman if he discovers an error in the form or substance of the entry and within one calendar month after the discovery, in the presence of the parties married, or in case of their death or absence in the presence of the superintendent registrar and of two other credible witnesses, who attest the same, corrects the erroneous entry according to the truth of the case by entry in the margin, without any alteration of the original entry, and signs the marginal entry adding the date of the correction (Forgery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 86), s. 21; Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 44). In such case he must make the like marginal entry, attested in like manner, in the duplicate marriage register book and in the certified copy of the register book which he is required to make, or, if that copy has already been made, he must make and deliver to the superintendent registrar of the district a separate certified copy of the original erroneous entry and of the marginal correction therein made (Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 44). As to keeping a marriage register in the church or chapel of an extra-parochial place, see Extra-Parochial Places Act, 1857 (20 Vict. c. 19), s. 10).

(e) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 31. The number of the place of entry in each duplicate marriage register book is to be the same (*ibid.*). A clergyman who refuses or without reasonable cause omits to register a marriage solemnised by him is liable to forfeit a sum not exceeding £50 (*ibid.*, s. 42).

(f) *Ibid.*, s. 33. The minister is to be paid 6d. for every entry contained in a certified copy (Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 27).

(g) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 33. If a minister carelessly loses or injures a marriage register book, or carelessly allows a marriage register book to be injured while in his keeping, he is liable to forfeit a sum not exceeding £50 (*ibid.*, s. 42). As to unlawfully destroying, defacing, or injuring a marriage register book, or forging or fraudulently altering an entry therein, or knowingly and unlawfully inserting or permitting to be inserted a false entry therein, or in a certified copy thereof, see title **CRIMINAL LAW AND PROCEDURE**, Vol. IX., pp. 741, 742.

(h) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 33.

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a limited district (i) is revoked, all registers of marriages solemnised in the chapel under the licence, which are in the custody or possession of the minister of the chapel, are to be forthwith transmitted to the incumbent or officiating minister of the parish church, and are to be thenceforth preserved and dealt with in the same manner, and will be of the same force and validity for all purposes, as if they had been originally made and deposited with such incumbent or officiating minister (j).

1403. Every minister who has the custody for the time being of any marriage register book must at all reasonable times allow searches to be made of any such book and give a copy certified under his hand of any entry or entries in the same on payment of 1s. for every search extending over not more than one year, and 6d. additional for every additional year and 2s. 6d. for every single certificate (k). Searches.

SUB-SECT. 8.—Fees.

1404. In an ancient parish the minister can only demand, for publishing banns, giving certificates of the publication of banns, and solemnising marriage, such fees, if any, as have been taken by immemorial custom in the parish (l), or have been settled for the parish by the Church Building Commissioners, or by the Ecclesiastical Commissioners as their successors (m). In a new ecclesiastical parish he can demand such fees as have been duly Fees in parishes.

(i) See pp. 697, 698, *ante*.

(j) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 33. When the incumbent or officiating minister of the parish church next transmits to the superintendent registrar copies of the registers of marriages solemnised in the parish church, he is to transmit therewith copies of the entries made in the registers of marriages solemnised in the chapel subsequently to the date of the last entry a copy whereof was transmitted to the superintendent registrar, and is also to transmit to the superintendent registrar one copy of every register book received by him of which no copy has been already transmitted to the superintendent registrar, having first signed his name at the foot of the last entry therein (*ibid.*).

(k) *Ibid.*, s. 35. The duty of 1d., which may be denoted by an adhesive stamp, cancelled by the person signing the copy or extract before delivery thereof, is to be paid by the person requiring the same on every certified copy or extract from any register of marriages, except (1) a copy or extract furnished pursuant to and for the purposes of an Act of Parliament or furnished to a general or superintending registrar under any general regulation, and (2) a copy or extract, for which the person giving the same is not entitled to any fee or reward (Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 64, and schedule, Copy or Extract, Certified). As to knowingly and unlawfully giving a false certificate relating to a marriage, or certifying a writing to be a copy or extract from a marriage register knowing the writing or the part of the register whereof a copy or extract is given to be false in any material particular, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 536, 742.

(l) Watson, Clergyman's Law, 4th ed., p. 585; *St. David's (Bishop) v. Lucy* (1699), 1 Ld. Raym. 447, *per* HOLT, C.J., at p. 450; *Patten v. Castleman* (1753), 1 Lee, 387, *per* Sir GEORGE LEE, at p. 393. A fee cannot be demanded for the marriage of a parishioner which is solemnised in another parish (*Patten v. Castleman*, *supra*). A customary marriage fee must be of such a moderate amount that, having regard to the then value of money, it could conceivably have been taken as of right in the reign of Richard I.; otherwise it is bad for rankness (*Bryant v. Foot* (1868), L. R. 3 Q. B. 497, Ex. Ch.). It must be a fixed sum, and cannot be of a varying amount (*ibid.*, at p. 509).

(m) Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 11, 17, 18.

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Holy
Matrimony.

Fees in
limited
districts.

settled by the Church Building Commissioners, or the Ecclesiastical Commissioners, or the chancellor of the diocese (*n*).

1405. When a bishop grants a licence for the publication of banns and solemnisation of marriages in a chapel for persons residing within a district limited in the licence, he may in the licence declare that the whole of the fees, dues, and emoluments on account of the solemnisation of marriages in the chapel, or such part thereof as is specified in the licence, shall be receivable by or for the minister and clerk of the chapel (*o*).

When church
pulled down
or under
repair.

1406. When on the pulling down, rebuilding, or repairing of a parish church the bishop orders that banns may be published and marriages solemnised in a consecrated chapel of the parish until the church is reopened for divine service, the fees in respect thereof are to be applied during that period as the bishop, with the consent of the incumbent of the parish, directs (*p*).

SUB-SECT. 9.—*Validity of Marriage.*

Validity.

1407. If persons intending to be married according to the rites of the Church of England either (1) knowingly and wilfully intermarry in any other place than a church or a public chapel in which banns may be lawfully published, unless by special licence from the Archbishop of Canterbury, or (2) knowingly and wilfully intermarry without due publication of banns (*q*) or a licence from a person having authority to grant it (*r*), or (3) knowingly and wilfully consent to or acquiesce in the solemnisation of their marriage by a person not in holy orders, their marriage is null and void (*s*). In other

(*n*) Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 6, 11, 17, 18; New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 15; New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 11–14.

(*o*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 27.

(*p*) Marriage Confirmation Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 18), s. 2.

(*q*) Including no publication at all (*Wright v. Elwood* (1837), 1 Curt. 662, *per* Sir HERBERT JENNER, at pp. 672, 673).

(*r*) *Balfour v. Carpenter* (1810), 1 Phillim. 204.

(*s*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 22; *Wiltshire v. Prince* (1830), 3 Hag. Ecc. 332; *Tongue v. Tongue* (1836), 1 Moo. P. O. O. 90; *Brealy v. Reed* (1841), 2 Curt. 833; *Orme v. Holloway* (1847), 5 Notes of Cases, 267; *Tooth v. Barrow* (1854), 1 Ecc. & Ad. 371; *Midgley v. Wood* (1860), 30 L. J. (P. M. & A.) 57; *Wormald v. Neale* (1868), 19 L. T. 93. Guilty knowledge and wilfulness on the part of one of the persons will not invalidate the marriage unless the other participates in it (*R. v. Wroxtton (Inhabitants)* (1833), 4 B. & Ad. 640, 646; *Wright v. Elwood* (1835), 1 Curt. 49; (1837), *ibid.*, 662; *Dormer v. Williams* (1838), 1 Curt. 870; *Holmes v. Simmons* (1868), L. R. 1 P. & D. 523; *Gomperts v. Kensit* (1872), L. R. 13 Eq. 369; *Templeton v. Tyree* (1872), L. R. 2 P. & D. 420; *R. v. Kay* (1887), 16 Cox, O. O. 292). A marriage is valid although solemnised without either banns or licence, unless both parties were aware of the defect at the time of the ceremony (*Greaves v. Greaves* (1872), L. R. 2 P. & D. 423), and although solemnised after the expiration of three months from the last publication of banns, if the parties did not wilfully intermarry with knowledge that there had been no previous effective publication of banns (*R. v. Clarke* (1867), 16 L. T. 429). A marriage by a person professing and believed by the parties to be in holy orders, though not so in fact, is valid (*Costard v. Winder* (1860), Cro. Eliz. 775; *Hawks v. Corri* (1820), 2 Hag. Con. 280, *per* Lord STOWELL (then Sir WILLIAM SCOTT), at p. 288). As to civil marriages, see title HUSBAND AND

cases irregularity or a breach of the law does not invalidate the marriage (a).

1408. After a marriage has been solemnised it is not necessary, in support of it, if it took place after publication of banns, to give any proof of the actual dwelling of the parties in the parishes or chapelries wherein the banns were published, nor, if it took place by licence, to give any proof that the usual place of abode of one of the parties for the space of fifteen days immediately before the granting of the licence was in the parish or chapelry where the marriage was solemnised; and no evidence in either case is admissible to prove the contrary in any suit respecting the validity of the marriage (b).

SECT. 5.
Holy
Matrimony.

Proof of
necessary
preliminaries.

SECT. 6.—Churching of Women.

1409. The churching of a woman is the first Church service which she attends after childbirth, and is her act of thanksgiving for her safe delivery (c). She is to come for its performance into the parish church (d) decently apparelled (e), and is to kneel down in the place accustomed or prescribed by the ordinary (f). If there is a communion it is convenient that she should partake of it (g). She is at the churching to offer the accustomed offering to the priest (h).

Service for
the churching
of women.

(a) *R. v. Wroxton (Inhabitants)* (1833), 4 B. & Ad. 640, 646; *Wright v. Elwood* (1835), 1 Curt. 49; *ibid.*, 662; *Dormer v. Williams* (1838), 1 Curt. 870; *Templeton v. Tyree* (1872), L. R. 2 P. & D. 420; *R. v. Clarke* (1867), 16 L. T. 429; *Greaves v. Greaves* (1872), L. R. 2 P. & D. 423. A marriage of a minor actually solemnised without the requisite consent (see p. 693, *ante*) is valid (*R. v. Birmingham (Inhabitants)* (1828), 8 B. & C. 29). As to settling the property of the parties in such cases, see title HUSBAND AND WIFE.

(b) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 26; *Nicholson v. Squire* (1809), 16 Ves. 259, *per* Lord ELDON, L.C., at p. 261; *Robinson v. Grant* (1811), 18 Ves. 289; *Tree v. Quin* (1812), 2 Phillim. 14; *R. v. Hind* (1813), Russ. & Ry. 253, C. C. R.; *Diddear v. Faucit* (1821), 3 Phillim. 580, 581; *Ray v. Sherwood* (1836), 1 Curt. 173, 193, 235.

(c) Book of Common Prayer (Rubric before the Churching of Women).

(d) The Church Building Acts and New Parishes Acts (see note (e), p. 444, *ante*) make provision for the performance of churchings in churches or chapels of distinct and separate parishes, district parishes, district chapelries and consolidated chapelries (Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 27—29; Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 6, 11, 16, 17; Church Building Act, 1822 (3 Geo. 4, c. 72), s. 12; Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 17), in extra-parochial places (Church Building Act, 1822 (3 Geo. 4, c. 72), s. 18), in churches or chapels with particular districts (Church Building Act, 1831 (1 & 2 Will. 4, c. 38), ss. 10, 14); Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 18), in Peel districts (New Parishes Act, 1843 (6 & 7 Vict. c. 37), ss. 11, 13), and in churches of new parishes (*ibid.*, s. 15; New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 11, 12, 14, 15).

(e) Book of Common Prayer (Rubric before the Churching of Women). In *Shipden v. Redman* (1622), Palm. 296, a diocesan order that a woman should come in a white veil to be churched was held to be enforceable as being in accordance with ancient ecclesiastical custom.

(f) Book of Common Prayer (Rubric before the Churching of Women).

(g) *Ibid.* (Rubric after the Churching of Women).

(h) *Ibid.*; *Naylor v. Scott* (1729), 2 Ld. Raym. 1558. A custom that a fee shall be paid at the usual time of churching, whether the woman is actually churched or not, is void (*Naylor v. Scott, supra*). In Peel districts (New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 13), and in new parishes under the

SECT. 7.

Visitation
of the Sick.

—
Visiting the
sick.

SECT. 7.—*Visitation of the Sick.*

1410. When any person is dangerously sick in a parish, the minister or curate, on becoming aware thereof, is to resort to such person and give instruction and comfort according to the order of the Book of Common Prayer if he is not a preacher, or, if he is a preacher, as he thinks most needful and convenient (*i*). A form of service for the purpose is provided in the Book of Common Prayer (*k*).

Communi-
cating the
sick.

1411. Where a sick person who is unable to come to the church desires to receive the Communion, he must give timely notice to the minister, signifying how many there are to communicate with him, which must be three or at least two (*l*), except that, on special request, the minister may communicate with him alone in time of the plague or other contagious disease, when no parishioners or neighbours can be got to communicate with him for fear of infection (*m*).

SECT. 8.—*Burial.*

Burial Office,
by and for
whom to be
used in
consecrated
ground.

1412. The Order or Office for the Burial of the Dead is to be said by a minister in holy orders (*n*) at the burial in consecrated ground of every person buried therein (*o*), except (1) where the person has died unbaptized (*p*) or excommunicate (*q*), or has laid violent hands upon himself (*r*); (2) where any relative, friend, or legal representative having the charge of or being responsible for the burial of the deceased person gives the prescribed notice in writing that it is intended that the burial shall take place without the use of the Burial Office (*s*); and (3) where, in a case in which the use of

New Parishes Acts, 1843 and 1856 (6 & 7 Vict. c. 37, s. 15; 19 & 20 Vict. c. 104, ss. 1, 2, 14, 15) the minister is entitled to such fees for churchings as are fixed for the parish by the chancellor of the diocese in which it is situate (New Parishes Act, 1843 (6 & 7 Vict., c. 37), ss. 13, 15).

(*i*) *Canones Ecclesiastici* (1603), 67.

(*k*) Book of Common Prayer (Order for the Visitation of the Sick).

(*l*) *Ibid.* (Rubric before the Communion of the Sick).

(*m*) *Ibid.*

(*n*) Book of Common Prayer (Rubric before the Order for the Burial of the Dead); *Johnson v. Friend* (1860), 6 Jur. (N. S.) 280; *Wood v. Headingley-cum-Burley Burial Board*, [1892] 1 Q. B. 713, per Lord COLERIDGE, O.J., at p. 729.

(*o*) As to burial in consecrated ground, see title BURIAL AND CREMATION, Vol. III., pp. 404, 407 *et seq.*, 413, 416—466 *et seq.*, 517 *et seq.*

(*p*) A person who has been baptized with water in the name of the Trinity by a dissenting minister or by a lay person is not within this exception (*Kemp v. Wickes* (1809), 3 Phillim. 264; *Escott v. Martin* (1842), 4 Moo. P. C. C. 104; *Nurse v. Henslow* (1844), 3 Notes of Cases, 272; *Titchmarsh v. Chapman* (1844), 3 Notes of Cases, 370).

(*q*) *Kemp v. Wickes*, *supra*, per Sir JOHN NICHOLL, at pp. 271, 272; see p. 539, *ante*.

(*r*) That is to say, has put an end to his own life, being, at the time, of years of discretion and in his senses (4 Bl. Com. 189; *Clift v. Schwabe* (1846), 3 C. B. 437, per POLLOCK, O.B., at pp. 472—476; *Dufaur v. Professional Life Assurance Co.* (1858), 25 Beav. 599, 602). As to the burial of a person found *felo de se*, see title BURIAL AND CREMATION, Vol. III., pp. 421, 422.

(*s*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 1, Sched. A. In such cases the burial may take place at the option of the person so having the charge of or being responsible for the same, either without any religious

SECT. 8.
Burial.

the Burial Office is unlawful (*t*), or in which the relative, friend, or legal representative having the charge of or being responsible for the burial so requests, the minister uses a service prescribed or approved by the ordinary, and consisting of prayers taken from the Book of Common Prayer and portions of Holy Scripture (*a*). With these exceptions if a corpse entitled to burial (*b*) is brought for burial to a church or churchyard after convenient notice has been given beforehand (*c*), the minister must not refuse or delay to bury it with the Burial Office (*d*). The relative, friend, or legal representative having the charge of or being responsible for the burial of a deceased person who has a right of interment in any unconsecrated ground vested in a burial authority or provided under an Act relating to burial is entitled, if he thinks fit, to have the burial performed therein with the Burial Office by any minister in holy orders who is willing to perform the same; and no minister in holy orders is liable to any censure or penalty for using the Burial Office in any unconsecrated burial ground or cemetery, or part of a burial ground or cemetery, or in any building thereon, in any case in which, if it had been consecrated, he might have lawfully used that office (*e*).

The Church Building Acts and New Parishes Acts (*f*) make provision for burials in distinct and separate parishes, district parishes, district chapelries, and consolidated chapelries (*g*), extra-parochial places (*h*), particular districts (*i*), and new ecclesiastical parishes (*k*).

Burials in parishes and places under the Church Building Act and New Parishes Act

1413. The incumbent of an ecclesiastical parish is not bound to perform a funeral service before at, or after the cremation within

Service in case of cremation.

service or with such Christian and orderly religious service at the grave as he thinks fit; and any one or more persons invited or authorised by him so to do may conduct the service or take part in any religious act thereat (*ibid.*, s. 6). See title BURIAL AND CREMATION, Vol. III., pp. 424—428.

(*t*) See exception (1), p. 710, *ante*.

(*a*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 13.

(*b*) See title BURIAL AND CREMATION, Vol. III., pp. 413—415.

(*c*) *Titchmarsh v. Chapman* (1844), 3 Notes of Cases, 370, 412, 416, *Cooper v. Dodd* (1850), 2 Rob. Eccl. 270.

(*d*) *Canones Ecclesiastici* (1603), 68; see title BURIAL AND CREMATION, Vol. III., p. 420. The penalty for the offence is three months' suspension (*Canones Ecclesiastici* (1603), 68; *Escott v. Mastin* (1842), 4 Moo. P. C. C. 104; *Nurse v. Henslow* (1844), 3 Notes of Cases, 272; *Cooper v. Dodd*, *supra*, at p. 283).

(*e*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 12. A minister cannot be compelled to perform any part of the Burial Service on unconsecrated ground (*Rugg v. Kingsmill* (1868), 5 Moo. P. C. C. (N. S.) 79, 89, 90).

(*f*) See note (*i*), p. 444, *ante*; and title BURIAL AND CREMATION, Vol. III., p. 414.

(*g*) Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 27—29; Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 6, 11, 16, 17; Church Building Act, 1822 (3 Geo. 4, c. 72), s. 12; Church Building Act, 1827 (7 & 8 Geo. 4, c. 72), s. 2; Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 17.

(*h*) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 18.

(*i*) Church Building Act, 1831 (1 & 2 Will. 4, c. 38), ss. 10, 14; Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 18.

(*k*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 15; New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 11, 12, 14, 15, 32.

SECT. 8.
Burial.

the ground of a burial authority of the remains of a parishioner or of a person dying in the parish. But if he refuses to do so, any other minister in holy orders, not being prohibited under ecclesiastical censure, may, with the permission of the bishop and at the request of the executor of the deceased person or of the burial authority or other person having charge of the cremation or interment of the cremated remains, perform such service within the ground (*l*).

Fees for
burial.

1414. In the absence of custom no fee is by common law payable for burial (*m*), and in an ancient parish the minister and parish clerk and sexton can only demand and recover such burial fees (if any) as are payable therein by custom (*n*), or according to a table of fees duly fixed for the parish (*o*). In churchyards elsewhere they may demand and recover such burial fees as have been lawfully fixed under statutory authority (*p*).

Registration
of burials.

1415. A minister must, as soon as possible after solemnising a burial, register it in the prescribed manner (*q*).

(*l*) Cremation Act, 1902 (2 Edw. 7, c. 8), s. 11. As to cremation generally, see title BURIAL AND CREMATION, Vol. III., pp. 568—575.

(*m*) *Burdeaux v. Lancaster* (1698), 1 Salk. 332; *St. David's (Bishop) v. Lucy* (1699), 1 Ld. Raym. 447, per HOLT, C.J., at p. 450; *Exeter (Dean and Chapter) Case* (1707), 1 Ld. Raym. 334; *Andrews v. Cawthorne* (1745), Willes, 536, 539, n.

(*n*) Gib. Cod. 452, 453; Watson, Clergyman's Law, 4th ed., p. 585; *Topsall v. Ferrers* (1617), Hob. 175; *Burdeaux v. Lancaster*, *supra*; *St. David's (Bishop) v. Lucy*, *supra*; *Exeter (Dean and Chapter) Case*, *supra*; *Andrews v. Cawthorne*, *supra*. See also *Anderson v. Wandsworth Borough Council*, [1908] 2 Ch. 81.

(*o*) See next note.

(*p*) By the Church Building Act, 1819 (59 Geo. 3, c. 134), the Church Building Commissioners were, and the Ecclesiastical Commissioners (see Church Building Commissioners (Transfer of Powers) Act, 1856 (19 & 20 Vict. c. 55)) are, empowered to settle a table of fees for any parish with the consent of the vestry or select vestry or persons exercising the powers of vestry in the parish and of the bishop of the diocese (Church Building Act, 1819 (59 Geo. 3, c. 134), s. 11), and for any consolidated chapelry or extra-parochial place or any district chapelry or parochial chapelry in which a church or chapel has been built or appropriated under the provisions of that Act or of the Church Building Act, 1818 (58 Geo. 3, c. 45), and apparently of later Church Building Acts (see Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 25), with the consent of the bishop of the diocese (Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 6, 11); and the table is to be registered in the registry of the diocese (*ibid.*, s. 18), and the fees so fixed may be demanded and recovered in like manner as ancient legal fees of the same nature (*ibid.*, ss. 6, 11, 17). And by the New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 15 (extended by the New Parishes Act, 1856 (19 & 20 Vict. c. 104), ss. 1, 2, 11—15), such fees are authorised to be demanded and recovered in any new parish under those Acts as are fixed by the chancellor of the diocese in which it is situate. See further title BURIAL AND CREMATION, Vol. III., pp. 428—432. As to the fees on burials in a burial ground provided by a burial authority, see title BURIAL AND CREMATION, Vol. III., pp. 479—483; and as to the fees on burials in a cemetery under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), see title BURIAL AND CREMATION, Vol. III., p. 510. As to the appointment and stipend of chaplains of cemeteries provided under the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), see pp. 649, 650, *ante*; and title BURIAL AND CREMATION, Vol. III., p. 518.

(*q*) *Canones Ecclesiastici* (1603), 70; Parochial Registers Act, 1812 (52 Geo. 3, c. 146), ss. 1—4; see title BURIAL AND CREMATION, Vol. III., pp. 51—52.

Part VI.—Property of the Church of England.

SECT. 1.—*Characteristics of Ecclesiastical Property.*

SECT. 1.

CHARACTERISTICS of Eccle- siastical Property.

1416. The existence of property capable of recognition by a court of law presupposes the existence of a person recognised by the law and of some legal right vested in such person, either of a corporeal or of an incorporeal nature (a).

Where the relations existing between such recognised person and such legal right arise out of or have relation to a Church (*ecclesia*) regarded as an organism distinct from the individual members composing it (b), the property is regarded as ecclesiastical property.

Accordingly, where property is appropriated for use only in connection with or for the benefit of a Church, or is appropriated for use only by or for the benefit of officers or members of a Church as such (c), or is held for a spiritual purpose (b) in connection with a Church, or is owned by any person in the capacity of a representative of a Church (d), such property is called ecclesiastical property (e).

recognition.

1417. The recognition by the law and the legal characteristics of the persons who own property on behalf of the Church of England, and the ecclesiastical characteristics of the property which is owned for use by or for the benefit of officers or members of that Church as such, have to a great extent arisen out of and now depend on the parochial system, and can best be realised by reference to the stages of the growth of that system.

(a) Property may denote the thing to which a person stands in a certain relation, and also the relation in which the person stands to the thing (*Re Earnshaw-Wall*, [1894] 3 Ch. 156).

(b) These distinctions are illustrated by the decision of the House of Lords in *Westminster Corporation v. St. George's, Hanover Square (Rector and Churchwardens)* (1910), 27 T. L. R. 327, reversing the decision of the Court of Appeal, [1909] 1 Ch. 592, O. A., and approving the dissentient judgment of BUCKLEY, L.J. (*ibid.*, at p. 611). The money there in question was to be applied "for the benefit of such parish as the vestry of such parish shall direct." BUCKLEY, L.J., pointed out that there is a difference between a trust for a parochial charity and a trust for persons residing in a parish, and it was held that the property, having been bought with church money, was vested in the rector and churchwardens in their ecclesiastical capacity, and did not pass to the borough council under the London Government Act, 1899 (62 & 63 Vict. c. 14).

(c) Even though the benefit to the members of a Church is of a temporal nature, yet if they derive it as members of the Church, the property is ecclesiastical property (*Re Perry Almshouses, Re Ross's Charity*, [1899] 1 Ch. 21, O. A.).

(d) Where land is owned by a person in his ecclesiastical capacity, it is ecclesiastical property, although it need not necessarily be applied to an ecclesiastical purpose (*Westminster Corporation v. St. George's, Hanover Square, supra*). But where land bought with money representing part of the endowment of a rectory is conveyed to the rector, but not in his capacity as rector, it may cease to be ecclesiastical property (*Power v. Banks*, [1901] 2 Ch. 487).

(e) These characteristics of ecclesiastical property are based on those set out in the definition clause as characterising an ecclesiastical charity in the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (2), by which that Act and the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 23, distinguish charities which, being ecclesiastical, are not to be transferred to the local authority from those which, not being ecclesiastical, are so transferred (see note (c), p. 355, *ante*).

SECT. 1.
Charac-
teristics
of Eccle-
siastical
Property.

Primitive
charac-
teristics.

Localisation
of ministra-
tions.

During the earlier stages, while the Church still retained a missionary character (*f*), the predominant characteristic of such ecclesiastical property was that it was dedicated to God or to the service of God. The persons who held the immediate possession of such property (*g*) held it only in a representative capacity and usually as property held as a common fund on behalf of all who were working together for the common cause. In most districts the ministrations of the Church were provided either by regular clergy working from and under the control of the monastery or abbey to which they belonged, or by secular clergy working from a diocesan centre under the control of the bishop, who had his seat there (*h*). In the former case the immediate possession and control of the property were as a rule vested in the abbot in his representative capacity; in the latter case the immediate possession and control of the property were vested in the bishop (*i*) as the representative of the *parochia* or mother church, and he awarded such stipend as he thought fit to the clergy working under him (*k*).

Gradually, as more churches were built, the ministrations of the Church became more localised, and partly by the deliberate acts of the bishops and those serving under him, partly by the allocation by

(*f*) As Christianity spread in England the representatives of the Church acquired property for ecclesiastical purposes, in part by succession to the temples formerly occupied and customary payments formerly received by the heathen priests, in part by voluntary gifts, and in part by payments based on the ordinances of the Church (Bede's Ecclesiastical History of England, Vol. I., pp. 30, 32; Lingard's History of England, Vol. I., p. 261; Haddan and Stubbs, Councils and Ecclesiastical Documents (relating to Great Britain and Ireland), Vol. I., p. 37).

(*g*) The means by which the Roman law gave effect to gifts of property for the benefit of the Church without requiring that the property should be vested in some person capable of owning it (see note (*g*), p. 357, *ante*), are not recognised by the law of England, but in the period from the introduction of Christianity into Britain until the Conquest there were frequent instances of gifts being dedicated to pious uses without any more specific statement as to their ownership than that they were the property of "the Church" or "dedicated to God," and so long as the bishop and clergy of a diocese worked from a centre and were sustained from a common fund, and the regular clergy held no other property than that which belonged to their order in common, such a statement as to ownership practically sufficed, the bishop or abbot, as the case might be, being in effective control, and being himself precluded from selling Church property (see note (*i*), *infra*), but as the division of the *parochia* into several parishes grew, and parish churches were separately endowed, the necessity, or at least the expediency, arose of vesting the endowment in some person recognised by the law capable of securing it as a reward for the spiritual care of the inhabitants for ever (1 Bl. Com. 469).

(*h*) See note (*a*), p. 442, *ante*. For the first six or seven centuries the *parochia* was the diocese or episcopal district wherein the bishop and his clergy lived together at the cathedral church, and all tithes and oblations were brought into a common fund for the support of the bishop and his college of priests and deacons and for the repair and ornaments of the church, and for other suitable works of piety and charity, so that before the distribution into parishes all tithes, offerings, and ecclesiastical profits whatever belonged to the bishop and his clergy for pious uses, and by their original nature could not be in the hands of any layman or be employed to any secular purpose (Burn, Ecclesiastical Law, Vol. I., p. 66).

(*i*) Council of Chelsea, clause 7 (816 A.D.), "That neither bishops nor abbots should sell any church property"; Haddan and Stubbs, Councils and Ecclesiastical Documents, Vol. III., p. 582.

(*k*) Council of Chelsea, clause 11.

PART VI.—PROPERTY OF THE CHURCH OF ENGLAND.

the monasteries of particular districts to be served by individual members of their number, and partly by agreement between great nobles and ecclesiastical authorities, smaller ecclesiastical districts were formed and the parochial system was evolved (*l*). The evolution of this system naturally varied with the variation of the forces which evolved it, but certain rules which are known to have been more or less generally enforced at different stages of this evolution may be usefully stated as an assistance to forming a true view of the growth of the existing system, and of its characteristics as finally evolved.

SECT. 1. Characteristics of Eccle- siastical Property.

1418. The ordinances of the Church provided (1) that although any subject might, so far as the mere building went, erect a church or chapel, yet until consecration by the bishop of the diocese the building could not be used without licence of the bishop for the celebration of the sacraments (*m*), nor was it recognised as a church in any legal sense, and (2) that the building should not be consecrated as a church until a competent endowment was made for the priest and that this competent endowment should include the assignment of a house and glebe. The effect of these rules was that no person or body (*n*) could consistently with the law of the Church erect any new church with rights of burying and christening without obtaining the sanction of the bishop and satisfying him as to the endowment.

Governing principles.

1419. A bishop was not at liberty to invade the territory assigned to a monastery or religious house, nor the *parochia* of another diocese, but within the limits of his own *parochia* was as universal incumbent in a position to allot any particular district within his jurisdiction to be served by one cleric as incumbent and to assign to him as incumbent such stipend as he thought fit (*o*).

Foundation of churches

(*l*) 1 Bl. Com. 111, 112, 113. The statement that the lords obliged all the tenants upon their demesnes to appropriate their tithes to an officiating minister instead of leaving them at liberty to distribute them among the clergy of the diocese in general, and that the tract of land the tithes whereof were so appropriated formed a distinct parish, requires qualification, since such liberty, if it ever existed, had in general ceased before the parish was formed. A statement which would probably be more generally applicable is that when a great lord founded a church the boundaries of the district allocated as that in which the duties should be performed and the fees and tithes should be received usually followed the boundaries of the area in which the founder held sway, whether as the lord of a hundred or of one or more manors. Such an allocation was not arbitrary, inasmuch as it was in general made with the assent of the bishop (Lord Selborne's *Ancient Facts and Fictions concerning Churches and Tithes*, pp. 309—314).

(*m*) The test whether a building is a church or not is, "Is it of right that the sacraments are administered there?" (2 Co. Inst. 363).

(*n*) Even the religious houses were bound by this rule (Burn, *Ecclesiastical Law*, Vol. I., p. 322).

(*o*) The discretion thus given to the bishop became in time qualified by rules providing for the division of the emoluments arising in a particular district between the church of the district and the mother church, and the principles governing such division recognised a distinction between the more important and less important of the district churches. Thus the laws of King Edgar provided:—"If there be any thane who on his boc land has a church at which there is a burial-place, let him give the third part of his own tithe to his church. If any one have a church at which there is not a burial-place, then of

SECT. 1.
Characteristics
of Eccle-
siastical
Property.

Rights of
 religious
 houses.

The King and anyone by the King's licence, and by the general custom of the realm any bishop, earl, or baron, without the King's licence, might, with the assent of the bishop, build a church or chapel (*p*) and provide a permanent endowment, and before the Statutes of Mortmain (*q*) might appropriate the endowment and right of patronage to any spiritual corporation; while, if no appropriation were made, the church after consecration was recognised with full rights by the law throughout the district in which the incumbent (*r*) had the cure of souls, and the incumbent was recognised as owning the endowment in his spiritual capacity, with perpetual succession to his successors in the incumbency (*s*).

A monastery or other ecclesiastical house founded by the King was exempt from all other ecclesiastical jurisdiction, and was entitled within the limits assigned by its grants to enforce its own rights of property. It was therefore in a position to allot any particular district within its jurisdiction to be served by one cleric and to assign to him such stipend as it thought fit (*t*), and in this manner as well as by appropriations *pleno jure* the interests in the benefice both temporal and spiritual were annexed to the religious house (*a*), the duties being performed by members of the house or by stipendiary curates who were at first removable at pleasure, but later became regularly endowed vicars (*b*).

In other cases a religious house with the assent of the King and bishop might receive an appropriation *in temporalibus* only, that is, temporal interests only, such as tithes or patronage, were conveyed, and the cure of souls resided in an endowed perpetual curate or vicar (*c*), who was instituted by the bishop.

Division into
 parishes.

In these various ways the major part of the country was by

the nine parts let him give to his priest what he will and let every church-scot go to the old minster according to every free hearth" (Thorpe, *Ancient Laws and Institutes of England*, p. 111). Subject to such qualifications the bishop had power to divide off from his *parochia* such portions as he thought fit to be served as separate parishes (Council of Chelsea, Haddan and Stubbs, *Councils and Ecclesiastical Documents*, Vol. III., p. 582).

(*p*) Burn, *Ecclesiastical Law*, Vol. I., p. 321.

(*q*) See title **REAL PROPERTY AND CHATELS REAL**.

(*r*) As to the word "incumbent," see p. 451, and note (*i*), p. 560, *ante*.

(*s*) 3 Co. Inst. 201, 202.

(*t*) Such a cleric had no particular interest in the profits, because he was a mere nominee of the monastery (*Jones v. Ellis* (1828), 2 Y. & J. 265; *Greenslade v. Darby* (1868), L. R. 3 Q. B. 421, 429).

(*a*) Burn, *Ecclesiastical Law*, 8th ed., Vol. I., p. 66, n.

(*b*) By stat. (1402) 4 Hen. 4, c. 12, the monasteries were compelled to appoint a secular person, not a member of their house, and not removable at pleasure and sufficiently endowed (*Greenslade v. Darby*, *supra*). See stat. (1391) 15 Ric. 2, c. 6; stat. (1402) 4 Hen. 4, c. 12).

(*c*) As to the meaning of "curate," see note (*i*), p. 560, *ante*; as to "vicar," see p. 561, *ante*, p. 718, *post*. Sometimes the rectory belonged to a monastery under such circumstances as to exempt it from stat. (1402) 4 Hen. 4, c. 12, and it appointed a curate who had no endowment, and before the Reformation no possession beyond that which was required for the fulfilment of his duties. After the Reformation the lay impropiator was compelled to appoint a curate whom the ordinary could not change capriciously and who became to a certain extent perpetual (*Greenslade v. Darby*, *supra*). As to whether a perpetual curate can be said to have an estate in fee in right of his church, see *Doe d. Richardson v. Thomas* (1839), 1 Per. & Dav. 578).

about the end of the thirteenth century divided into parishes, but some lands were never united to any ancient parish; and in respect of these lands the King, as supreme ecclesiastical head, was entitled to the ecclesiastical emoluments in trust that he should distribute them for the good of the Church (*d*).

1420. Before the division into parishes, while the property of the *parochia* or of the monastery was still treated as a common fund, the bishop or abbot was recognised in his representative capacity as the owner of the property of the whole *parochia* or of the monastery, and was precluded from alienating it; and as the division into parishes (*e*) proceeded a need arose for some person who might be similarly recognised in a representative capacity as the owner of the property allotted to each parish. Accordingly, the law recognised that not only was the bishop in his spiritual capacity a corporation having perpetual succession, but that in respect of every parish a person might be recognised as the *parochianus*, or person who should in his representative capacity be a corporation capable of preserving the original endowment for his successors in perpetuity (*f*).

1421. The determination of the question who is the person thus recognised as parson in each particular parish depends on the question whether the benefice has been appropriated or impropriated, and on the nature of the appropriation or impropriation. Where a benefice has been annexed to the perpetual use of some spiritual corporation, either sole or aggregate, being the patron of the living which was bound to provide for the cure of souls within the parish, the benefice is said to have been appropriated, and the appropriators are recognised as the parson or rector of the parish (*g*).

1422. Where a benefice is in lay hands it is said to be impropriate, and the lay rector is said to be the impropriator. Whenever the impropriator was a layman (*h*) it was essential that some spiritual person should be appointed to have the cure of souls, and in many cases where the benefice was appropriated to a spiritual corporation the actual cure of souls was intrusted to one individual, who officiated in the place of the parson and received some portion of the emoluments. * Where one thus holds a spiritual office under the parson as officiating in his place or stead he is called

SECT. 1.
Characteristics
of Ecclesiastical
Property.

Ownership of
endowments.

Appropriation.

Impropriation

(*d*) 1 Bl. Com. 112; 2 Co. Inst. 647.

(*e*) A parish is that circuit of ground which is committed to the charge of one parson or vicar or other minister having cure of souls therein (Selden's History of Tithes, p. 260; and see p. 442, *ante*). The fact that the vicar of a parish receives the vicarial tithe of a chapelry, and that the inhabitants in the chapelry are in the habit of being married in the parish church, is almost conclusive evidence that the chapelry is part of the parish (*Re Sandbach School and Almshouse Foundation, A.-G. v. Crewe (Earl)*, [1901] 2 Ch. 317).

(*f*) As to the word "parson," see note (*k*), p. 560, *ante*.

(*g*) See also note (*n*), p. 561, *ante*.

(*h*) No layman could have cure of souls, and the granting of a benefice to a layman was against the law of the church, at least after the year 1200 A.D. (see 1 Co. Inst. 641), and probably before that date; but grants were in fact in some cases made, and were confirmed by statute, and after the dissolution of the monasteries a great number of the rectories which had been appropriated to the monasteries were granted to laymen and so became impropriate.

SECT. 1.
Charac-
teristics
of Eccle-
siastical
Property.

a vicar, and his office is called a vicarage (i). The emoluments of a vicar usually consist of the house held by the person officiating as vicar, called the vicarage, and a part of the emoluments of the benefice in kind, called the small or vicarial tithes (k), and may include a part of the great tithes and also of the glebe (i). The same grounds existing for such recognition as exist in the case of a rector, the law also recognises the vicar as a corporation, and he and his successors are the owners in perpetuity of such portions of the property as appertain to his office, including as a rule such property in the churchyard as is necessary for the performance of his ecclesiastical duty, and the site and fabric of the church, excepting the chancel, which appertains to and is owned by the rector.

Forms of
ecclesiastical
property in
parishes.

1423. In the case of an impropriate rectory, that portion of the endowment which is owned by the lay rector for other than spiritual purposes is not ecclesiastical property (l), but where a benefice is appropriate the endowment as a whole, and where a benefice is impropriate that part of the endowment which forms the emoluments of the vicar, or is otherwise owned for spiritual purposes, is ecclesiastical property, and where a benefice is impropriate, if the owner entitled in fee simple to the rectory or tithes is willing to restore the tithes, glebe, and other rectorial rights, the vicarage may be converted into a rectory (m), and the tithes and glebe restored will thereupon be ecclesiastical property again. The ecclesiastical property owned in connection with a parish thus usually includes: (1) The church and churchyard; (2) the tithes, rectorial or vicarial, as the case may be; (3) the parsonage house and glebe (n).

SECT. 2.—Property Ecclesiastical in its Nature.

SUB-SECT. 1.—Consecrated Churches and Churchyards.

Consecration.

1424. The property owned for the benefit of the Church of England which is most directly ecclesiastical in its nature is that which by an act of consecration has been set aside for ever to

(i) Burn, *Ecclesiastical Law*, Vol. IV., p. 9; see also p. 561, *ante*. In some cases a vicarage may be converted into a rectory upon a surrender of the great tithe by the impropiator (see *infra*).

(k) See p. 743, *post*.

(l) Although the ecclesiastical property of the monasteries, which on their dissolution was granted to non-ecclesiastical persons, and became impropriate, was to be held by the new owners as it was held by the religious house from which it was transferred, yet in fact the impropriations in the hands of laymen became inheritances of a merely temporal nature entirely freed from any spiritual jurisdiction. See p. 801, *post*.

(m) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 13. The Ecclesiastical Commissioners may direct the conversion to be made either for a parish or a separate division of a parish where a proportion of the tithe and glebe satisfactory to them is restored (*ibid.*).

(n) Every archbishop and bishop is bound as far as in him lieth to procure a true note and terrier of all the glebes, lands, meadows, gardens, orchards, houses, stocks, implements, tenements and portions of tithes lying out of their parishes which belong to any parsonage or vicarage or rural prebend within his diocese to be taken by the view of honest men in every parish appointed by the bishop, whereof the parson is to be one, to be laid up in the bishop's registry, there to be for a perpetual memorial thereof (Canons (1603), 87).

sacred uses, and the most important part of such property, and that which is most essential for the due performance of the ministrations of the Church, consists of the churches and churchyards which belong to, or are used in connection with, the parishes to which they appertain.

As a building does not become a church in the eye of the law until it is consecrated, a church must be so set aside before it can become the church of a separate parish (*o*). There is no corresponding necessity for the consecration of a churchyard (*p*), but the practice of consecrating a churchyard in connection with every parish church has become so general that a consecrated church and churchyard have come to be regarded as requisite for the complete performance of the offices of the Church in a parish, and as the natural centre and basis of the parochial organisation.

SECT. 2.
Property
Eccle-
siastical in
its Nature.

Necessity of
consecration.

(i.) *Acquisition of Churches and Churchyards.*

1425. A building intended for use as a church or chapel may be erected by anyone (*q*), and may, with the consent of the bishop, be used for divine service and the administration of sacraments, but the law does not take notice of such a building as a church or chapel of the Church of England until it has been consecrated by the bishop (*r*). The right of the bishop to give or withhold his sanction to the foundation of a church, and to consecrate or to refuse to consecrate a building erected for that purpose, is absolute (*s*).

Acquisition
of churches.

(*o*) Burn, Ecclesiastical Law, Vol. I., p. 323.

(*p*) The provision of a churchyard was never required as an essential preliminary to the erection of a church, the practice in England having been to bury persons of pre-eminent sanctity of life in the church, and to bury persons of less memorable merit in inclosed places not connected with the church, but after the year 750 A.D. the practice arose of carefully inclosing a space of ground adjoining the church and consecrating it and appropriating it to the burial of those who had been entitled to attend divine service in the church (*Gilbert v. Buzzard and Boyer* (1821), 2 Hag. Con. 333, 343), and when this practice became general it was recognised that every parishioner had a right to be buried in the churchyard without payment for the ground occupied or for the performance of the office (Burn, Ecclesiastical Law, Vol. I., p. 257). Even when it is proposed to erect on a part of the churchyard which has not been consecrated, there is jurisdiction to grant a faculty authorising the erection (*Re Holy Trinity, Hoxton* (1909), 25 T. L. R. 570).

(*q*) By a constitution of Otho it was provided that all cathedral, conventual, and parochial churches then built and the walls thereof perfected were to be consecrated within two years, and that it was to be so done within the like time in all churches thereafter to be built under penalty that they should be interdicted from the solemnities of the mass until consecrated unless they be excused for some reasonable cause (Burn, Ecclesiastical Law, Vol. I., p. 321), and on the principle that *omnia præsumuntur rite esse acta* it may therefore fairly be inferred that all ancient parochial churches have been duly consecrated. The fact that the sacraments have not been administered in a chapel thus affords strong ground for thinking that it is a chapel of ease and not a parochial chapelry (*Carr v. Mostyn* (1850), 5 Exch. 69).

(*r*) Within the limits of the possessions of a religious house which was exempt from ecclesiastical jurisdiction anyone with the assent of such religious house might erect a church or chapel, and outside such limits any bishop, earl, or baron might erect a church or chapel with full rights (Burn, Ecclesiastical Law, Vol. I., p. 321).

(*s*) Even if the incumbent of the existing church of the parish objects to the consecration of another building the bishop may overrule his objection (*Winchester (Bishop) v. Rugg* (1868), L. R. 2 A. & E. 247). The bishop's discretionary

SECT. 2.

Property
Eccle-
siastical in
its Nature.Foundation
of church.

Where the building is consecrated as a church, the church so founded (t) includes the cure of souls and the rights attached within the district assigned to it, and will continue to exist in the eye of the law as a church, even though the material building is destroyed (u), and the body corporate which has been endowed in respect of it will remain in possession of the endowment (x).

The bishop before consecrating a church is bound to ascertain that a competent endowment, including a manse and glebe, has been provided, and accordingly it is necessary before commencing to build a church to obtain the bishop's approval of the site, plans, and endowment, so as to secure that, when the church is finished, the bishop will be willing to consecrate it (a).

Modern
acquisitions.

1426. After the end of the thirteenth century the realm having, as stated (b), become divided into parishes and extra-parochial places, the foundation of churches according to the ancient manner ceased, and churches and chapels were thenceforth acquired and consecrated either (1) for the purpose of replacing existing churches (c), or of making better provision for the cure of souls in existing parishes or extra-parochial places; or (2) in connection with some alteration in the boundaries of existing parishes or

power to refuse consecration could not be defeated by the action of the religious houses (Burn, Ecclesiastical Law, Vol. I., p. 322).

(t) A chapel erected for the private use of a lord of a manor and his servants and tenants, even though consecrated and used on exceptional occasions for baptisms and other offices excepting burial, is not necessarily to be regarded as a parochial chapel (*Nevill v. Studdy* (1906), 94 L. T. 391).

(u) It was formerly thought that the material building would if it were polluted or absolutely destroyed require reconsecration (Burn, Ecclesiastical Law, Vol. I., p. 336; *Battiscombe v. Eve* (1863), 7 L. T. 697; *Turner v. Hanwell (Rector etc.)* (1842), 1 Notes of Cases, 368), but these cases have been doubted, and it has been said that even the material building will not require reconsecration if it is rebuilt on the same foundations; or at least this will be so when the offices of the church have continuously been performed, and what remained of the building has remained subject to the jurisdiction of the ordinary (*Parker v. Leach* (1866), L. R. 1 P. C. 312).

(x) Where a church was thus founded with full rights throughout a defined district under the charge of one incumbent, the district became a parish and the church became the parish church (see p. 442, ante).

(a) The ancient manner of founding a church was that on the founder applying to the bishop and receiving his sanction, the bishop or his commissioners set up a cross and set forth the ground where the church was to be built, and when the church was finished and endowed the bishop consecrated it (Burn, Ecclesiastical Law, Vol. I., p. 323).

(b) See p. 717, ante.

(c) Where a church had been consecrated and used for twelve years for divine worship in place of an ancient chapel which had fallen into decay, it was held that although christenings and burials were still performed in the chapel, the new church had become *de facto* the church of the parish, for the purpose of the Act requiring notices to be affixed to the door before the commencement of service (*Ormerod v. Chadwick* (1847), 16 L. J. (M. C.) 143). When an existing church which served certain purposes was compulsorily acquired at a price enhanced on the ground of the ornamental style in which it was built, there is no obligation to rebuild it in similar style provided the accommodation is equally good for such purposes, and the enhancement of price may be devoted to augmenting the endowment (*Olephane v. Edinburgh Town Council* (1864),

extra-parochial places for the purpose of providing for the cure of souls in some newly formed parish or district.

1427. Where a new church is built in any parish or chapelry and the bishop, patron, and incumbent of the parish or chapelry certify to the Ecclesiastical Commissioners that it will be convenient for the new church to be substituted for the existing church, the Ecclesiastical Commissioners may declare, with the consent of the bishop, patron, and incumbent, that on consecration the new church shall be so substituted, and may transfer the endowments, emoluments, and rights, and thereupon the trustees, if any, must transfer the same according to the directions of the commissioners, and all glebe lands, tithes, endowments, emoluments, fees, and profits are vested in the incumbent of the new church (*d*), and the incumbent of the old church becomes the rector, vicar, perpetual curate, or vicar, as the case may be, of the new church (*e*). After such substitution the bishop may by faculty provide for pulling down the old church (*f*), and for the use or preservation of the site either by the incumbent or by the churchwardens, or by an owner of some adjoining freehold (*g*), and in granting such faculty must take care that all tombstones, monuments, and monumental inscriptions are, as far as may be, preserved by the churchwardens or are transferred to the substituted church (*h*).

SECT. 2.
Property
Eccle-
siastical in
its Nature.

Substitution
of new
church for
old church.

1428. The various modes in which a parish may be subdivided or a new ecclesiastical district formed, or an extra-parochial place may be formed into a parish, have already been considered (*i*), and it is here necessary to deal only with the acquisition and consecration of the church and churchyard in connection with such subdivision or formation. The difficulties in the way of providing sites for churches and churchyards arose in part from the laws of mortmain and the laws relating to charitable trusts, and in part from the law against perpetuities. The law of mortmain, which formerly prevented the provision of sites for churches and churchyards without the consent of the King and the lord of the fee, now provides that where land or personal estate to be laid out in the purchase of land is assured by will to or for the benefit of any charitable use, so much land as is required for actual occupation for the purpose of the charity may be retained or purchased, provided the High Court or the Charity Commissioners are satisfied that it is so required and sanctions such retention or purchase (*j*), and that any assurance

Churches for
new divisions
or districts.

(*d*) Such a substituted endowment may be sufficient satisfaction of the rule that a new church shall not be consecrated until provision has been made for the church and the incumbent thereof to justify the consecration of the new church (*Re St. Mary, Bishopstoke* (1909), 26 T. L. R. 86).

(*e*) Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 1.

(*f*) *Ibid.*

(*g*) New Parishes and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), s. 8.

(*h*) Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 1.

(*i*) See pp. 443—451, *ante*.

(*j*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 8. A certificate of the Charity Commissioners is not required before an application is made to the court under this section (*Re Church Patronage Trust, Laurie v.*

SECT. 2.
Property
Eccle-
siastical in
its Nature.

Facilities
for erecting
churches.

otherwise than by will to trustees on behalf of any society or body of persons associated together for religious purposes of land, not exceeding two acres, for the erection thereon of a building for such purposes, if made in good faith and for full and valuable consideration, is exempt from the provisions (k) required to be fulfilled in order to validate an assurance of land to charitable uses (l).

1429. For the purpose of erecting or providing any church or chapel (m), any person of full age and sane (n) may, by will executed not less than three months before his death, or by deed enrolled, give land not exceeding five acres, or goods and chattels not exceeding £500 (o), or the Crown or the lord of any manor may grant land, not exceeding five acres (p), for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel of the Church of England, or any mansion-house for the residence of the minister officiating in such church or chapel, or any churchyard or glebe (q) for the same, to be applied with the consent of the ordinary in accordance with the directions in the will or deed, or if there are

A.-G., [1904] 1 Ch. 41). As to the application of the Mortmain Acts to charities generally, see title CHARITIES, Vol. IV., pp. 124 *et seq.*

(k) These provisions are contained in Part II. of the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42).

(l) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 7 (ii.).

(m) The word "church" according to the ordinary interpretation includes the chancel, and in the Church Building Acts the word bears this ordinary meaning unless the chancel is separately mentioned (*Rippin v. Bastin* (1869), L. R. 2 A. & E. 386).

(n) Gifts for Churches Act, 1803 (43 Geo. 3, c. 108), s. 1. The section contained an exception of women covert without their husbands, and it was held in *Re Smith's Estate, Clements v. Ward* (1887), 35 Ch. D. 589, that this exception was not impliedly repealed by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), but in *Re Douglas, Douglas v. Simpson*, [1905] 1 Ch. 279, it was held that the exception is impliedly repealed by s. 7 of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73).

(o) A gift of £500 on trust to apply the income in repairing a churchyard is good under the Act of 1803. Where the income of the £500 was directed to be in part applied to keeping a family vault in repair, and the residue in keeping in repair a tomb and the churchyard in which it was situated, it was held that the trust to keep the vault in repair was void and the residuary trust was void so far as it related to keeping the tomb in repair and the £500, less so much as would have provided sufficient income to keep the tomb in repair, was applied to the repairs of the churchyard (*Re Vaughan, Vaughan v. Thomas* (1886), 33 Ch. D. 187). Even without the statute such a gift might have been good as a charitable gift (*Re Manser, A.-G. v. Lucas*, [1905] 1 Ch. D. 68; *Re Pardoe, McLaughlin v. A.-G.*, [1906] 2 Ch. 184). Where a bequest was to pay £2,000 to the vicar of M. to be used at his discretion for the purposes of restoring, altering, enlarging, and improving the church parsonage house and school, it was held that the bequest was valid to the extent of the restoring etc. the church, and such other of the objects as were already in mortmain, and that such of the objects as were within the Gifts for Churches Act, 1803 (43 Geo. 3, c. 108), were payable out of the impure personalty to the full extent of £500 (*Champney v. Davy* (1879), 11 Ch. D. 949); but see now Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 7, and title CHARITIES, Vol. IV., p. 136, note (f).

(p) Gifts for Churches Act, 1811 (51 Geo. 3, c. 115). The power of a lord of the manor under this Act is restricted by the Commons Act, 1899 (62 & 63 Vict. c. 30), s. 22, Sched. I.

(q) No glebe above fifty acres in extent can be augmented by such a gift to the extent of more than one acre (*Gifts to Churches Act, 1803* (43 Geo. 3, c. 108), s. 3).

no such directions, in accordance with the directions of the patron and ordinary and with the consent of the incumbent (*r*).

SECT. 2.
Property
Eccle-
siastical in
its Nature.

Provision of
land for
churches.

1430. All bodies politic, corporate, or collegiate, or corporations sole or aggregate, tenants for life or in tail, guardians(*s*), trustees, committees, executors or administrators(*a*), or commissioners, or other persons having the control, care, or management of any hospitals, schools, charitable foundations, or other public institutions(*b*), may effectually contract for the sale of and convey for full consideration any lands or enfranchise copyholds, so as to bind all parties interested, to the commissioners appointed under the Church Building Acts, now the Ecclesiastical Commissioners, for the purpose of building churches or chapels(*c*), or for enlarging any churchyard or burial ground or providing any new burial ground(*d*), or by sale or exchange only may convey a site not exceeding five acres for the house of residence of any incumbent(*e*), and the Commissioners of Woods and Forests (with the consent of the Treasury) or the Lords of the Treasury, or the Chancellor of the Duchy of Lancaster, or the Chancellor of the Duchy of Cornwall, or any body politic, corporate, or collegiate, or corporation, aggregate or sole, may grant any building or buildings, or site or sites, sufficient for the building of any church or chapel providing a churchyard and access or approach thereto, or any house, garden, and appurtenances, or land for the erection thereof, not exceeding ten acres, for the residence of any spiritual person serving such church or chapel(*f*), and may grant timber, stone, slate, or other materials from the estates belonging to them for the purpose of such building(*g*).

1431. Where the commissioners cannot agree on the price to be paid for lands taken for the purposes of church building, they may proceed to have the amount to be paid settled by a jury(*h*), and on payment of the amount so settled may enter into possession of the lands(*i*). After the expiration of five years from the transfer or conveyance to the commissioners their title becomes absolute(*k*), provided the transfer or conveyance is justified by the provisions by virtue of which it has been made(*l*). For the purpose of providing the purchase-money of a site the commissioners have power to advance money, and the parish had power to raise moneys on the security of the church rates(*m*), but this latter power has been

Compulsory
acquisition
of land.

- r*) Gifts for Churches Act, 1803 (43 Geo. 3, c. 108), s. 1.
- s*) Including a father as natural guardian; see note (*h*), p. 725, *post*.
- a*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 36.
- b*) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 1.
- c*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 36.
- d*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 37.
- e*) Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 9.
- f*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 33.
- g*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 20.
- h*) Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 40—49.
- i*) *Ibid.*, s. 43.
- k*) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 29.
- l*) *A.-G. v. Manchester (Bishop)* (1867), L. R. 3 Eq. 436.
- m*) Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 54, 55.

SECT. 2.
Property
Eccle-
siastical in
its Nature.
—
Gifts for new
ecclesiastical
districts.

rendered inoperative since 1860 by the abolition of compulsory church rates (*n*).

1432. Any person or body corporate (*o*) having in his or their own right any estate or interest in possession, reversion, or contingency of or in any lands, tithes, or other hereditaments (*p*), or any property in any personal estate whatsoever (*q*), may by deed enrolled in the case of lands, or without any deed in the case of personal estate, or by will, give to and vest in the Ecclesiastical Commissioners all or any part thereof for the endowment (*r*) or augmentation of ministers or perpetual curates appointed to serve districts where the provision for public worship and for pastoral superintendence is insufficient for the spiritual wants of the inhabitants, or for or towards providing any church or chapel for such district, and to be applied for such purpose according to the directions of the donor, or when no such directions are given, then in accordance with directions framed by the Ecclesiastical Commissioners, with the consent of the bishop of the diocese, and approved by His Majesty in Council (*s*).

Enlargement
of church-
yards.

1433. For the purpose of providing for the enlargement of churchyards or burial grounds, limited owners may utilise all the facilities (*t*) for conveyance given by the School Sites Acts to persons desirous of providing lands for schools (*a*), and may on any such gift reserve the exclusive right in perpetuity of burial and of placing monuments and gravestones in one-sixth of the land given

(*n*) Compulsory Church Rate Abolition Act, 1860 (31 & 32 Vict. c. 109). Accordingly the Church Building Acts, 1818 (58 Geo. 3, c. 45), 1819 (59 Geo. 3, c. 134), and 1822 (3 Geo. 4, c. 72), are repealed by the Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91), so far as they provide for enforcing any rate.

(*o*) Including any ecclesiastical or collegiate corporation, aggregate or sole (New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 4).

(*p*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 22; District Church Tithes Act, 1865 (28 & 29 Vict. c. 42), s. 7.

(*q*) New Parishes Act, 1844 (7 & 8 Vict. c. 94), s. 7.

(*r*) These provisions extend to the giving of tithes or the giving of land or personal estate for the purchase of tithes with the view of annexing such tithes to a district church (District Church Tithes Act, 1865 (28 & 29 Vict. c. 42), s. 7).

(*s*) A gift by will for such a purpose is valid although at the death of the testator no district had been formed (*Baldwin v. Baldwin* (No. 2) (1856), 22 Beav. 419).

(*t*) The Schools Sites Acts, 1841 (4 & 5 Vict. c. 38), 1844 (7 & 8 Vict. c. 37), 1849 (12 & 13 Vict. c. 49), 1851 (14 & 15 Vict. c. 24), and 1852 (15 & 16 Vict. c. 49), provide facilities to limited owners for providing sites for schools, subject to a reverter on the land ceasing to be used for the purposes in the Acts mentioned, and to ascertain what this purpose is the terms of the grant of the land are to be looked at (*A.-G. v. Shadwell*, [1910] 1 Ch. 92), and a reverter will take place if the land has ceased to be used for that purpose even though it is still used for other purposes within the Acts, but not within the purpose of the grant (*ibid.*). Any number of sites may be conveyed, provided that not more than one acre is conveyed in any one parish or ecclesiastical district (Schools Sites Act, 1841 (4 & 5 Vict. c. 38), s. 9, 1849 (12 & 13 Vict. c. 49), s. 3, and 1851 (14 & 15 Vict. c. 24). The School Sites Act, 1849 (12 & 13 Vict. c. 49), s. 5, also enables an absolute owner to vest any quantity of land in a corporation in trust for the purposes of the Acts. As to the Schools Sites Acts, see further title EDUCATION.

(*u*) Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), s. 4.

subject to the jurisdiction of the ordinary as to the inscriptions thereon (b).

1434. Any person entitled in fee simple, fee tail, or for life to any manor or lands, and having the beneficial interest therein and being in possession (c), and any corporation, ecclesiastical or lay, sole or aggregate, and any officers, justices of the peace, trustees, or commissioners holding land for public, ecclesiastical, parochial, charitable, or other purposes (d), may grant or enfranchise, by way of gift or sale or exchange (e), any quantity, not exceeding one acre, of land not being part of a demesne attached to a mansion-house as a site for a church, chapel, or other place of worship, or for the residence of a minister officiating in a place of worship within one mile of such site, or for a burial place (f), or any number of such sites, provided each site does not exceed one acre, and that when the person conveying is seised only for life the concurrence of the person next entitled (g), if he be legally competent, or if such person be a minor, married woman, or lunatic, the concurrence of the guardian (h), husband, or committee is required; that when an ecclesiastical corporation sole below the dignity of a bishop conveys, the concurrence of the bishop of the diocese is required; that when a municipal corporation conveys, the consent of the Treasury is required; that when parochial property is conveyed, the concurrence of the ratepayers and owners of property in the parish (i), of the Local Government Board, and of the guardians of the poor is required; and that when charitable property is conveyed, the consent of the Charity Commissioners is required. Where a grant is made of real estate to the Ecclesiastical Commissioners or to the Governors of Queen Anne's Bounty, pursuant to any of the foregoing provisions, there is power to accept the grant (k). In many cases

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(b) Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), ss. 9, 10, amended by Consecration of Churchyards Act, 1868 (31 & 32 Vict. c. 47). As to these Acts, see further title BURLIAL AND CREMATION, Vol. III., pp. 413, 441, 442, 528.

(c) Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), s. 1.

(d) Places of Worship Sites Amendment Act, 1882 (45 & 46 Vict. c. 21), s. 1.

(e) As to the powers of sale or exchange of a tenant for life under the Settled Land Acts, see title REAL PROPERTY AND CHATTELS REAL.

(f) On the land ceasing to be used for the purpose, it is to revert (Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), s. 1).

(g) If the person entitled to the immediate remainder is unborn or unascertained, the grant may be made, with the concurrence of the person entitled in remainder expectant, on the estate of such unborn or unascertained person (Places of Worship Sites Amendment Act, 1882 (45 & 46 Vict. c. 21), s. 2).

(h) A father who is tenant for life can, as guardian by nature of his infant son, concur on his behalf if the son is entitled to the inheritance in remainder (*Re Salisbury (Marquis) and Ecclesiastical Commissioners* (1876), 2 Ch. D. 29, O. A.).

(i) See Local Government Act, 1894 (56 & 57 Vict. c. 73). The express power given to the parish meeting to give consent on behalf of the owners and ratepayers under the Schools Sites Acts and Acts relating to the relief of the poor (s. 52) may make it doubtful whether the parish meeting could give such consent under this Act.

(k) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 33; New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 22, amended by New Parishes Act, 1844 (7 & 8 Vict. c. 94), s. 7; Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 8; Parsonages Act, 1865 (28 & 29 Vict. c. 69), s. 4.

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vested in
trustees.

statutory forms of grant which may be adopted are provided and are, when adopted, given statutory force (*l*). A conveyance made in the form prescribed by the Church Building Act, 1822 (*m*), does not require to be enrolled and is free from stamp duty (*n*).

1435. A body of church trustees may be appointed in any parish for the purpose of accepting and holding any contributions which may be given to them for ecclesiastical purposes in the parish (*n*), and in any parish or extra-parochial place where the churches and chapels are inadequate for the accommodation of one-fourth of the parishioners, and twelve householders certify this to the bishop, and that they desire to build or purchase a church or chapel out of subscriptions, and to provide out of pew rents for the stipend of the minister and other expenses, such church or chapel may, with the approval of the bishop, be built (*o*) and vested in three life trustees to be elected by persons subscribing not less than £50 each (*p*). The Ecclesiastical Commissioners may, with the consent of the majority of the subscribers having the right to elect, and of the patron and incumbent, make any such church or chapel a district church or chapel (*q*), and after forty years it must become a district church if the parish has been divided, or a parochial chapel if no division is made (*r*).

Vesting of
site in new
parish.

1436. Where a new parish is created under the New Parishes Acts the freehold of the site of the church and churchyard, burial ground and vaults belonging thereto, with the rights, members, and appurtenances thereof, and the house of residence and all endowments belonging to or held for the exclusive benefit of the incumbent, vest on the creation of the parish in the incumbent and his successors in right of such incumbency, provided that where the church or churchyard is by any local Act of Parliament vested in any vestry, the consent of such vestry has been given (*s*).

Augmenta-
tion of
endowments.

1437. Various provisions have been made for the augmentation of endowments and for securing endowments for the support of the minister and the repair of the church or chapel of an ecclesiastical district, new parish, or district parish, either by providing (1) a

(*l*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 37, repealed Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91); Queen Anne's Bounty Act, 1838 (1 & 2 Vict. c. 20), s. 20; Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 6; Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), s. 4.

(*m*) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 2.

(*n*) See p. 474, *ante*.

(*o*) Church Building Act, 1824 (5 Geo. 4, c. 103), s. 5.

(*p*) *Ibid.*, s. 6.

(*q*) *Ibid.*, s. 16.

(*r*) *Ibid.*, s. 17.

(*s*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 10. Where under a local Act a new church was made the parish church, and the old parish church was converted into a "parish chapel," and the adjacent part of the parish into a new district, this section did not operate to vest the old churchyard in the incumbent of the new district (*Champneys v. Arrowsmith* (1867), L. R. 3 C. P. 107 Ex. Ch.).

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parsonage house and glebe; (2) tithes; (3) pew rents; (4) fees; or (5) income from investments or from the fund of the Ecclesiastical Commissioners, and such provision may be made either by transference of property or rights from the endowments of the mother church or by the creation of new endowments.

Any owner or proprietor of any impropriation or tithes, or rent-charge in lieu of tithes (*a*), in any parish or chapelry may, without any licence in mortmain, annex the same to the parsonage or vicarage of the church or chapel where they arise (*b*), and the incumbent of any benefice, the income of which does not amount to a clear £100, may, without licence, accept or purchase lands, tithes, or other hereditaments (*c*).

By tithe
owner.

Any ecclesiastical corporation (*d*), or college, or hospital (*e*) may, out of any rectory impropriate or portion of tithes, or other hereditaments, reserve and grant a rent by way of augmentation to any incumbent of any church or chapel in any parish in which such rent arises, or of which the grantors are patrons (*d*), provided that the income of the benefice does not before augmentation exceed £300, nor after augmentation exceed £350 without counting surplice fees (*f*).

By rector.

The incumbent of any benefice, with the consents of the ordinary and patron, may annex any land or tithe to which he is entitled in right of his benefice to any church or chapel within the parish, district, or place in which such land or tithe is situated or arises (*g*), and may charge his benefice with the payment of any annual sum, to be paid quarterly or half-yearly to the incumbent of any chapel of ease, parochial chapel, or district church or chapel within the original limits of his rectory or vicarage (*h*), provided that no such charge can be made in favour of a chapel of ease which is to become the church of a distinct parish after the existing incumbency of the mother church (*i*).

Endowment
of chapel by
incumbent.

The Ecclesiastical Commissioners may, in cases where they do not deem it expedient to divide a parish for ecclesiastical purposes, allot a portion of the endowment not exceeding one half to the incumbent of or person serving a chapel within the parish in which the celebration of marriage has been authorised by the bishop (*k*).

By Eccle-
siastical
Commis-
sioners.

A chapelry served by a chapel-of-ease may be made into a distinct and separate parish by the bishop, with the consents of the incumbent and patron, if the bishop is satisfied that some person will

(*a*) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 23.

(*b*) Stat. (1665) 17 Car. 2, c. 3, s. 7. This statute was repealed by the Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 15; but ss. 7 and 8 were revived by the New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 25.

(*c*) Stat. (1665) 17 Car. 2, c. 3, s. 8.

(*d*) Stat. (1677) 29 Car. 2, c. 8, extended by Augmentation of Benefices Act, 1831 (1 & 2 Will. 4, c. 45); Augmentation of Benefices Act, 1854 (17 & 18 Vict. c. 84); and by the District Church Tithes Act, 1865 (28 & 29 Vict. c. 42).

(*e*) Augmentation of Benefices Act, 1831 (1 & 2 Will. 4, c. 45), s. 3.

(*f*) *Ibid.*, s. 16.

(*g*) *Ibid.*, s. 20; and Augmentation of Benefices Act, 1854 (17 & 18 Vict. c. 84), ss. 2, 3.

(*h*) Augmentation of Benefices Act, 1831 (1 & 2 Will. 4, c. 45), s. 21.

(*i*) *Ibid.*, s. 22.

(*k*) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 22.

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ment by
scheme.

Apportion-
ment by
Court of
Chancery.

endow the chapel with a competent stipend for the minister (*l*). Before the bishop can grant the patronage of a privately built church to the donor an endowment certified to be worth £1,000 must be provided (*m*).

On the formation of a distinct and separate parish (*n*), but not on a division only into district parishes (*o*), the endowment of the divided parish and any charges on it (*p*) may be apportioned without regard to local situation (*q*) by scheme on the recommendation of the Ecclesiastical Commissioners.

Where a distinct and separate parish or a district parish or a district chapelry is formed out of any parish or extra-parochial place a Court of Chancery may apportion any gifts, devises, or bequests given for the use of such parish or place, and any charges thereon (*r*).

Further provisions for the endowments of benefices and their augmentation are made by the Governors of Queen Anne's Bounty (*s*) and by the Ecclesiastical Commissioners (*t*), and by the assignment of fees (*a*) or of pew rents (*b*).

(ii.) *Consecration of Churches and Churchyards.*

Act of
consecration.

1438. Property which has been dedicated to God or to the service of God may be stamped with an ecclesiastical character in a real sense by an act recognised by the law, which is called an act of consecration, and when real estate has thus been legally consecrated it will retain the ecclesiastical character thus bestowed upon it, whoever may be the actual owner and whatever may be the nature of his tenure (*c*). Consecration is effected by the decree of a competent ecclesiastical court. The act or sentence of consecration signed by the bishop setting aside land or buildings *in sacros usus* is what constitutes the legal act of consecration, and the effect of such act is that the property consecrated is separated for ever from the common uses of mankind (*d*), and is set apart solely for sacred purposes for all time or until the decree has been set aside by the like authority (*e*).

(*l*) Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 23; Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 7.

(*m*) Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 2; Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 12.

(*n*) Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 16, 17.

(*o*) *Ibid.*, s. 30.

(*p*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 8.

(*q*) *Ibid.*, s. 9.

(*r*) Church Building Act 1845 (8 & 9 Vict. c. 70), s. 22.

(*s*) See p. 781, *post*.

(*t*) See pp. 774, 783, *post*.

(*a*) See p. 778, *post*.

(*b*) See p. 786, *post*.

(*c*) Where ground is consecrated and dedicated to sacred purposes, nothing short of an Act of Parliament can divest it of its sacred character (*R. v. Twiss* (1869), L. R. 4 Q. B. 407, 412).

(*d*) *Wright v. Ingle* (1885), 16 Q. B. D. 379, 399, C. A. Under the Church Building Act, 1818 (58 Geo. 3, c. 45), s. 43, lands taken under that section are to vest "as may be declared in the sentence of consecration" for the purposes of the Act for ever.

(*e*) *Wood v. Headingley-cum-Burley Burial Board*, [1892] 1 Q. B. 713, 725.

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—
Preliminaries.

1439. A church or chapel may be erected before consecration of the ground, and may with the consent of the bishop be used for divine service and the administration of sacraments, but it does not thereby become a church in the eye of the law (*f*). For this consecration is essential, and in order that the dedication may be certain, it is always required that the freehold of the ground on which the church is to be erected shall have been secured (*g*). This having been done, and the conveyance of the land having been effectively executed in the form appropriate in the particular circumstances so as to vest the land in the incumbent or in the Ecclesiastical Commissioners, or in some corporation or persons as trustees as the case may be (*h*), a petition is presented to the bishop (*i*) reciting the conveyance and requesting him to separate the land or land and buildings from all profane and common uses and to dedicate the same to God and divine worship, and to consecrate it for the celebration of divine offices therein, or for such other ecclesiastical purposes as are desired according to the doctrine and discipline of the Church of England (*k*).

Ceremony.

1440. Thereupon the bishop, with such religious ceremonial as he thinks fit, proceeds to consecrate the land or land and buildings, and to declare by sentence (*l*) that he thereby separates and sets them apart from all profane and common uses whatsoever, and dedicates them to the service of Almighty God for the performance of divine offices therein according to the liturgy and usages of the Church of England as by law established, and consecrates them for the use

The act of consecration is effective notwithstanding that a statutory provision requiring the sanction of a Secretary of State to the allocation of the land to be consecrated has not been complied with (*Williams v. Briton Ferry Burial Board*, [1905] 2 K. B. 565). No further act of consecration is required where the church is rebuilt on the same foundations (*Parker v. Leach* (1866), L. R. 1 P. C. 312); but where an extension of the chancel is built on unconsecrated ground, it must be consecrated (*Re St. Barnabas, Kensington* (1909), 25 T. L. R. 571).

(*f*) See p. 719, *ante*.

(*g*) The ancient manner of founding churches was that on the founders applying to the bishop and receiving his licence the bishop or his commissioners set up a cross and set forth the ground where the church was to be built, and when the church was finished and endowed the bishop consecrated it, but before consecrating it the bishop was bound to ascertain that a competent endowment had been provided, which provision was commonly made by an allotment of manse and glebe by the lord of the manor, who thereby became patron of the church (Burn, Ecclesiastical Law, Vol. I., p. 324). Whether the sixteenth canon of the Council of London, 1102 A.D., “ne ecclesia sacratur donec providiantur necessaria et presbytero et ecclesiæ,” ever became binding as part of the canon law of the Church of England or not, it provided a rule which has in the main been adhered to (*Re St. Mary, Bishopstoke* (1909), 26 T. L. R. 86).

(*h*) For forms of conveyance appropriate for the purpose, see Encyclopædia of Forms, Vol. III., pp. 604—617.

(*i*) For forms of petition, see Encyclopædia of Forms, Vol. III., pp. 713—716.

(*k*) The fees to be paid on the consecration of churches, chapels, cemeteries, and burial grounds are prescribed in Tables of Fees, settled from time to time, pursuant to the Ecclesiastical Fees Act, 1867 (30 & 31 Vict. c. 135), by the two archbishops and their vicars-general and the Lord Chancellor with the consent of the Treasury.

(*l*) For forms of sentences on consecration, see Encyclopædia of Forms, Vol. III.; pp. 717—719. Where an addition to a churchyard is consecrated under the Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), the statutory form set out in s. 5 of that Act should be used; a gift for the purposes of that Act is exempt from stamp duty (*ibid.*, s. 6).

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intended, and openly and publicly pronounces decrees and declares the same to be so separated, dedicated and consecrated, and that they ought to remain so for ever, saving, in the case of a chapel of ease, any rights which are reserved in favour of the mother church. When a church is consecrated and is to be vested in trustees, the sentence itself describes the site and declares that it is vested in the trustees and their successors as the trustees of such church (*m*).

Vesting of
freehold.

1441. The churchyard, when dedicated and consecrated, is regarded as the soil of the church (*n*), and the freehold is in the rector (*o*), the fee being in abeyance and the freehold being vested in him for the use of the soil by the parishioners for the purpose of their burial therein (*p*), the management being vested on their behalf in the incumbent and churchwardens, who have a discretion as to the part of the churchyard in which any burial shall take place, any alleged custom to the contrary being bad (*q*). Where the rector is a layman the enjoyment of the property so far as it can be exercised by a layman belongs to him as owner of the freehold, but the vicar or perpetual curate has such possession as is necessary for the performance of his sacred duties (*r*).

(iii.) *Effect of Consecration.*

Effect of
decree of
consecration.

1442. As has been already stated, the effect of the decree or sentence of consecration is in itself to vest the property covered by it in the person in whom the fee is, subject to a limitation *in sacros usus*, and when the site of a church has been conveyed to the Ecclesiastical Commissioners under the Church Building Acts, not only does the site which is covered by the consecration thereupon vest in the incumbent by virtue of the statute (*s*), but even a portion

(*m*) When a church or chapel is built by subscribers under the Church Building Act, 1824 (5 Geo. 4, c. 103), and is to be vested in trustees elected by them, the sentence of consecration declares the land, ground, and site to be vested in them and their successors for ever by such name and style as is therein specified (*ibid.*, s. 14).

(*n*) Stat. (1306-7) 35 Edw. 1, stat. 2.

(*o*) By his induction into his living he has full and entire possession of it and can maintain an action of trespass in respect of it (*Beckwith v. Harding* (1818), 1 B. & Ald. 508; *Winstanley v. North Manchester Overseers*, [1910] A. C. 7; *Maidman v. Malpas* (1794), 1 Hag. Con. 205; *Ex parte Blackmore* (1830), 1 B. & Ad. 122; *St. Gabriel, Fenchurch Street (Rector etc.) v. City of London Real Property Co.*, [1896] L. 95, 101; and see title BURIAL AND CREMATION, Vol. IV., pp. 413-415).

(*p*) The inhabitants of the parish have a general right of sepulture in the churchyard which may be enforced by mandamus (*R. v. Coleridge* (1819), 2 B. & Ald. 806). Originally the land was the property of some lay person which, when the rectory was formed, was dedicated to the church and conveyed by him to the rector. Thus the freehold was vested in the rector, and he was entitled to the land, including the grass herbage and everything else, as fully as the original owner had been, but as the land had been set apart by consecration for the church and churchyard, his right was proportionably diminished because he could not desecrate it or use it for any purpose which was inconsistent with its use as a graveyard (*Greenslade v. Darby* (1868), L. R. 3 Q. B. 421).

(*r*) *Winstanley v. North Manchester Overseers*, *supra*. A lay rector can maintain an action of trespass (*Batten v. Gedge* (1889), 41 Ch. D. 507), but when a lay rector applied as a parishioner for a mandatory injunction to compel the incumbent and churchwardens to restore a churchyard path, it was refused on the ground that it might be rendered nugatory by a faculty (*ibid.*).

(*s*) Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 13.

of the site which is is not consecrated vests as part of the site (t). When the fabric of the church has thus become devoted *in sacros usus* it cannot ever be used as a habitation for man (a), nor has a judge any power to sanction the use of it for secular purposes (b), and no alteration or addition can be made to it without a faculty (c).

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1443. A church or churchyard when consecrated ceases to be the property of the donor, who, by dedicating his property to God, voluntarily sacrifices it for the attainment of sacred objects (d). Thenceforth it may be possible to authorise by faculty the use of a portion of the consecrated ground for purposes which do not alienate it completely from sacred uses and are advantageous to persons using the church (e), or to the parishioners (f), or to the public (g), or to a private person without any detriment to the parishioners (h); but it is not possible to alienate it completely from sacred uses and to appropriate it to secular uses without the authority of an Act of Parliament (i). When such an appropriation to secular uses takes place by virtue of an Act of Parliament, the value of the property taken is not to be estimated on the basis of, but independently of (k), that irrevocable appropriation which has been withdrawn.

Appropriation
to sacred
uses.

1444. The effect of consecration is to subject the land consecrated to the ordinary, who thenceforth has jurisdiction to see that in the consecrated ground the laws of the Church are observed and in particular to see that in consecrated places of burial all conditions which the laws of the Church require in relation to the bodies of persons buried there are observed. This jurisdiction is not confined to occasions when it is necessary to remove a body, but extends to all such acts as are necessary in the interests of justice or of the decent and respectful treatment of the dead, and is not affected by the

Subjection
to the
ordinary.

(t) *Plumstead District Board of Works v. Ecclesiastical Commissioners for England*, [1891] 2 Q. B. 361.

(a) *Wright v. Ingle* (1885), 16 Q. B. D. 379, 391, 399, C. A.

(b) *Campbell v. Paddington Parishioners* (1852), 2 Rob. Eccl. 558; *R. v. Twiss* (1869), L. R. 4 Q. B. 407, 413.

(c) *Hutchins v. Denziloe* (1792), 1 Hag. Con. 170; *Lee v. Hawtrey*, [1898] P. 63. An additional building in order to be regarded as an enlargement of a consecrated church must serve directly or indirectly that which is the primary purpose of a church, namely, public worship, and it will not suffice to make it an enlargement that it serves purposes, which are lawful in a church but could equally well be carried out elsewhere (*London County Council v. Dundas*, [1904] P. 1). See also *St. Margaret's, Lothbury (Rector and Churchwardens) v. London County Council*, [1909] P. 310.

(d) *Hilcoat v. Canterbury and York (Archbishops)* (1850), 10 C. B. 327, 347.

(e) *St. Nicholas, Leicester (Vicar) v. Langton*, [1899] P. 19; *St. Botolph Without, Aldgate (Vicar etc.) v. Parishioners of Same*, [1892] P. 161.

(f) *Re St. Benet Sherehog* (1892), cited [1893] P. 66, n.

(g) *Re St. Nicholas Cole Abbey*, [1893] P. 58; *Lee v. Hawtrey*, [1898] P. 63; *Re St. John the Baptist, Cardiff*, [1898] P. 155; *Re Bideford Parish, Ex parte Bideford (Rector etc.)*, [1900] P. 314.

(h) See p. 542, *ante*.

(i) *Harper v. Forbes* (1859), 5 Jur. (n. s.) 275.

(k) *Re City and South London Railway and St. Mary Woolnoth and St. Mary Woolchurch Haw*, [1903] 2 K. B. 728, C. A.; affirmed, *sub nom. City and South London Railway v. St. Mary Woolnoth and St. Mary Woolchurch Haw (United Parishes)*, [1905] A. C. 1. The Court of Appeal approved *Hilcoat v. Canterbury and York (Archbishops)*, *supra*, in preference to *Siebbing v. Metropolitan Board of Works* (1870), L. R. 6 Q. B. 37; *R. v. Tristram (Dr.)*, [1898] 2 Q. B. 371.

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provisions in the Burial Acts which require a licence from a Secretary of State before a body can be removed, although a faculty authorising removal may be inoperative until the licence is obtained. Where such licence has been obtained a faculty may be granted authorising removal from consecrated to unconsecrated ground (*l*), or to ground consecrated in accordance with the use of the Roman Catholic Church (*m*).

Ornaments
not included.

1445. The bishop by the act of consecrating a church does not necessarily consecrate or approve all the ornaments and fittings therein (*n*). He is assured by the petition presented to him that all things have been rightly done, and is entitled to act on that assumption, and if there are any ornaments therein which are not in accordance with ordinary usage it is the duty of those who apply for consecration to call the attention of the bishop to them in order that he may exercise his discretion (*o*). Where this has not been done, or where ornaments have been retained in spite of an objection by the bishop, and the decree of consecration does not refer to them, the act of consecration of the church does not stamp them with his approval, and they may, if adjudged to be improper, be removed by a decree of the Ecclesiastical Court (*p*).

(iv.) *Repairs.*

Repair of
church.

1446. The repair of the church of a parish (*q*), which by the canon law belonged to the rector as the person who received the tithes (*r*), is transferred by custom so far as the nave is concerned to the parishioners (*s*), and so far as the chancel is concerned to the

(*l*) *Re Talbot*, [1901] P. 1.

(*m*) *Re Seward and Casella* (1909), *Times*, 27th November.

(*n*) *Westerton v. Liddell* (1857), Moore's Special Report, pp. 21, 22.

(*o*) *Markham v. Shirebrook Overseers*, [1906] P. 239.

(*p*) *Ibid.*; *Davey v. Hinde*, [1901] P. 95; *Beal v. Liddell* (1857), Moore's Special Report, p. 82.

(*q*) By s. 4 of the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), the provisions of that Act as to buildings belonging to a benefice (as to which see pp. 753 *et seq.*, *post*) apply to all chancels, walls, fences and other buildings and things which the incumbent is by law or custom bound to maintain in repair.

(*r*) Burn, Ecclesiastical Law, Vol. I., p. 350. The incumbent of a church is not in receipt of rents and profits of the church in such a sense as to subject him to the liabilities of an owner within the meaning of the Metropolis Management Acts, 1855 (18 & 19 Vict. c. 120) and 1862 (25 & 26 Vict. c. 102) (*R. v. Lee* (1878), 4 Q. B. D. 75, decided on the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), nor is a church a "house," nor are the Ecclesiastical Commissioners "owners" of a consecrated church, within the meaning of those Acts (*Angell v. Paddington Vestry* (1868), L. R. 3 Q. B. 714), but churchwardens have been held liable to pay a paving rate in respect of a district church erected under the New Parishes Act, 1843 (6 & 7 Vict. c. 37) (*Mills v. Rydon* (1854), 10 Exch. 67), as have also the owners of dissenting chapels (*Wright v. Ingle* (1885), 16 Q. B. D. 379, C. A.; *Caiger v. St. Mary, Islington, Vestry* (1881), 50 L. J. (M. C.) 59), and a church has been held to be a house within the meaning of a local Act (*Folkestone Corporation v. Woodward* (1872), L. R. 15 Eq. 159), and the effect of the decision in *Winstanley v. North Manchester Overseers*, [1910] A. C. 7, may be that a parson who receives or who might receive substantial emoluments from a churchyard might be held to be the "owner" thereof within the meaning of the Metropolis Management or Public Health Acts.

(*s*) Burn, Ecclesiastical Law, Vol. I., p. 350. The neglect or refusal to

parson, unless there is a custom in the parish for the parishioners or the estate of a particular person to repair it (*t*).

Where the parson is bound to repair the chancel and there is a rector and a vicar, the vicar and the rector or rectors, whether spiritual or lay, contribute in proportion to their respective benefices (*u*). When the parson repairs the chancel he is thereby discharged from contributing as parson to the repair of the nave (*v*).

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siastical in
its Nature.
Of chancel.

1447. Any person having a house within the parish may be liable for the repair of an aisle of the church as having been built for the proper use of those whose estate he has in the house (*w*), and where the chancel is in fact a chapel coeval with the church which has been and is held and used exclusively as appendant to some estate, the person entitled to the exclusive use of it will be liable for its repair, notwithstanding that the freehold is not in him (*x*).

Of private
aisle.

1448. When part of the parishioners repair a chapel where they bury and christen, and have time out of mind not repaired the parish church, they may prescribe to be discharged provided it is possible for the chapelry and the parish to be coeval, or if they have rights of burial only in the parish church they may prescribe to pay a sum of money or to repair a part of the churchyard wall in lieu of reparation of the church (*a*).

Of chapel.

Where a church or chapel is acquired, appropriated, built, enlarged or improved in aid of the church of any parish or place, whether any district is assigned to it or not, unless some special provision applies it is to be repaired by the parishioners at large in the same manner as the church of such parish or place (*b*).

Where a church or chapel has been provided for a new district, parish, or chapelry (*c*), or for a consolidated chapelry, the inhabitants of the district, parish, or chapelry are liable to repair it, and a voluntary church rate may still be levied for that purpose (*d*). Where a particular patronage district is formed by the Ecclesiastical Commissioners a repair fund is provided (*e*), and the inhabitants of the district may also levy a rate for repairs (*d*). Where a church is built by subscribers and vested in trustees, repairs may be provided for by a fund derived from the sale of vaults or burial places (*f*).

Of new
district
church.

In separate and disunited benefices formed by scheme and Order in Council provision is made for the repairs in the scheme (*g*).

Of church
of separate
benefice.

perform this duty will subject those who neglect or refuse to punishment in the ecclesiastical court (*Gosling v. Veley* (1853), 4 H. L. Cas. 679).

(*t*) Burn, Ecclesiastical Law, Vol. I., p. 350.

(*u*) *Ibid.*, p. 351.

(*v*) *Ibid.*, p. 353.

(*w*) 3 Co. Inst. 202.

(*x*) *Churton v. Frewen* (1866), L. R. 2 Eq. 634.

(*a*) Burn, Ecclesiastical Law, Vol. I., p. 354.

(*b*) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 20.

(*c*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 70.

(*d*) Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), s. 6.

(*e*) Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 7.

(*f*) Church Building Act, 1824 (5 Geo. 4, c. 103), s. 15.

(*g*) Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 12, provides for the acceptance by the Governors of Queen Anne's Bounty of an endowment to be provided for, *inter alia*, "the use or benefit of any church or chapel."

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Property
Eccle-
siastical in
its Nature.Church-
wardens' duty
to repair.

In Peel parishes and districts (*h*) and in other new parishes formed by scheme and Order in Council the inhabitants are released from any liability to repair the mother church, and are subjected instead to a liability to repair the new church or chapel (*i*).

1449. It is the duty of the churchwardens to take care and provide that the churches be well and sufficiently repaired and so kept and maintained, that the windows be well glazed, and that the floors be kept paved plain and even (*j*), and also that the churchyards be well and sufficiently repaired, found and maintained with walls, rails and pales at their charges unto whom by law the same appertaineth (*k*); and it is the duty of every dean and chapter, archdeacon and others having authority to hold ecclesiastical visitations, to survey the churches within their jurisdiction once in every three years (*l*) and to report any want of repair there found to the bishop.

Church-
wardens' power to
borrow.

The churchwardens of any parish may, with the consent of the vestry, bishop, and incumbent, borrow on the security of the rates (*m*), and, with the consent of the Ecclesiastical Commissioners, on the security of surplus pew rents (*n*), the money necessary for repairs of any church (*o*) or chapel, but, the provisions as to the recovery of rates in the Church Building Acts having been repealed (*p*), the security of the rates is confined to such liability of individual persons to pay the voluntary rate as in fact results from the nature of the transaction in connection with which the rate is made; and when a contract is made by the vestry of a parish it does not necessarily follow that the churchwardens are liable on it (*q*).

(v.) Alterations and Extensions.

Alterations.

1450. When a church, churchyard or chapel has been consecrated it is not lawful for any person other than the ordinary to make any alteration in it, or in any fittings or ornaments appertaining to it, without a faculty for the purpose (*a*). The consent of the vestry is not essential, but is generally required before such a faculty is

(*h*) See p. 448, *ante*.

(*i*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), ss. 15, 17; New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 15.

(*j*) Canon 85. Their duty is to take all reasonable steps to provide funds for this purpose by, if necessary, inviting the parish in vestry to levy a church rate, but as they cannot any longer enforce payment of this rate there is no legal obligation on them to incur expenditure beyond the amount which they receive.

(*k*) Canon 85. And see title BURIAL AND CREMATION, Vol. III., pp. 411, 412.

(*l*) Canon 86.

(*m*) Church Building Acts, 1818 (58 Geo. 3, c. 45), s. 14, and 1819 (59 Geo. 3, c. 134), s. 14. Such a power must be exercised in exact accordance with the authority given (*R. v. All Saints, Wigan (Churchwardens)*) (1876), 1 App. Cas. 611.

(*n*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 27.

(*o*) Including repairs of the chancel (*Ripplin v. Bastin* (1869), L. R. 2 A. & E. 386; *Smallbones v. Edney* (1870), L. R. 3 P. O. 444; *Asterley v. Adams* (1871), L. R. 3 A. & E. 361). Stat. (1824) 5 Geo. 4, c. 36, under which money for the purpose could be borrowed from the Public Works Loan Commissioners, has been repealed by the Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 57.

(*p*) Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91).

(*q*) *Klenck v. Farris* (1904), 69 J. P. 41, O. A.

(*a*) See p. 468, *ante*. Although the High Court has no jurisdiction to direct the restoration of fittings of a church which have been improperly altered, the court may grant an interim injunction to restrain further alterations pending an

granted (b), especially in relation to alterations affecting the architecture of the church or the convenience of the public; and where a proposed alteration will affect the comfort and convenience of those who attend the church, the opinion of the majority of the parishioners who are members of the Church of England may be taken into account (c), even though it differs from a resolution of the vestry, including, as the vestry may, persons who do not regularly attend the church (d).

(vi.) *Fittings and Decorations.*

1451. It is the duty of the churchwardens to provide, at the charge of the parish, in every church or chapel, or to see that provision is made for, all the fittings which are required for the due administration of divine worship and of the sacraments of the Church, including, besides those already mentioned (e), a fair linen cloth at the time of ministration, a table of the Ten Commandments (f), a convenient seat for the minister to read service in (f), a comely and decent pulpit for the preaching of God's Word (g), and a book for recording the names and licences of strangers who preach in the church (h); also a strong chest for alms, having three keys, set and fastened in the most convenient place (i).

Fittings.

application for a faculty to restore (*Cardinall v. Molyneux* (1861), 4 De G. F. & J. 117). Where a faculty was granted for a vault under a church to be entered from unconsecrated ground, it was made a condition that the ground round the entrance should be consecrated so as to bring it under the jurisdiction of the ordinary (*Rugg v. Kingsmill* (1868), 37 L. J. (ECCL.) 13, P. C.).

(b) See p. 454, *ante*. In the case of St. Margaret's, Westminster, which is the national church for the use of the House of Commons, the consent of the speaker was required (*Re St. Margaret's, Westminster*, [1905] P. 286).

(c) *Tottenham (Vicar) v. Venn* (1874), L. R. 4 A. & E. 221.

(d) The weight to be attached to this consideration has been much diminished by the transfer from the vestry by the Local Government Act, 1894 (56 & 57 Vict. c. 73), and the London Government Act, 1899 (62 & 63 Vict. c. 14), of the powers, duties, and liabilities of the vestry except so far as relates to the affairs of the church or to ecclesiastical charities, which has resulted in the vestry called together for ecclesiastical purposes being more likely to express the wishes of the parishioners who are members of the Church of England. The alteration of a churchyard pursuant to a faculty granted for that purpose and the granting of faculties enabling a portion to be used for secular purposes have been considered in the article on BURIAL (see title BURIAL AND CREMATION, Vol. III., pp. 411, 423, 424). In that article also will be found full details as to the closing of churchyards (pp. 412, 423, 424, 525—536), and the provision of substituted or additional burial grounds under the Burial Acts (pp. 445—505), Church Building Acts (pp. 436—441), Consecration of Churchyards Acts (pp. 441, 442), Gifts for Churches Acts (pp. 434, 435), New Parishes Acts (p. 441), Places of Worship Sites Acts (pp. 442—444), Trustee Appointment Acts (pp. 444), Cemeteries Clauses Acts (pp. 514—525), and Public Health (Interments) Act (pp. 506—512), and the enactments as to the rights and obligations of incumbents to perform burial services and to receive fees when such closing or new provision takes place (pp. 449, 472, 480, 481, 510, 522, 569).

(e) See p. 471, *ante*.

(f) Canon 82. Where it was impossible to place the table of the Ten Commandments in the East end without removing monuments there, a faculty was granted, allowing these to be placed in the West end where they could be most conveniently seen (*Re St. Giles, Cripplegate* (1901), 17 T. L. R. 672).

(g) Canon 83.

(h) Canon 52.

(i) Canon 84. Where a prisoner was indicted for breaking into a church and

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In addition to these canonical requirements, it is necessary for the churchwardens to provide a chalice or communion cup, with one or more flagons (*k*), and a bier for the dead (*l*). Register books for baptisms, marriages, and burials according to the rites of the Church of England must be kept by the rector, vicar, curate, or officiating minister of every parish or chapelry (*m*), the books being supplied by His Majesty's printer at the expense of the parish (*m*). In addition to the above-mentioned necessary fittings, it is usual and permissible for the incumbent and churchwardens, or other persons with the consent of the ordinary, to provide seats, either movable or fixed, and hassocks for the use of persons attending service, an organ, a clock, church bells, and other fittings or decorations for the purposes of use or ornament which are not forbidden by law. In so far as such fittings and decorations are ornaments of the church within the meaning of the rubric, they must either come within the express terms of the rubric or be consistent with and subsidiary to the services of the church (*n*); and where they are merely decorations, they are permissible with the consent of the ordinary if they are not in danger of being abused by superstitious reverence (*o*).

Where fittings or decorations have been placed in and devoted to the use of the church of a parish they are under the control of the incumbent (*p*), and the keys of the church belong to him (*q*).

Protection of
goods in
church.

1452. Goods appertaining to and contained in a church are exceptionally protected by the sanctity of the place (*r*). It is sacrilege feloniously to take any goods out of a parish church (*s*) or other church or chapel (*t*), whether the goods are intended for use

stealing a box and money and the box had been fixed by screws to a pew and inscribed "Remember the poor," it was held that the box might be presumed to have been so placed pursuant to canon 84, and that the money therein was constructively in the possession of the vicar and churchwardens, and that, they not being a corporation, the property was properly laid in the vicar by name "and others" (*R. v. Wortley* (1846), 1 Den. 162, O. C. R., cited Roscoe's Criminal Evidence, 13th ed., p. 764).

(*k*) Lynd. 252.

(*l*) *Ibid.*

(*m*) See p. 741, *post*.

(*n*) See p. 667, *ante*.

(*o*) See p. 668, *ante*.

(*p*) *Redhead v. Wait* (1862), 6 L. T. 580; *Harrison v. Forbes* (1860) 6 Jur. (N. S.) 1353; *Lee v. Matthews* (1830), 3 Hag. Ecc. 169, 173; *Daunt v. Crocker* (1867), L. R. 2 A. & E. 41; but where bells were rung without the consent of the incumbent the ringing must be against his express wish to found criminal proceedings (*ibid.*, at p. 43).

(*q*) *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113.

(*r*) It is the violation of the sanctity of the place which stat. (1547) 1 Edw. 6, c. 12, s. 10 (now repealed), depriving persons committing sacrilege of their clergy, was intended to prevent (*R. v. Rourke* (1819), Russ. & Ry. 386, 387, O. C. R.).

(*s*) A tower which has a separate roof, but can only be entered through the church, is for this purpose a part of the church (*R. v. Wheeler* (1829), 3 O. & P. 585), and so is a vestry formed out of what was the church porch, having a door into the churchyard which could not be unlocked from outside (*R. v. Evans* (1842), Car. & M. 298).

(*t*) 2 Hale, P. C.

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in connection with divine worship or not (*a*), and the breaking and entering any church, chapel, meeting-house, or other place of divine worship, and committing any felony therein, or the committing any felony therein and breaking out, is a felony punishable with penal servitude for life (*b*). The property in goods feloniously taken is sometimes laid in the parishioners and is sometimes laid in the churchwardens, or in the rector, as guardians of the goods of the parish, either alone or together (*c*). In a private chapel the property ought, perhaps, to be laid in the private owner (*d*).

(vii.) *Parishioners' Rights in Church.*

1453. Every parishioner who does not dissent from the doctrines of the Church of England is under a duty to attend his parish church (*e*), and is clothed with a corresponding right to enter and remain there for the purpose of participating in divine worship so long as there is accommodation available (*f*). Subject to certain rights (*g*), he is entitled to a seat so long as there is a seat available, and, although he must obey the reasonable directions of the churchwardens, acting as the officers of the bishop, as to which seat he shall occupy, he cannot be prevented by them from entering and standing if no seat is available, nor can his rights be affected by reference to any payment, excepting pursuant to the express provisions of some statute (*h*). Accordingly, the seats are in general to be built and repaired, as the church is to be, at the general charge of the parishioners, and, whether they are or are not affixed to the freehold, are to be regarded as erected for the use of the inhabitants and for the accommodation alike of all the parishioners (*i*).

Right to
attend
church.

Where, owing to increase of population, more seats are required, and, there being no unanimous agreement of incumbent, churchwardens, and parishioners as to how they are to be provided (*k*), a faculty is necessary, it is usual to require that the opinion of the parishioners in vestry assembled should be ascertained before a faculty is granted (*l*).

Provision of
additional
seats.

(viii.) *Pews.*

1454. A pew signifies an enclosed seat in a church (*m*). By the common law there is no property in nor any right to sell or let a pew or

Pewa.

(*a*) *R. v. Rourke* (1819), Russ. & Ry. 386; *R. v. Wheeler* (1829), 3 C. & P. 585, 586, n.

(*b*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 50. See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 675.

(*c*) 1 Hale, P. C. 512; 2 Hale, P. O. 181.

(*d*) 2 Hale, P. O. 181; Roscoe, Criminal Evidence, 13th ed., p. 765.

(*e*) See p. 481, *ante*; *Marshall v. Graham*, [1907] 2 K. B. 112.

(*f*) See p. 471, *ante*.

(*g*) See p. 470, *ante*; p. 740, *post*.

(*h*) See p. 471, *ante*.

(*i*) Burn, Ecclesiastical Law, Vol. I., p. 358.

(*k*) Where there is unanimous agreement there is no necessity for the interpretation of the ordinary (*ibid.*, p. 359; *Fresgrave v. Shrewsbury* (Churchwardens) (1705), 1 Salk. 167).

(*l*) As to parishioners' rights, see further, p. 480, *ante*.

(*m*) The word "pew" is said to be derived from the Dutch "puye," and to

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prescription.

seat in the body of a parochial church or chapel (*n*), but a right to use particular seats may have been acquired, as appurtenant to a particular messuage (*o*), by faculty or prescription (*p*), and where the seats in respect of which such right has been acquired are enclosed they are called a pew. The right thus established in a pew (*q*) is essentially a right to use it for the services of the Church

signify a seat enclosed in a church (*Brumfitt v. Roberts* (1870), L. R. 5 O. P. 224, 232). It appears to have been formerly used of a raised standing place, stall or desk in a church to enable an officiant to be seen or heard, e.g., 1662 A.D., Book of Common Prayer, Communion, "The priest shall in the reading pew or pulpit say"; and later of a place often enclosed, usually raised, seated for, and appropriated to certain of the worshippers (New English Dictionary). Before the Reformation no seats were allowed for the use of parishioners in a church except in private chapels of which the fee simple was vested in the owner (*Claverley (Vicar etc.) v. Claverley (Parishioners etc.)*, [1909] P. 195; Burn, Ecclesiastical Law, Vol. I., p. 358). After the Reformation it was held that any question as to seats in the body of a church was to be decided by the ordinary, because the place is common to all the inhabitants, and it belongs to the bishop to order it so that the service of God may be best celebrated and that there be no contention (*Corven's Case* (1612), 12 Co. Rep. 105).

(*n*) By the general law and of common right all pews belong to the parishioners at large for their use and accommodation, but the distribution of seats among them rests with the ordinary, and the churchwardens as his officers, and subject to his control, place the parishioners according to their rank and station (*Pettman v. Bridger* (1811), 1 Phillim. 316, 323); and this law applies in a cathedral which is also a parish church, although in a cathedral which is not also a parish church the ordinary may have the allocation of the seats (*Re Londonderry Cathedral Church Pews* (1863), 8 L. T. 861). Every man who settles as a householder has a right to call on the parish for a seat, and on the allotment by the churchwardens acquires a possessory right to it (*Groves v. Hornsey* (1790), 1 Hag. Con. 188; *Walter v. Gunner* (1798), 1 Hag. Con. 314) against any mere disturber (*Kenrick v. Taylor* (1752), 1 Wils. 326; *Cross v. Sulter* (1794), 3 Term Rep. 639), but not against the churchwardens or the ordinary (*Pettman v. Bridger, supra*). The allotment by the churchwardens must be in general terms entitling the allottees to occupy the seats allotted at all ordinary services of the church, and will entitle them to claim the seat so allotted at any time prior to the commencement of the service (*Claverley (Vicar etc.) v. Claverley (Parishioners etc.)*, [1909] P. 195). In allotting seats, where an allotment can be made the churchwardens may give a preference to parishioners who pay a church rate or who contribute to a fund formed in lieu of a church rate for the repair of the church (*St. Saviour, Westgate-on-Sea (Vicar) v. Parishioners of Same*, [1898] P. 217, 221).

(*o*) *Rogers v. Brooks* (1783), 1 Term Rep. 431, n. If the messuage is divided the right to use the pew may be apportioned (*Harris v. Drewe* (1831), 2 B. & Ad. 164). The messuage need not necessarily be within the parish (*Lousley v. Hayward* (1826), 1 Y. & J. 583); but the pew must be appurtenant to a messuage (*Mainwaring v. Giles* (1822), 5 B. & Ald. 356). A faculty to a man and his heirs is bad (*Stocks v. Booth* (1786), 1 Term Rep. 428).

(*p*) Where a question of prescription is raised it must be dealt with by the temporal courts (*Byerley v. Windus* (1826), 5 B. & C. 1; *Knapp v. St. Mary, Willesden (Parishioners)* (1851), 15 Jur. 473), and where the house to which a pew was alleged to be appurtenant was being replaced by a new mansion-house and the owner had applied for a faculty to annex the pew to the new house or alternatively that he might be allotted a pew, and the rector denied that any pew ever was appurtenant by prescription to the old house, a prohibition was granted to prevent the question of prescription being tried in the consistory court (*R. v. Tristram* (1909), *Times*, 17th June); but where a prohibition was sought on the ground that it was proposed to make a grant by faculty of a gallery and pews to a corporation, the prohibition was refused (*Hallack v. Cambridge University* (1841), 1 Gal. & Dav. 100).

(*q*) A pew in the chancel which legally may belong to a person, whether a parishioner or not (*Fuller v. Lane* (1825), 2 Add. 419, 427), in respect of the

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at times when it is open for use, subject to the regulations of the church, and there is no right of access to it or to use it for other purposes or in any other manner (*r*), and although the seats are permanently enclosed and affixed to the freehold, the freehold of the land remains vested in the parson, and the ownership of the pew carries with it no more than an easement in the nature of an exclusive right to occupy during divine service and the times of other religious observances (*s*). Where a rent is paid for a pew it is a profit arising from the use of the freehold and gives to the person paying the rent a right to have the use and occupation of a certain portion of the freehold for the purpose above defined (*t*); but the receipt of the rent by the freeholder, while it may constitute a freehold interest entitling the freeholder as such to a vote (*a*), does not constitute an occupation of the land for the purpose of the Representation of the People Act, 1832 (*b*).

The right to a pew by prescription may be established whenever there is evidence of exclusive possession of the pew inconsistent with mere possession by permission (*c*) and so long continued that the grant of a faculty ought to be presumed, and even where the first possession arose in a form which gave no legal title a faculty may be presumed when it is consistent with the later long-continued user (*d*).

Evidence of
exclusive
possession.

Such a right to a pew involves the burden of repairing the pew (*e*), and the carrying out of repairs by a claimant or by his predecessors in title without leave from the churchwardens, which would be illegal in the absence of any title, affords strong grounds for presuming the grant of a faculty (*f*), but it is not essential to prove

Repairs to
pew.

ownership of a house or may belong to a lay rector, differs from a pew in the body of the church, which can only be acquired by virtue of a faculty or by prescription founded on a presumed faculty (*Parker v. Leach* (1866), L. R. 1 P. C. 312, 327; *Mainwaring v. Giles* (1822), 5 B. & Ald. 356). A grant of a portion of the chancel to a man and his heirs is bad (*Clifford v. Wicks* (1818), 1 B. & Ald. 498).

(*r*) *Hinde v. Chorlton* (1866), L. R. 2 C. P. 104, 115; *Brumfitt v. Roberts* (1870), L. R. 5 C. P. 224.

(*s*) Even where by a private Act of Parliament trustees were empowered to sell and convey for the purpose only of attending divine service certain pews, and by a subsequent Act it was enacted that the fee simple and inheritance in the pews should be vested in the proprietors, their heirs and assigns for ever, it was held that they had not such an estate of freehold in the soil as would support a claim to a parliamentary vote (*ibid.*); and see also *Greenway v. Hockin* (1870), L. R. 5 C. P. 235.

(*t*) *Re Leveson, Ex parte Arrowsmith* (1878), 8 Ch. D. 96, C. A.

(*a*) *Vickers v. Selwyn* (1903), 89 L. T. 747.

(*b*) 2 & 3 Will. 4, c. 45; *Beswick v. Alker* (1872), L. R. 8 C. P. 265, *per BOVILL, Q.J.*, at p. 268, followed in *Wolfe v. Surrey County Council (Clerk)*, [1905] 1 K. B. 439. See title ELECTIONS.

(*c*) Mere occupancy is not sufficient (*Crisp v. Martin* (1876), 2 P. D. 15).

(*d*) *Philipps v. Halliday*, [1891] A. C. 228; and see *Griffith v. Matthews* (1793), 5 Term Rep. 296, and *Morgan v. Curtis* (1828), 3 Man. & Ry. (κ. B.) 389.

(*e*) *Crisp v. Martin*, *supra*; *Churton v. Frewen* (1866), L. R. 2 Eq. 634. Where three pews adjoining each other are used under one claim in respect of one message, repair done to one is evidence as to all (*Pepper v. Barnard* (1843), 12 L. J. (Q. B.) 361).

(*f*) *Kenrick v. Taylor* (1752), 1 Wils. 326; *Philipps v. Halliday* (1889), 23 Q. B. D. 48, C. A.; affirmed, [1891] A. C. 228

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acts of repair where evidence is given of other acts of user which are inconsistent with possession by mere permission (*g*).

Where there is no prescription the ordinary, or the churchwardens on his behalf and subject to his control, may take order for the placing of parishioners in any public consecrated church or chapel (*h*), and neither the minister nor the vestry has any right to interfere with them in so doing, although they may reasonably defer to the advice of the minister and the wishes of the vestry. Their duty is to provide to the best advantage for the accommodation of all parishioners, so that as far as practicable everyone may have a seat, and they are bound not to accommodate the richer classes beyond their real wants to the exclusion of their poorer neighbours (*i*). If they find it necessary to dispossess anyone of a sitting which he has enjoyed for a time they should give him notice before doing so (*j*).

Re-allotment
of seats.

1455. Where churches are under a faculty enlarged, restored, or repaired, it has been usual to re-allot seats in the church in cases where there have been a large number of faculty seats in the church or seats allotted by the churchwardens to houses in the parish, or where the funds for the alterations have been mainly subscribed by parishioners who desire to have faculty pews annexed to their houses, and such re-allotment has usually been confirmed by faculty (*k*); but in view of the increase in the population to be accommodated, such faculties will only be granted with the greatest prudence (*l*); and where the allocation is made by the churchwardens and not confirmed by faculty it gives no legal right to the allottees to claim the sittings allotted as faculty seats or pews (*k*), unless there is evidence from which the consent of the ordinary may be inferred (*m*).

Allotment
under Church
Building
Acts.

1456. The Ecclesiastical Commissioners have power under the Church Building Acts (*n*), in cases to which those Acts are applicable, to allot one seat or pew for the use of the minister and his family, and one for the use of his servants, and after setting apart not less than one-fifth of the whole of the sittings as free seats may provide that the rest of the sittings shall be chargeable with specified rents, but they have no power to appropriate seats for children, and where they have done so it is competent for the

(*g*) Such as locking the pew and keeping the key (*Philipps v. Halliday* (1889), 23 Q. B. D. 48, C. A.), or removing the woodwork and substituting chairs for the former seats (*Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749).

(*h*) 3 Co. Inst. 202; *Reynolds v. Monkton* (1841), 2 Mood. & R. 384; *Proud v. Price* (1893), 63 L. J. (Q. B.) 61, C. A.; and see *Battiscombe v. Eve* (1863), 9 Jur. (N. S.) 210.

(*i*) *Fuller v. Lane* (1825), 2 Add. 419, 425; *Re Londonderry Cathedral Church Pews* (1863), 8 L. T. 851; see also p. 470, *ante*.

(*j*) *Horsfall v. Holland* (1859), 6 Jur. (N. S.) 278.

(*k*) *Claverley (Vicar etc.) v. Claverley (Parishioners etc.)*, [1909] P. 195.

(*l*) *Fuller v. Lane* (1825), 2 Add. 419.

(*m*) *Claverley (Vicar etc.) v. Claverley (Parishioners etc.)*, *supra*, at p. 203.

(*n*) 1818 (58 Geo. 3, c. 45), ss. 75, 76; 1819 (59 Geo. 3, c. 134), s. 32; 1822 (3 Geo. 4, c. 72), s. 24; 1845 (8 & 9 Vict. c. 70), s. 11. See further as to pew rents and the letting of sittings under the Church Building Acts and New Parishes Acts, p. 786, *post*.

ordinary to treat the appropriation as *ultra vires* and to authorise by faculty the re-allotment of the seats so appropriated (o).

1457. Any pews or sittings in any church or chapel consecrated or unconsecrated which are in the disposal of or are the property of any persons by virtue of any Act of Parliament, deed, or instrument, whether subject to any trust or not, may be surrendered to the Ecclesiastical Commissioners with or without consideration for such surrender by the persons having the disposal of or the property in them (p), by deed executed by them and by the bishop of the diocese (q), or may be transferred to the Ecclesiastical Commissioners (r).

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—
Surrender of
pews or
sittings.

(ix.) *Parishioners' Rights in Churchyard.*

1458. Every parishioner and inhabitant of a parish and every person dying within the parish has the right to be buried in the parish churchyard or burial ground (s). The rector has the right to permit the burial of strangers or to permit the burial of parishioners in other than an ordinary manner (t). This right vests in him as owner of the freehold of the churchyard, and his power to exact fees for such permission constitutes a beneficial occupation of the churchyard, which makes him rateable in respect of it (u).

Rights as to
burial.

(x.) *Registers.*

1459. Registers of public and private baptisms and burials solemnised according to the rites of the Church of England must be kept by the rector, vicar, curate, or officiating minister of every parish or of any chapelry (a), cathedral, or collegiate church, chapel of a college or hospital, or burying ground belonging thereto (b), where such baptisms and burials have been or may be performed, in books to be provided by His Majesty's printer at the cost of the parish, or in a non-parochial place at the cost of the body having right to appoint the officiating minister (b) for the purpose (a).

Registers.

(o) *St. Saviour, Westgate-on-Sea (Vicar) v. Parishioners of Same*, [1898] P. 217.

(p) New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), s. 2.

(q) *Ibid.*, s. 3.

(r) *Ibid.*, s. 6.

(s) See title BURIAL AND CREMATION, Vol. III., pp. 413, 415. This right has been there so fully dealt with that it is only necessary to add that since that article was published the decision in the case of *North Manchester Overseers v. Winstanley* therein referred to has been affirmed by the House of Lords (*Winstanley v. North Manchester Overseers*, [1916] A. C. 7).

(t) See p. 777, *post*.

(u) *Winstanley v. North Manchester Overseers*, *supra*.

(a) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 1. Separate books must be kept for baptisms and for burials (*ibid.*, s. 2). They must be of parchment or durable paper, and the pages and entries must be numbered consecutively (*ibid.*, s. 1). When the benefice is full the incumbent is the proper custodian of the parish books (*R. v. Cumley, Ex parte Holloway* (1855), 3 W. R. 247). As to registration of baptisms, see p. 686, *ante*; as to registration of marriages, see p. 705, *ante*; and as to registration of births and deaths, see further, title REGISTRATION OF BIRTHS AND DEATHS.

(b) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 20.

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Property
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its Nature.Property held
for spiritual
purposes.SUB-SECT. 2.—*Property held for Spiritual Purposes on behalf of the Church of England.*

1460. In addition to the churches, chapels, and churchyards, and property appurtenant thereto, various descriptions of property are held for spiritual purposes on behalf of the Church of England (c), either by the incumbent of a parish or by some other corporation or body of trustees in connection with the parish, or for the benefit of the incumbent as incumbent (d); or by a corporation or other legally constituted body as trustees for the benefit of the Church of England as a whole, or of particular officers or territorial divisions of it other than a parish (e). The property so held in connection with a parish ordinarily includes (1) the whole or some part of the tithes of the parish (f); (2) the parsonage house and glebe (g); (3) Easter offerings (h); (4) fees (i).

In addition, large estates and funds are held by Queen Anne's Bounty (k), the Ecclesiastical Commissioners (l), and other bodies, for spiritual purposes on behalf of the Church of England, but not necessarily in connection with a particular parish, although the trusts affecting much of such property admit of the allocation of the property or of the income therefrom for parochial purposes.

The most important provision for the endowment of the clergy of the Church of England in connection with each parish is the tithe, or the rentcharge in lieu of tithe, into which it has been commuted.

(i.) *Tithes and Tithe Rentcharge.*

Tithes.

1461. Tithes are the tenth part of all fruits, prædial, personal, and mixed, which are due to God and consequently to His Church's ministers for their maintenance (m). Tithe is in its inception an ecclesiastical inheritance collateral to the estate of the land (n), and of its proper nature due only to an ecclesiastical person by the ecclesiastical law (a).

Tithes are payable yearly out of all things which with the aid of

(c) Any spiritual or eleemosynary corporation sole is allowed a period of two incumbencies and six years or sixty years, whichever is the longer, in which to make an entry or distress or bring an action to recover any land or rent (Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 29, amended by Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57). See also pp. 745, 748, *post*, and title LIMITATION OF ACTIONS).

(d) See note (d), p. 713, *ante*.

(e) See pp. 800, 802, *post*.

(f) See pp. 743 *et seq.*, *post*.

(g) See p. 753, *post*.

(h) See p. 775, *post*.

(i) See p. 776, *post*.

(k) See p. 780, *post*.

(l) See p. 783, *post*.

(m) Cowell's Interpreter, *sub voce* "Tithe." See also 2 Bl. Com. 24, 25.

(n) Neither was the tithe nor is the rentcharge into which it has been commuted a charge on the inheritance (*Bailey v. Badham* (1885), 30 Ch. D. 84). Tithes are an incorporeal hereditament, and as such are included in s. 2 (10) (i.) of the Settled Land Act, 1882 (44 & 45 Vict. c. 38) (*Re Esdaile, Esdaile v. Esdaile* (1886), 54 L. T. 637).

(a) *Priddle and Napper's Case* (1612), 11 Co. Rep. 8 b, 13 b.

cultivation (b) yield increase by the act of God, although the increase be not realised every year (c).

Tithes which arise merely and immediately from the ground, as grain of all sorts, hay, wood, fruits, and herbs, are called prædial tithes (d).

Tithes which arise from things immediately nourished by the ground, as colts, calves, lambs, chickens, milk, cheese, eggs, are called mixed tithes (e). Tithes which arise from the profits of labour and industry, being the tenth part of the clear gain after charges deducted, are called personal tithes (f).

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1462. Where the tithes are divided into great and small tithes, the great tithes, which are ordinarily the rectorial tithes, are those of corn, hay, and wood, the small tithes, which are ordinarily the vicarial tithes, are the remainder of the prædial tithes, and the mixed and personal tithes (g).

Great and
small tithes.

1463. Tithes, being regarded as an ecclesiastical inheritance set apart as due to God, were primarily payable in each place to the ecclesiastical person whose duty it was to provide for the cure of souls of that place (h).

Nature of
tithe.

(b) Animals *feræ naturæ* are not titheable (Burn, Ecclesiastical Law, Vol. III., p. 685) except by custom, nor is land which is in its nature barren, until it shall have been cultivated for seven years (*ibid.*, p. 685).

(c) As, for example, saffron though gathered but once in three years (Burn, Ecclesiastical Law, Vol. III., p. 684), and *silva cædua* (*Page v. Wilson* (1821), 2 Jac. & W. 513, 523).

(d) 2 Co. Inst. 649.

(e) Burn, Ecclesiastical Law, Vol. III., p. 680.

(f) 2 Co. Inst. 656—7.

(g) Whether small tithe is grown in great or small quantity makes no difference (*Smith v. Wyat* (1742), 2 Atk. 364).

(h) *Caudrey's Case* (1591), 5 Co. Rep. 1 a, 15 a. According to the fundamental principles of the common law all land is equally charged with tithes. To suppose a single acre not charged is quite a mistake (*Page v. Wilson* (1821), 2 Jac. & W. 513, 528). As the division of the country into parishes developed (see p. 715, *ante*) the tithe became payable to the person or body whose duty it was to provide for the cure of souls in each parish, and in extra-parochial places was payable to the King as having the supreme ecclesiastical jurisdiction, and therefore bound to provide a sufficient pastor where no other provision was made (1 Bl. Com. 384). Where the parish formed part of a district which was ministered to by a monastery it was usual for the monastery to appoint a vicar to undertake the ministrations of the parish and to allot him a portion of the tithe in respect of his ministrations (*Grimslade v. Darby* (1868), L. R. 3 Q. B. 421, 429). Where the parish formed part of a *parochia* (see p. 714, *ante*) ministered to by secular clergy working under a bishop from a common centre, the payment of all receipts into a common fund was gradually replaced by an allocation of part of the receipts from the particular district to the priest of the church of that district (see note (o), p. 715, *ante*). Where a church was newly erected at the instance or expense of some noble, the whole or part (which in the case of a district church with rights of burial was frequently a third (Lingard's History, Vol. I., p. 186)) of the tithe of the district served might be allocated to the priest of that parish, while the remainder was allocated to the mother parish which claimed the district as belonging to it. By these means the tithe became divided in some cases into apportioned parts which might or might not be burdened with a corresponding apportionment of duties, in other cases according to the nature of the material tithed into great tithes which, being easy of collection, were usually appropriated to the rector, and small

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Lands
regarded as
exempt.

1464. Although tithes were primarily payable in respect of all lands which were not naturally barren, the following lands were regarded as exempt:—

1. Forest lands while in the occupation of the Crown or its lessee (*i*).

2. Church lands or glebe of a parish while in the occupation of the parson or incumbent of the parish in his ecclesiastical capacity (*k*), but not the glebe of another parish (*l*).

3. Lands in the occupation of an owner deriving title from one of the privileged orders, Cistercians, Templars, or Hospitallers (*m*).

4. Lands held free and discharged from tithe by one of the greater monasteries at the time of their dissolution (*n*).

5. Lands in respect of which an arrangement, called a composition real, had been made by the owner of the tithe, with the consent of the ordinary and the patron, that the lands should be discharged from tithe (*o*).

6. Lands in respect of which an arrangement, called a modus, could be proved to exist for the discharge of the liability in some other customary mode (*p*).

7. Lands in respect of which a prescriptive right not to pay can be shown to have arisen against the Crown or any lay person not being a corporation sole or any corporation aggregate, or a discharge from tithe can be proved, or non-payment or the payment of a modus can be proved for thirty years (*q*), without any written consent to such non-payment or payment

tithes which, being less easy to collect, were usually allocated to the vicar and were called vicarial tithes.

(*i*) Burn, Ecclesiastical Law, Vol. III., p. 686.

(*k*) *Priddle and Napper's Case* (1612), 11 Co. Rep. 8 b, 14 a.

(*l*) The maxim *Ecclesia ecclesie decimas solvere non debet* is confined to ecclesiastical persons belonging to the same church (*St. Paul's (Warden etc.) v. St. Paul's (Dean)* (1817), 4 Price, 65, 74; *Sheris v. Baskerville* (1714), 1 Eag. & Y. 709).

(*m*) Burn, Ecclesiastical Law, Vol. III., p. 688.

(*n*) The greater monasteries of the yearly value of £200 or upwards were dissolved by stat. (1539) 31 Hen. 8, c. 13, and by s. 17 of that Act the King and every other person who should have any parsonages appropriate, tithes, pensions and portions and other hereditaments of the said monasteries should enjoy them discharged and acquitted of payments of tithes as freely and in as large and ample a manner as the abbots or other ecclesiastical governors of them had. A list of the greater monasteries is given in Burn, Ecclesiastical Law, Vol. III., pp. 690—695. But lands held free by an alien monastery which passed to the Crown, and thence through lay hands to a greater monastery, are not exempt (*Page v. Wilson* (1821), 2 Jac. & W. 513).

(*o*) A composition real was where the present incumbent with his patron and ordinary did agree by deed or by fine in the King's Court that certain lands should be freed and discharged from all manner of tithes in specie by reason of sown land or other real recompense given to the parson in lieu thereof (2 Co. Inst. 490 (*Ekens v. Dormer* (1747), 3 Atk. 534; *A.-G. v. Bowles* (1754), 3 Atk. 806, 809).

(*p*) *Modus decimandi* is money or other thing of value given annually in lieu of tithes (*Termes de la Ley*). A modus must be certain and invariable, beneficial to the parson himself, and different from the thing compounded for. As to the difference between a modus and a composition real, see *Ekens v. Dormer*, *supra*.

(*q*) Tithe Act, 1832 (2 & 3 Will. 4, c. 100), commonly called Lord Tenterden's Act. The exemption is absolute after sixty years. As to the evidence of non-payment required, see *Salkeld v. Johnston* (1849), 1 Mac. & G. 242. Where a modus is set up as existing from time immemorial it need not be proved for each

of a *modus* (*r*), or where the tithe is claimed by a corporation sole, non-payment or payment of a *modus* can be proved during two incumbencies and three years or sixty years, whichever is the shorter period (*s*).

1465. The inconvenience of collecting tithe in kind, and the fluctuating nature of the income derived from it, made it desirable that it should be replaced by some more convenient form of property, and by the Tithe Act, 1836 (*t*), provision was made for substituting in every parish, where possible by agreement (*a*) between the owners of lands and the owners of the tithes (*b*), or where necessary by compulsion (*c*), a corn rent payable half-yearly

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Tithe rent-
charge.

of the sixty years fixed by the statute for an indefeasible prescription, but the evidence is liable to be rebutted by proof of payment of tithe in kind before the sixty years (*Stamford (Earl) v. Dunbar* (1845), 13 M. & W. 822). Where the tithes were commuted before the time limited had expired, the time under this Act ceased to run (*A.-G. v. Durham (Earl)* (1882), 46 L. T. 16).

(*r*) The consent must be expressly given for that purpose, as is expressly provided in the Tithe Act, 1832 (2 & 3 Will. 4, c. 100) (*Toynbee v. Brown* (1848), 3 Exch. 117).

(*s*) Mere non-payment of tithes apart from the statute is no evidence to defeat the title even of a lay impropriator (*Andrews v. Drever* (1835), 3 Cl. & Fin. 314, H. L.). The payments in the city of London of annual sums under the name of tithes were not tithes within the Tithe Act, 1832 (2 & 3 Will. 4, c. 100) (*Payne v. Esdaile* (1888), 13 App. Cas. 613), but they were annuities or periodical sums of money charged upon land within the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 1, as amended by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57) (*ibid.*). As to the application of the Statutes of Limitation to tithes, *i.e.*, to an estate in tithes, see *Ely (Dean) v. Bliss* (1852), 2 De G. M. & G. 459, and as to their application to tithe rentcharge, see note (*e*), p. 748, *post*.

(*t*) 6 & 7 Will. 4, c. 71.

(*a*) The owners of not less than one-fourth in value of the land subject to tithes or of the tithes could call a meeting, and a majority of not less than two-thirds in value of the lands and two-thirds of the great tithes and two-thirds of the small tithes might proceed to make and execute a parochial agreement (*ibid.*, s. 17) binding all the parish for the payment of an annual rentcharge instead of the great and small tithes of the parish collectively or severally. The proportioned values were determined by the values at which the lands were rated for poor rate (*ibid.*, s. 19). By agreement land not exceeding twenty acres might be given to any ecclesiastical owner of tithes in lieu of the whole or any part of the rentcharge (*ibid.*, s. 29, extended by the Tithe Act, 1839 (2 & 3 Vict. c. 62), s. 19, and the Tithe Act, 1842 (5 & 6 Vict. c. 54), s. 6), and vested absolutely upon the confirmation of such agreement (Tithe Act, 1839 (2 & 3 Vict. c. 62), s. 20).

(*b*) "Owners of lands" and "owners of tithes" mean and include every person in the actual possession or receipt of the rents or profits of any lands or tithes (except a tenant for life or for years under a lease or agreement at not less than two-thirds of the net value, or for a term which did not exceed fourteen years) without regard to the real amount of the interest of such person (Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 12).

(*c*) Tithe Commissioners were appointed (*ibid.*, ss. 1—11), and in case of no agreement being arrived at provision was made for the appointment of valuers and for compulsory action by the Commissioners after October 1st, 1838 (*ibid.*, s. 36). The Tithe Commissioners became the Land Commissioners by s. 48 (1) of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and all their powers and duties under the Tithe Acts were transferred to the Board of Agriculture by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2; and to the Board of Agriculture and Fisheries by the Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31). For the Board of Agriculture and Fisheries, see generally **title AGRICULTURE**, Vol. I., p. 237.

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in money, known as tithe rentcharge, for all tithe moduses and compositions real not already commuted. Failing an agreement, the clear average value of these charges for the seven years preceeding the year 1836, after deducting expenses, except parochial and county rates, was ascertained, any moduses, compositions, real or prescriptive or customary payment being treated as tithe (*d*), but special provisions being made for separate valuations of hops, orchards, or gardens (*e*), and of coppice wood (*f*), and for dividing the tithe on hop-grounds or market gardens into ordinary and extraordinary tithe rentcharge, the latter being chargeable only so long as the land continued to be used as hop-grounds or market gardens respectively (*g*).

Amount of
rentcharge.

1466. The total sum to be paid for the tithes of the parish thus determined was apportioned by valuers appointed by the owners of land subject to tithe in the parish (*h*), or, in default of the completion of the valuation, by the commissioners (*i*), and the apportioned part of the rentcharge was by the final award of the commissioners charged on each parcel of land on which it was apportioned (*k*). The effect of this final award after its final confirmation by the commissioners is absolutely to discharge the lands from tithes, and instead thereof to charge each parcel of the lands with a sum of money in the nature of a rentcharge issuing thereout (*l*). The amount payable in respect of this rentcharge is to be paid by equal half-yearly payments on the 1st of January and 1st of July in each year, and is to vary so as always to consist of the price of the same number of bushels of wheat, barley, and oats, calculated according to the weekly averages in the preceeding seven years as published in the *London Gazette* (*m*). This rentcharge is subjected to the same rights and incidents as the tithe which it replaced (*n*), and in particular is subject to all parliamentary, parochial, and county and other rates and charges as the tithes had

(*d*) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 37.

(*e*) *Ibid.*, s. 40.

(*f*) *Ibid.*, s. 41.

(*g*) *Ibid.*, s. 42. See *Walsh v. Trimmer* (1867), L. R. 2 H. L. 208.

(*h*) *Ibid.*, s. 53.

(*i*) *Ibid.*, s. 64 (now repealed).

(*k*) *Ibid.*, ss. 55, 58, 61, 63, 66, 67. And on those lands only (*Walker v. Bentley* (1852), 9 Hare, 629).

(*l*) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 67. The proceedings, properly authenticated, of the commissioners under the Act are public evidence of the matters therein stated (*Giffard v. Williams* (1869), 38 L. J. (OH.) 597), but the award, though conclusive between tithe owner and tithe payer, is not necessarily conclusive between different tithe owners (*Clarke v. Yonge* (1842), 5 Beav. 523; *Edwards v. Bunbury* (1842), 3 Q. B. 885), nor is the map attached to the award evidence in a dispute as to title to land (*Wilberforce v. Hearfield* (1877), 5 Ch. D. 709). One copy of the apportionment was deposited with the incumbent and churchwardens of the parish (Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 64), but the parish council are under the Local Government Act, 1894 (56 & 57 Vict. c. 73), entitled to require the custody of that copy to be handed over to them (*Lewis v. Poole*, [1898] 1 Q. B. 164).

(*m*) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 67.

(*n*) *Ibid.*, s. 71. It is apportionable under the Apportionment Act (*Heasman* (1869), L. R. 8 Eq. 599).

been (o). No person is personally liable to pay the rentcharge (p). The commutation does not extend, unless by special provision in some parochial agreement, to any Easter offerings, mortuaries, or surplice fees, or tithes of fish or of fishing (q), or to any personal tithes (r), other than the tithes of mills or any mineral tithes, nor to the city of London, nor to any rentcharge or payment in lieu of tithes calculated on the rent or value of any houses or lands in any city or town under any custom or private Act of Parliament (a).

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(o) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 69. Prior to the Tithe Act, 1891 (54 & 55 Vict. c. 8), these rates might be assessed upon the occupier and recovered from him, and might by him be deducted from his rent, and might then in turn be deducted by the landlord from his tithe rentcharge, and a tenant holding his tenancy tithe free was allowed to pay this tithe rentcharge and deduct the amount from his rent (Tithe Act, 1836 (6 & 7 Will. 4, c. 70), s. 80). An owner of tithe rentcharge is liable to be assessed in respect of it to a rate made for repayment of money raised under the Church Building Acts (*Smallbones v. Edney* (1870), 24 L. T. 241, P. O.).

(p) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 67; *Griffinhoofs v. Daubus* (1854), 4 E. & B. 230. An injunction will not be granted to restrain a distress for tithe rentcharge on property of a company in liquidation, seeing that the company is under no liability (*Re Trimmaran Coal, Iron, and Steel Co.* (1876), 24 W. R. 900).

(q) Fish, being *feræ naturæ*, were not titheable (2 Co. Inst. 651), except by custom. Oysters and oyster lay were not titheable (*Murray v. Skinner* (1713), 1 Eag. & Y. 706).

(r) The statute for the true payment of tithes (1548), 2 & 3 Edw. 6, c. 13, which enacted (s. 7) that every person exercising merchandise, bargaining and selling clothing, handicraft, or other art or faculty, who had within the preceding forty years accustomably paid, or of right ought to pay, personal tithes, other than such as be common day labourers, should yearly account for them, was repealed by the Statute Law Revision Act, 1887 (50 & 51 Vict. c. 59), except as to tithes, offerings, and duties which have not been commuted or are otherwise still payable.

(a) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 90. As to the application of the Tithe Acts to corn rents, rentcharges, and money payments payable out of lands by virtue of any Act of Parliament in lieu of tithes, see p. 752, *post*. Power was given to the Land Tax Commissioners, and afterwards extended to the Tithe Commissioners, and is now vested in the Board of Agriculture and Fisheries, to alter the apportionments on the application of the owner of the lands charged whenever the lands charged with one rentcharge become vested in different owners, provided that no sub-division of rentcharge is less than 5s. (Tithe Act, 1842 (5 & 6 Vict. c. 54), s. 14), but in the absence of an agreement so to do a purchaser cannot call on his vendor to obtain an apportionment (*Re Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23, O. A.). The Tithe Act, 1836 (6 & 7 Will. 4, c. 71), was amended in many minor respects by statutory provisions relating to the commutation and apportionment which have to a great extent become obsolete through the completion of the commutation and apportionment and have so far as they are obsolete been repealed. One of the first difficulties to arise was caused by the uncertainty of the boundaries, especially of parishes, and the Tithe Acts, 1837 (7 Will. 4 & 1 Vict. c. 69); 1839 (2 & 3 Vict. c. 62), ss. 34—36; 1840 (3 & 4 Vict. c. 16), s. 28; and 1842 (5 & 6 Vict. c. 54), s. 5, provided machinery for overcoming these difficulties by determinations of the Tithe Commissioners which might be removed into court. On such removal the court might, by s. 35 of the Tithe Act, 1839 (2 & 3 Vict. c. 62), direct an issue at its discretion (*R. v. Merson* (1842), 3 Q. B. 895), and the determination of the commissioners, or after removal into court of the court, was made final and conclusive (Tithe Act, 1837 (7 Will. 4 & 1 Vict. c. 69), s. 3; Tithe Act, 1839 (2 & 3 Vict. c. 62), s. 35) as to the boundary after the award is made, but not before (*R. v. Madeley (Inhabitants)* (1850), 15 Q. B. 43), provided the initiation of the proceedings is regular (*R. v. Hobson* (1850), 19 L. J. (Q. B.) 262), even though the boundary line defined is past of the

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rentcharge.

1467. The tithe rentcharge issuing out of lands and payable in pursuance of the Tithe Acts (b) is payable by the owner of the lands, notwithstanding any contract made between him and the occupier (c), and the tithe owner whenever any sum due on account of tithe rentcharge is three months in arrear may apply to the county court for an order for payment thereof, and tithe rentcharge cannot be recovered in any other manner (d). No sum is recoverable under the Acts unless proceedings are commenced before the expiration of two years from the date at which it became payable (e).

boundary of a county (*Re Dent Commutation* (1845), 8 Q. B. 43); but where two parishes in different counties adjoined, and the commutation in one was fixed by voluntary agreement and in the other compulsorily, the commissioners cannot against the wish of one of the parishes proceed to determine the county boundary between the two (*Re Ystradgunlais Commutation* (1844), 6 Q. B. 32). The power which the commissioners had of defining boundaries was applied to the definition of glebe lands where the quantity of glebe is known but cannot be identified, and the commissioners were also given power on the application of any spiritual person to exchange glebe lands for other lands within the same parish (Tithe Act, 1842 (5 & 6 Vict. c. 54), s. 5; Tithe Act, 1846 (9 & 10 Vict. c. 73), s. 22). The Ecclesiastical Corporations Act, 1832 (2 & 3 Will. 4, c. 80), enables an ecclesiastical corporation by agreement with any tenant to refer the settlement of unknown or disputed boundaries or quantities of the manorial or other estates of such corporation to arbitration, but the necessity for using this Act has been much diminished by subsequent legislation.

(b) Including any rentcharge into which a corn rent has been converted under the Tithe Act, 1860 (23 & 24 Vict. c. 93), see p. 752, *post*, but not including a rentcharge payable under the Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54) (see p. 751, *post*), nor a rentcharge in respect of tithes on a gated or stinted pasture (see p. 752, *post*), nor a sum payable for each head turned on land subject to common rights (Tithe Act, 1891 (54 & 55 Vict. c. 8), ss. 1 (1), 9 (2)).

(c) Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 1 (1). Not only is a contract by the tenant to pay the tithe rentcharge prohibited, but also a contract to reimburse the landlord sums paid by him for tithe rentcharge (*Ludlow (Lord) v. Pike*, [1904] 1 K. B. 531; and see also *Davies v. Fitton* (1842), 2 Dr. & War. 225). Special provision is made for cases where the occupier is liable under a contract made before March 26th, 1891 (*ibid.*, ss. 1 (2), (3), 2 (6)), and any sum due from him is to be recoverable by distress and not otherwise (*ibid.*, s. 1 (3)). This is an absolute bar to its being recovered in any other manner (*Church v. Maxsted* (1898), 67 L. J. (Q. B.) 823). As to notice of liability to occupier under contract made before the Act, see *Re Tithe Act*, 1891, *Hughes v. Rimmer*, [1893] 2 Q. B. 314.

(d) Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 2 (1). As to the proceedings in the county court for the recovery of tithe rentcharge, see title COUNTY COURTS, Vol. VIII., pp. 690, 691, and Rules under the Tithe Act, 1891, Yearly County Court Practice, 1909, Vol. II., pp. 413 *et seq.*, and title DISTRESS, *ante*, pp. 217, 218.

(e) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 81; Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 10 (2). This limitation only precludes the recovery of the rentcharge due for a particular half-year, but a rentcharge is a "rent" within the meaning of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 1, and is not tithe within the meaning of that section, so as to be exempt from that statute when belonging to a spiritual or eleemosynary corporation (*Payne v. Esdaile* (1888), 13 App. Cas. 613), and consequently the owner of the rentcharge may be barred in the case of a lay owner by twelve years' adverse possession, or in the case of an ecclesiastical or eleemosynary corporation by adverse possession during two incumbencies and six years, or sixty years, whichever is the larger period (*Irish Land Commission v. Grant* (1884), 10 App. Cas. 14). A payment made under a mistake of fact in respect of tithe may be recovered after two years, notwithstanding that the tithe owner meanwhile has lost his remedy (*Durrant v. Ecclesiastical Commissioners* (1880), 6 Q. B. D. 234).

1468. The county court appoints an officer who, when the lands are occupied by the owner, has the powers of distraint which were conferred by the Tithe Acts on the tithe owner (*f*), and accordingly may, where the owner of the lands is in occupation of them, distraint upon the lands liable to the charge or on any other lands within the parish occupied by the same owner (*g*). In any other case the officer acts as a receiver of the rents and profits of the lands or of any lands held therewith (*h*). If the court is satisfied that the rentcharge exceeds two-thirds of the annual value of the land out of which it issues, it may remit the sum and may also order a remission of a proportionate amount of any current rate assessed on the owner of the rentcharge (*i*).

1469. Any rate (*k*) to which tithe rentcharge is subject (*l*) is to be assessed on and may be recovered from the owner of the tithe rentcharge as from an occupying ratepayer (*m*), on an assessment

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(*f*) Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 2 (2). A growing crop may form a sufficient distress, although not yet ripe for cutting (*Ex parte Arnison* (1868), L. R. 3 Exch. 56); but cattle not actually on the land do not, unless their absence is merely accidental and temporary (*Ex parte Jones* (1889), 5 T. L. R. 512).

(*g*) Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 2 (2); and title DISTRESS, *ante*, p. 217. Prior to that Act, this provision for distress applied whether the owner was the occupier or not, and the distress might be levied on any lands occupied under the same landlord (Tithe Act, 1836 (6 & 7 Will. 4, c. 71), ss. 81, 82, 85). As to the issue of a writ of possession when there is no sufficient distress, see *Yearly Supreme Court Practice* (1910), p. 491.

(*h*) Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 2, including lands held therewith in another parish, in which case an apportionment between the two parishes takes place (*ibid.*, s. 2 (3)). No rentcharge can be so recovered in respect of land which has been washed away or otherwise destroyed by a natural casualty (Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 85).

(*i*) Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 8 (1). As to the assessment of the value of the land for this purpose, see *R. v. Petersfield Tax Commissioners* (1893), 63 L. J. (Q. B.) 357, and *R. v. Barnstaple Tax Commissioners*, [1895] 2 Q. B. 123.

(*k*) Including any rate assessed by a public authority for public purposes (Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 6 (4)).

(*l*) The provisions of the Tithe Acts, 1836 (6 & 7 Will. 4, c. 71), ss. 69, 70, and 1837 (7 Will. 4 & 1 Vict. c. 69), s. 8, for the assessment and recovery of rates on tithe rentcharge, formed a code which replaced the existing law as to the assessment of tithes (*Lamplugh v. Norton* (1889), 22 Q. B. D. 452, 459, O. A.), and have rendered it unnecessary to consider the numerous cases whereby it was finally established that the parson was rateable in respect of tithes (*R. v. Boldero* (1825), 4 B. & C. 467; *R. v. Capel* (1840), 12 Ad. & El. 382); and for a rentcharge in lieu of tithes, excepting in so far as some express exemption extended (*ibid.*; *R. v. Joddrell* (1830), 1 B. & Ad. 403). With regard to the deductions to be made, much doubt existed as to whether any deduction was to be allowed in respect of services rendered (e.g., for the salary of a curate (*Hackney and Lamberhurst Tithe Commutation Rent Charges* (1858), E. B. & E. 1); but it is now settled law that no such deduction is to be allowed (*R. v. Sherford* (1867), L. R. 2 Q. B. 503, overruling *Hackney and Lamberhurst Tithe Commutation Rent Charges*, *supra*); and even where on the formation of a new parish under the New Parishes Act, 1843 (6 & 7 Vict. c. 37), a rentcharge for its endowment is secured on the rectory of the old parish, no deduction can be made from the tithe rentcharge of the old parish in respect of the portion thus voluntarily granted away in arriving at its rateable value (*Lawrence v. Tolleshunt Knights Overseers* (1862), 2 B. & S. 533).

(*m*) Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 6 (1). As to the modes of recovery, see title RATES AND RATING.

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according to the sum for which the rentcharge might reasonably be expected to let from year to year, allowing for the expenses of collecting, for bad debts, and for legal and other expenses, if any, which would be necessary to induce a tenant to take it (*n*), provided that the owner of tithe rentcharge attached to a benefice (*o*) is liable to pay only one half of the amount assessed on him as owner, the remaining half being paid by the Commissioners of Inland Revenue (*p*). If the collector satisfies the county court that he is unable to recover any rate so assessed, the court may order the owners of the lands out of which the rentcharge issues to pay the tithe rentcharge to the collector until the rates, including a sum due in respect of any future rate, have been paid (*q*).

Redemption.

1470. Redemption of tithe may be effected by payment of a sum of money which, in the case of a rentcharge not exceeding 20s., the Board of Agriculture and Fisheries may, on the application of the owner either of the rentcharge or of the land, order to be paid at the rate of twenty-five years' purchase (*r*), or which in the case of a rentcharge exceeding 20s. is, with the consent of the owner of the land and of the rentcharge (*s*), ordered by the Board, such sum not being less than twenty-five years' purchase (*t*). The Board may also order redemption of rentcharge by payment of twenty-five years' purchase when any rentcharge has by mistake as to boundaries or otherwise been charged on lands not in the parish in respect of which the apportionment was made (*a*), or when land is taken for certain purposes, including the building of any church, chapel or other place of public worship, or the making of any place of burial (*b*), and may order redemption by payment of not less than twenty-five years' purchase of tithe apportioned on lands divided into numerous plots (*c*). The money payable for redemption of any rentcharge which is payable to any spiritual person in respect of a

(*n*) *St. Asaph (Dean and Chapter) v. Llanrhaidr-yn-Mochnant Overseers*, [1897] 1 Q. B. 511, O. A.; see also *Stevens v. Bishop* (1888), 20 Q. B. D. 442, O. A. As to the recovery of rates in tithe rentcharge before 1891, see *Lamplugh v. Norton* (1889), 22 Q. B. D. 452, O. A.

(*o*) Including all chapelries or districts reputed to belong or to be annexed to any church or chapel, and districts formed for ecclesiastical purposes by statutory authority (Tithe Rentcharge (Rates) Act, 1899 (62 & 63 Vict. c. 17), s. 2 (1) (*b*)).

(*p*) *Ibid.*, s. 1.

(*q*) Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 6 (2).

(*r*) Tithe Act, 1878 (41 & 42 Vict. c. 42), s. 3. The practice of the Board of Agriculture and Fisheries now is to conduct by means of their own officers all proceedings for altered apportionments and for such redemptions as are compulsory on the landowners concerned, and to collect themselves the expenses of so doing (Parliamentary Paper, Od. 4,127, 1908, p. 5). The County Court has jurisdiction to enforce the payment of the redemption money (*R. v. Paterson*, [1895] 1 Q. B. 31).

(*s*) When the owner owns the rentcharge in right of a benefice or cure, the consents of the bishop and patron are required (Tithe Act, 1878 (41 & 42 Vict. c. 42), s. 24).

(*t*) *Ibid.*, s. 4.

(*a*) Tithe Act, 1860 (23 & 24 Vict. c. 93), s. 33.

(*b*) Tithe Act, 1878 (41 & 42 Vict. c. 42), s. 1.

(*c*) *Ibid.*, s. 5.

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benefice is to be paid to Queen Anne's Bounty, and appropriated for the augmentation of such benefice (*d*).

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1471. Any person or persons seised in possession of an estate in fee simple or fee tail, whether legally entitled or only entitled in equity (*e*), or having the power of acquiring or disposing of the fee simple in possession of any tithe rentcharge, may by a deed in such form as the Board of Agriculture and Fisheries approve, to be confirmed by such Board, release, assign, or otherwise dispose thereof, so that it shall merge in the freehold and be extinguished (*f*), whatever the tenure of the land may be (*g*). Any tenant for life of tithe rentcharge and of the land on which it is charged may by a deed similarly approved and confirmed merge the tithe rentcharge in the land (*h*). The effect of the merger is to subject the lands to any charge to which the tithe rentcharge was liable to the extent of the value of the rentcharge, and the Board may apportion such charge on any portion of the land which is three times the value of the charge (*i*). These provisions as to merger extend to glebe or other lands in all cases where the tithe rentcharge belongs to the same person by virtue of his benefice or of any appointment held by him (*k*).

1472. Extraordinary tithe rentcharge on hop grounds, orchards, fruit plantations, and market gardens newly cultivated as such since June 25th, 1886, has been abolished, and replaced by an annual payment calculated at 4 per cent. on the capital value of the charge ascertained by the Land Commissioners for England (*l*), after taking into account, *inter alia*, the fact that the owner of the land had the right to discontinue the special cultivation from which the extraordinary charge resulted (*m*). Such annual payment is payable half-yearly (*n*) by the landlord (*o*), and is recoverable in the same way as tithe rentcharge (*p*), and is chargeable on the farm or parcel of land in respect of which the extraordinary charge was payable described in the certificate of the Board of Agriculture (*q*).

Extra-
ordinary titl
rentcharge.

(*d*) Tithe Act, 1846 (9 & 10 Vict. c. 73), s. 8.

(*e*) *Ibid.*, s. 19. If the estate is insufficient to effect the merger, the declaration may effect it and the parties affected by it be left to their remedy against the person making the declaration (*Walker v. Bentley* (1852), 9 Hare, 629).

(*f*) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 71; Tithe Act, 1838 (1 & 2 Vict. c. 64), s. 1. Such deed is free from stamp duty (*ibid.*, s. 2).

(*g*) Tithe Act, 1838 (1 & 2 Vict. c. 64), s. 4.

(*h*) *Ibid.*, s. 3.

(*i*) Tithe Act, 1839 (2 & 3 Vict. c. 62), ss. 1, 2.

(*k*) *Ibid.*, s. 6.

(*l*) Now the Board of Agriculture and Fisheries; see note (*e*), p. 745, *ante*.

(*m*) Extraordinary Tithe Acts, 1886 and 1897 (49 & 50 Vict. c. 54, ss. 1—4; 60 & 61 Vict. c. 23).

(*n*) Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), s. 4 (3).

(*o*) *Ibid.*, s. 7.

(*p*) (*i*) (5). Where the ownership of the land on which the rentcharge has been assessed becomes divided the claim of the owner of one part against the owner of the other part for contribution should be enforced before justices under the Tithe Act, 1842 (5 & 6 Vict. c. 54), s. 16, and not in the county court (*Simmonds v. Heath*, [1894] 1 Q. B. 29, O. A.).

(*q*) *Simmonds v. Heath*, *supra*; and Extraordinary Tithe Act, 1897 (60 & 61 Vict. c. 23), s. 1.

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It is exempt from rates (*r*) and from land tax (*s*), and may be redeemed at any time by payment of the capital value, such payment being made, where the person entitled is the incumbent of a benefice, to the Governors of Queen Anne's Bounty (*t*), who have power when the income of the benefice is thereby diminished to modify the incidence of any mortgage charged thereon (*a*).

Corn rents
and other
rights.

1473. Corn rents payable under any local Act of Parliament may be converted into tithe rentcharge by the Board of Agriculture and Fisheries, and apportioned upon the lands which were subject to such rents on the application of the majority of owners of the lands or of the rents at any time when the rents are subjected to variation (*b*) under the local Act, or on the joint application of the majority of owners of the land and of the rents at any other time (*c*). In the case of lammas lands, commons, and gated or stinted pastures, where by reason of the peculiar tenure the rentcharge cannot be fixed on the lands so as to be borne fairly by the owners of such rights, a supplemental agreement or award may be made fixing the rentcharge by reference to the different rights enjoyed (*d*), but such rentcharge may, on the application of any person entitled to receive or liable to pay the same, be converted into a gross rentcharge payable out of the land (*e*).

Annexation
of tithes to
district
church.

1474. For the purpose of annexing to any chapel of ease or parochial chapel, or district church or chapel, any part or parts of the tithes or other revenues of any rectory or vicarage, the rector or vicar may (*f*), with the consent of the patron and of the archbishop or bishop of the diocese (*g*), agree with the incumbent of any district church within the limits of the rectory or vicarage for such annexation in consideration of a sufficient compensation out of the endowments of such district church, and such agreement may be carried into effect by the Ecclesiastical Commissioners, which has the effect of vesting the tithe in the incumbent of the district church and securing the compensation to the rector or vicar (*h*).

Tithes in
London.

1475. The law relating to tithes in London has been and is distinct from the law elsewhere. By a decree made in the year 1545 by commissioners appointed by statute (*i*) for the purpose

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- (*r*) Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), s. 4 (5).
(*s*) *Curr v. Fowle*, [1893] 1 Q. B. 251.
(*t*) Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), s. 5. As to the procedure for recovery, see title COUNTY COURTS, Vol. VIII., p. 647.
(*a*) Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), s. 12.
(*b*) But not at any other time except on a joint application (*R. v. Lindsey (Justices)*) (1849), 13 Q. B. 484.
(*c*) Tithe Act, 1860 (23 & 24 Vict. c. 93), ss. 1—10.
(*d*) Tithe Act, 1839 (2 & 3 Vict. c. 62), s. 13 (now repealed); Tithe Act, 1840 (3 & 4 Vict. c. 15), s. 14 (now repealed).
(*e*) Tithe Act, 1860 (23 & 24 Vict. c. 93), ss. 18, 19.
(*f*) District Church Tithes Act, 1865 (28 & 29 Vict. c. 42), s. 3.
(*g*) *Ibid.*, s. 4.
(*h*) *Ibid.*, s. 8, as amended by Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111), s. 22.
(*i*) Act for Tithes in London, stat. (1545) 37 Hen. 8, c. 12. Where tithe was

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of appeasing strife between the parsons, vicars and curates, and the citizens and inhabitants of the city of London concerning the payment of tithes (*k*), it was decreed that the citizens and inhabitants of the city of London and the liberties of the same (*l*) should for ever pay their tithes after specified rates commencing with 16½*d.* on every 10*s.* rental of every house, shop, warehouse, cellar and stable, and rising by 16½*d.* for every additional 10*s.* rental (*m*). The payment thus decreed was not necessarily a payment in lieu of tithe nor in the nature of tithe, and in the absence of any evidence that any tithe was payable in the city of London, it is to be regarded merely as a new personal imposition which is not tithe nor in lieu of tithe and is therefore not rateable as such (*n*). By a private Act of Parliament the payments thus decreed were in the year 1879 (*o*) commuted except in a certain parish, where they were separately commuted by a subsequent Act (*p*).

(ii.) *Glebe and Parsonage Houses.*

1476. Glebe is a portion of land belonging to or parcel of the parsonage or vicarage, over and above the tithes (*q*). "Glebe."

A parsonage house is a house which belongs to or is parcel of the parsonage, that is, of the endowments of the benefice (*r*). "Parsonage house."

The house and glebe are both comprehended under the word

claimed on a house in Southwark not within the city of London, and therefore not within this statute, the claim was allowed without proof of custom or prescription on the ground that the tithe was the only provision for St. Saviour's Church (*Pocock v. Titmarsh* (1721), Bunb. 102).

(*k*) 2 Co. Inst. 659.

(*l*) Immunities which were not expressly included in the Act for Tithes in London must be taken to have been excluded (*St Paul's (Warden etc.) v. St. Paul's (Dean)* (1817), 4 Price, 65).

(*m*) *Esdaille v. London (City) Union Assessment Committee* (1887), 18 Q. B. D. 599, 600, where the decree is set out; affirmed 19 Q. B. D. 431, C. A.

(*n*) *Esdaille v. London (City) Union Assessment Committee*, *supra*; nor is it "tithe" within the Tithe Act, 1832 (2 & 3 Will. 4, c. 100) (*Payne v. Esdaille* (1888), 13 App. Cas. 613). See also *London and Blackwall Rail. Co. v. Letts* (1851), 3 H. L. Cas. 470; and *Wagstaff v. London (City Common Council)* (1908), 99 L. T. 791.

(*o*) London (City) Tithes Act, 1879 (42 & 43 Vict. c. clxxvi.).

(*p*) London (City) Tithes (St. Botolph Without Aldgate) Act, 1881 (44 & 45 Vict. c. cxvii.).

(*q*) Burn, Ecclesiastical Law, Vol. II., p. 297. The word properly means a hard turf or clod of earth with grass growing thereon (Ayl. Par. 285). "Glebe land" includes any manor, land or tenement, forming the endowment or part of the endowment of a benefice (Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), s. 12). A gift of land in trust to pay the income to an incumbent so long as no pew rents are charged is not a gift of glebe (*Re Randell, Randell v. Dixon* (1888), 57 L. J. (Ch.) 899).

(*r*) "Parsonage" in legal parlance means the various properties which constitute the endowments of the benefice. "A parsonage or rectory is a certain portion of land, tithes and offerings established by the laws of this kingdom, for the maintenance of the minister that hath the cure of souls, within the parish where he is rector or patron, and properly comprehends *integra ecclesia parochialis cum omnibus suis juribus, praediis, decimis aliisque proventuum speciebus; alias vulgo dictum beneficium*" (Spelman's Glossary) (*Re Alms Corn Charity, Charity Commissioners v. Bode*, [1901] 2 Ch. 750, 758). The use of the word "parsonage" as equivalent to parsonage-house, occurs in Fitzherbert's Boke of Surveying and Improvements (1523), and the use of "parsonage-house" is as old as 1566 (New English Dictionary, *sub voce* "parsonage").

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"manse" (s). The parsonage house (t) and glebe are owned (a) by the incumbent as a corporation sole for the benefit of himself (b) and his successors in the incumbency, and he is entitled to use them for his own enjoyment or profit so far as such use is consistent with the due preservation of them for the use of his successors (c). He may cultivate the glebe in any way he thinks fit, provided he does not commit any waste, and he may work mines already opened, but he may not cut down trees except for purposes beneficial to the Church, such as repairs to buildings belonging to or repairable by the benefice; nor may he open mines, nor may he quarry except for the purpose of repairs (d).

Provision of
parsonage.

1477. Notwithstanding the rule that no church should be consecrated without the provision of a parsonage house and glebe (e), many of the clergy for want of proper habitations were compelled or induced to reside at a distance from their benefices (f), and to remedy this evil, as well as to provide for the acquisition of houses of residence where new parishes or ecclesiastical districts are formed, many facilities have been afforded by statute for the purpose of purchasing a house of residence, or purchasing a site and building a house of residence thereon, or rebuilding or improving an existing house of residence. In addition to the facilities for acquiring sites already referred to in connection with the acquisition of sites for churches (g), where a residence house is inconveniently situate or for other reasons it is thought desirable to sell it, the incumbent may, with the consent of the ordinary, patron, and archbishop, sell the house with contiguous land not exceeding twelve acres, or any other house belonging to the benefice which is ruinous beyond repair, or which for other reasons it is advisable to sell, the purchase-money being paid to Queen Anne's Bounty and applied in the erection or purchase of another site and house, with land not exceeding twelve acres, approved by the ordinary and patron (h).

(s) Burn, Ecclesiastical Law, Vol. II., p. 297.

(t) Where the Governors of Queen Anne's Bounty require for a benefice a house not within the parish, but so near as to be convenient and suitable for a residence, such house when approved by the bishop is to be deemed the house of residence (Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 34).

(a) The nature of the estate of the incumbent is described as a fee simple qualified (Co. Litt. 341).

(b) Where in fixing a price for glebe land a sum has been allowed in respect of inconvenience or annoyance to the incumbent, it may be paid out to him (*Re East Lincolnshire Rail. Co., Ex parte Little Steeping (Rector)* (1848), 5 Ry. & Can. Cas. 207; *Re Saunderton Glebe Lands, Ex parte Saunderton (Rector)*, [1903] 1 Ch. 480).

(c) Surplus profits are primarily applicable to keeping the house in repair (*Ex parte Claypole (Rector)* (1873), L. R. 16 Eq. 574).

(d) See p. 768, *post*.

(e) See p. 720, *ante*.

(f) Preamble to Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53). This Act and the Clergy Residences Repair Act, 1780 (21 Geo. 3, c. 66), the Clergy Residence Act, 1826 (7 Geo. 4, c. 66), the Parsonages Act, 1838, and the Parsonages (Amendment) Act, 1838 (1 & 2 Vict. cc. 23, 29), the Parsonages Act, 1865 (28 & 29 Vict. c. 69), and the Incumbents and Benefices Loans Extension Act, 1881 (44 & 45 Vict. c. 25), are commonly known as the Gilbert Acts.

See pp. 722 *et seq.*, *ante*.

Parsonages Act, 1838 (1 & 2 Vict. c. 23), ss. 7—9; amended by the

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Grants of
land by
public bodies.

1478. The principal officer of any public department holding lands on behalf of His Majesty or for the public use or use of his department and every body politic, corporate or collegiate, and corporation, aggregate or sole, and all trustees or other persons having the management of any charitable foundation or public institution, or other person empowered under the Lands Clauses Acts to convey or release lands by an assurance under seal, may convey to the Governors of Queen Anne's Bounty, by way of voluntary, gift or on sale, any lands, tenements, or hereditaments, provided that any lands given must not exceed one acre, including the site of any buildings thereon, to be used as parsonages or residences, or for enlarging parsonages or residences of incumbents, or as gardens or appurtenances thereto (*i*).

(iii.) *Mortgages for Expenditure on House of Residence or Glebe or Chancel.*

1479. An incumbent of a benefice (*k*) may borrow at interest on mortgage of the glebe and profits of his benefice in the prescribed form any sum or sums, not being less than £100 and not exceeding three years' net income of the benefice (*l*), for all or any of the following purposes, namely: (1) For building a new or repairing or improving an existing house of residence for the benefice (*m*); (2) for purchasing a site for a house of residence and other necessary buildings; (3) for purchasing not more than twenty acres of land, where the existing glebe does not exceed five acres, for a site for a house of residence with outbuildings and for gardens and glebe; (4) for purchasing not more than twelve acres of land contiguous to or desirable to be used or occupied with the house of residence or glebe of the benefice; (5) for building offices, stables, outbuildings, or fences for the house of residence; (6) for repairing the chancel of the church of the benefice where the incumbent is liable to repair the chancel (*n*); and (7) for building, improving, or purchasing a farm-house or farm buildings or labourers' dwelling-houses belonging to or desirable to be acquired for a farm or lands appertaining to the benefice (*o*). The incumbent must first submit

Mortgage by
incumbent.

Parsonages (Amendment) Act, 1838 (1 & 2 Vict. c. 29), the Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 25, and the Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 17.

(*i*) Parsonages Act, 1865 (28 & 29 Vict. c. 69), s. 4.

(*k*) The incumbent of any benefice which has been augmented under the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), cannot raise money by mortgage of his benefice for purchasing, building, or improving a parsonage house without the consent of the Ecclesiastical Commissioners (Ecclesiastical Houses of Residence Act, 1842 (5 & 6 Vict. c. 26), s. 13).

(*l*) The rule of the Governors of the Bounty is that the outside limit of the loan which they will sanction is three years' net income, and they rarely lend more than two years' net income except for a new house.

(*m*) This includes making additions to the house (*Boyd v. Barker* (1859), 4 Drew. 582).

(*n*) See p. 732, *ante*.

(*o*) Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53), ss. 1—7, 12—20; Clergy Residences Repair Act, 1780 (21 Geo. 3, c. 66); Glebe Exchange Act, 1815 (55 Geo. 3, c. 147), s. 6; Clergy Residence Act, 1826 (7 Geo. 4, c. 66); Parsonages Act, 1838 (1 & 2 Vict. c. 23), ss. 1, 4, 5; Parsonages Act, 1865 (28 & 29 Vict. c. 69), ss. 1, 3. The objects recognised by the Governors of the Bounty

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a scheme and estimate (*p*) to the bishop of the diocese and the patron of the benefice, and obtain their written consent to it (*q*). The mortgage is to be for the term of thirty-five years, or until repayment of the principal sum secured with interest and incidental costs; and after the first year of the term the incumbent is to repay yearly one thirtieth part of the principal sum with interest thereon or on so much as remains unpaid (*r*). But the Governors of Queen Anne's Bounty may lend money to incumbents for any of the above-mentioned purposes at interest not exceeding 4 per cent. per annum for shorter terms and under different forms of mortgage, and repayable either by annual instalments as above mentioned or by fixed yearly sums in the form of a terminable annuity (*s*). Colleges and halls in the Universities of Oxford and Cambridge and other corporate bodies possessing the patronage of benefices are also

as those for which a loan may be sanctioned are:—(1) Purchasing house and land or site for residence, or purchasing land, not exceeding twelve acres, contiguous to the residence or glebe or desirable for use or occupation therewith; (2) Building, rebuilding, enlarging, and altering residence and offices, or building necessary stables, outbuildings, or fences; (3) Restoring, rebuilding, or repairing the fabric of the chancel where the incumbent is liable to repair or sustain it, provided the fabric of the church is in good preservation, or is about to be restored; (4) Building, improving, or purchasing farm-houses, buildings, or cottages desirable to be held with lands belonging to the benefice; (5) Water supply and sanitary improvements to residence; (6) Purchasing moveable fixtures in the residence.

(*p*) The incumbent must procure a certificate showing the condition of the buildings, the value of the timber and materials on the glebe to be used, and an estimate of the work to be done, and verifying on oath the annual profits of the living. The estimate must follow the form and be in accordance with the instructions which are supplied by the Governors of Queen Anne's Bounty, so as to comply with the statutory requirements, and the estimate and plans must be signed by the bishop and patron before the application will be considered by the Governors of the Bounty.

(*q*) Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53). In the case of a benefice augmented under the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), the consent of the Commissioners under their common seal must also be obtained (Ecclesiastical Houses of Residence Act, 1842 (5 & 6 Vict. c. 26), s. 13). The bishop and patron, as consenting parties, are precluded from themselves advancing money on the mortgage (*Greenlaw v. King* (1840), 3 Beav. 49), but the incumbent may do so (*Boyd v. Barker* (1859), 4 Drew. 582). The money can be borrowed on mortgage only to pay for future works and not to repay money already expended (*Lidbetter v. Hatch*, [1907] 1 Ch. 404). It is essential that before any loan is obtained or any building is commenced application should be made to the Governors of Queen Anne's Bounty, and that the necessary preliminaries shall have been completed in accordance with the instructions which will be given by them, and that the formal consent prepared by them shall have been duly executed.

(*r*) Parsonages Act, 1838 (1 & 2 Vict. c. 23), s. 1.

(*s*) Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53), s. 12; Parsonages Act, 1838 (1 & 2 Vict. c. 23), s. 4; Parsonages Act, 1865 (28 & 29 Vict. c. 69), s. 3; Ecclesiastical Dilapidations Act, 1872 (35 & 36 Vict. c. 96), ss. 1, 2. By the Incumbents of Benefices Loans Extension Acts, 1881, 1886, and 1896 (44 & 45 Vict. c. 25, 49 & 50 Vict. c. 34, and 59 & 60 Vict. c. 13), and the Incumbents of Benefices Loans Extension Act, 1886 Amendment Act, 1887 (50 & 51 Vict. c. 8), the Governors were empowered during a limited time to make certain extensions in the terms for the repayment of money lent by them by suspending for a few years the payment of the annual instalments of principal (see note (*u*), p. 757, *post*). By the Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), s. 12, whenever it should appear to the Governors that the income

empowered to lend money to assist in any of the above-mentioned purposes in respect of benefices in their patronage (t).

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Loan for
purchase,
building, or
repair.

1480. Where the object of the loan is the purchase of sites or houses or the building or repair of houses (*u*), the money must be paid into the hands of some person nominated to receive and apply the same for the purpose by the ordinary, patron, and incumbent (*v*). Where there are buildings on the glebe, the bishop, before giving his consent, is bound to make inquiries (*w*), which he usually does through two neighbouring beneficed clergymen, respecting dilapidations, unless a certificate has within the last preceding five years been given under the Ecclesiastical Dilapidations Act covering all the buildings of the benefice (*x*). If the site for building is not already part of the glebe, it must be secured to the benefice through the medium of the Governors of Queen Anne's Bounty or of the Ecclesiastical Commissioners.

1481. If the Ecclesiastical Commissioners have at any time augmented the income of the benefice, or are contributing towards the object for which the loan is sought, they usually appoint their own nominee and surety, and their approval of the proposal should be obtained before application is made to the Governors of Queen Anne's Bounty, unless the loan asked for, with the sum contributed by the commissioners, is less than £300, and the sum so contributed is

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sioners' con-
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required.

of a benefice on which a mortgage to them existed, had been diminished by the operation of that Act, they were empowered on the application of the incumbent, with the consent of the patron, to modify the conditions of the mortgage, or the term fixed for the repayment of the principal sum secured thereby, as might seem to them reasonable.

(t) Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53), s. 13; Parsonages Act, 1838 (1 & 2 Vict. c. 23), s. 5; Parsonages Act, 1865 (28 & 29 Vict. c. 69), s. 3.

(u) Parsonages Act, 1865 (28 & 29 Vict. c. 69). The mortgage cannot be validly made if the money has already been expended (*Lidbetter v. Hatch*, [1907] 1 Ch. 404). The rule of the Governors of the Bounty is that the outside limits of the term for repayment are thirty years for a purchase of land, twenty-five years for a new house, fifteen years for alterations, additions, or improvements, and seven years for fixtures. The Governors of the Bounty have been granted powers by certain statutes to pass resolutions extending the time for repayment of loans, but the powers for this purpose given by Incumbents and Benefices Loans Extension Act, 1881 (44 & 45 Vict. c. 25), were not exercisable beyond three years (*ibid.*, s. 2); and those given by the Incumbents of Benefices Loans Extension Act, 1886 (49 & 50 Vict. c. 34), amended by Incumbents of Benefices Loans Extension Act, 1886, Amendment Act, 1887 (50 & 51 Vict. c. 8), were to be exercised by resolutions passed before 31st December, 1887. As to extension of the mortgage terms where the income of a benefice is reduced under the Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), see note (s), p. 756, *ante*; Parsonages Act, 1838 (1 & 2 Vict. c. 23), s. 1; Ecclesiastical Dilapidations Act, 1872 (35 & 36 Vict. c. 96), s. 1.

(v) Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53), s. 4. The nomination is to be in the form contained in the schedule to the Act, and should not substantially depart from it (*Lidbetter v. Hatch*, *supra*). In addition to the nominee there must be a surety who will join him in a bond in double the value of the loan to secure that it is duly laid out.

(w) Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53), s. 5. The bishop's secretary is entitled to a fee of one guinea on issuing a commission of inquiry as to dilapidations.

(x) See p. 772, *post*.

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less than the loan. In order that a loan may be sanctioned it is requisite that the income of the benefice must be sufficient to pay the annual interest and instalments (*y*), as well as the curate's stipend in case of non-residence, and in cases where the income consists principally of pew rents the patron or three of the parishioners may be required to enter into a deed of guarantee as a collateral security for payment of the interest and principal.

Where the Ecclesiastical Commissioners hold any money which is applicable for the proposed purpose, and their consent to the application of such money is required, the plans of any proposed work must, before being finally approved by the Commissioners, receive the approval of the bishop. The Commissioners require that before any building of a house is commenced, or contracts are entered into, either one of their two model plans of a house should be with their approval adopted (*z*), or plans, specifications, and estimates should be submitted to and approved by them; and in case of purchase of a house they require that the tenure shall be freehold and that plans shall be submitted.

Loan for
erection of
house of
residence.

1482. Where new buildings are necessary for the residence of the incumbent of a benefice having an income exceeding £100 a year, the bishop may, on the avoidance of the benefice, after obtaining a report from four beneficed clergy of the diocese, including the rural dean, if any, of the district, that a fit house of residence can be conveniently provided on the glebe, and that the income exceeds £100, obtain a certificate of a surveyor as to the buildings, if any, and materials, and a plan or estimate for the erection or repair of such a house (*a*), and after transmitting copies of the report, plan, estimate, and certificate to the patron and incumbent, if any, and considering any objections raised within two calendar months in writing by them, and modifying the plan if he thinks fit (*b*), raise the sum so estimated by mortgage of the profits of the benefice, such sum to be paid to a nominee appointed by the bishop, and expended by him in such buildings or repairs, or, if not all required for such purpose, then in permanent improvements in building on the glebe or payment of the mortgage debt (*c*). Where a fit house of residence cannot be conveniently provided on the glebe, the bishop may contract, either personally or through a nominee, for the purchase of a house and land, or for land upon which a house can be built in a convenient situation for such residence, and may raise money for the purpose by mortgage of the glebe, tithes, and other profits of the benefice (*d*), such buildings

(*y*) No instalment becomes payable until after the expiration of the first year of the term (Parsonages Act, 1838 (1 & 2 Vict. c. 23), s. 1).

(*z*) The respective costs of these model houses is calculated not to exceed £1,800 and £1,500. The plans, quantities, and specifications are supplied by the Commissioners at a cost of one guinea, but a responsible architect must be employed to superintend the erection, for which the Commissioners allow 2½ per cent. on the cost out of funds (if any are available) in their hands.

(*a*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 62.

(*b*) *Ibid.*, s. 63.

(*c*) *Ibid.*, s. 66.

(*d*) *Ibid.*, s. 70.

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and land being conveyed to the patron, his heirs and successors, for the use and benefit of the incumbent of the benefice (e). The mortgage is to be in the prescribed form for the term of thirty-five years or until repayment of the loan with interest and incidental costs. The Governors of Queen Anne's Bounty may lend the money at interest not exceeding 4 per cent. per annum; and colleges and halls in the Universities of Oxford and Cambridge and other corporate bodies possessing the patronage of benefices may lend the money without taking any interest for it (f).

(iv.) *Other Authorised Charges.*

1483. With the consent of the bishop and patron, a loan on the security of the possessions of a benefice may be made by the Governors of Queen Anne's Bounty: (1) of the whole or any part of the sum stated in the final report, together with a sum for costs and expenses, in cases where, when the benefice is not vacant, a report is made as to the costs of the works needed to repair dilapidations in the buildings of the benefice, and (2) of the whole or any part which the Governors do not receive from the new incumbent of the sum stated in the order, together with a sum for costs and expenses in cases where, on the avoidance of a benefice, an order is made as to the repairs necessary to make good the dilapidations and the cost of such repairs (g).

For dilapida-
tions.

1484. An incumbent, with the consent of the patron or of the Governors of Queen Anne's Bounty, after paying compensation to an outgoing tenant of land belonging to the benefice, or after expending the amount necessary to execute an improvement which the tenant has notified his intention to execute, may obtain from the county court a charge upon the tenant's holding of the amount so paid or expended. Or, instead of the incumbent, the Governors of Queen Anne's Bounty may pay the compensation to the tenant, and obtain from the county court a charge on the holding in respect thereof in favour of themselves (h).

For compen-
sation paid to
tenant of
glebe.

1485. Under certain local and personal Acts constituting companies with power to advance money for the improvement of lands, and under the Improvement of Land Act, 1864 (i), incumbents may create a terminable charge on the lands of their benefices for securing the repayment of money borrowed for the improvement thereof; but the patron of the benefice and the bishop of the diocese

For improve-
ment of land.

(e) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 71.

(f) *Ibid.*, ss. 62—74, Sched. II. Loans under this Act by the Governors of Queen Anne's Bounty were included in the provisions of the Loans Extension Acts, and the section of the Extraordinary Tithe Redemption Act mentioned in note (e), p. 756, *ante*.

(g) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), ss. 17, 18, 38, 39, 62—64; Ecclesiastical Dilapidations Act, 1872 (35 & 36 Vict. c. 96), ss. 1, 2; see pp. 770, 771, *post*. Loans for repair of dilapidations were included in the provisions of the Loans Extension Acts, and the section of the Extraordinary Tithe Redemption Act, mentioned in note (e), p. 756, *ante*.

(h) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 15, 16, 40 (2), (3). See title AGRICULTURE, Vol. I., p. 268.

(i) 27 & 28 Vict. c. 114.

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must give their written consent to every such improvement and charge (*k*). Arrears of the charge can be recovered by a sale of the lands charged (*l*), but if a portion of the lands is compulsorily purchased under statutory powers, the remaining payments of the charge will not be ordered to be paid off in advance out of the purchase-money (*m*).

For redemp-
tion of land
tax.

1486. Mortgages and charges can be made on the lands of a benefice by the incumbent, or a sequestrator, or the patron, for the purpose of redeeming the land tax thereon or purchasing an assignment of the redeemed land tax (*n*).

For expenses
of commuting
tithe.

1487. Incumbents have power to charge the expenses defrayable by them in connection with the commutation of the tithe of their benefices upon the rentcharge for which the tithe is commuted, or to borrow the expenses on the security of a charge on such rentcharge; but the charge must be paid off in twenty years (*o*).

(v.) *Leases and Sales.*

Alienation of
Church
property.

1488. No person holding a spiritual office can alienate the possessions of the Church committed to him as the holder of such office, save in accordance with certain provisions imposed by law on such alienations. Thus, a bishop cannot alienate without the consent of the chapter, nor other ecclesiastical corporations sole without the consent of the bishop (*p*). With the requisite consent alienation was possible prior to the year 1571, but after that date all leases, gifts, grants, feoffments, conveyances, or estates made or suffered by any dean and chapter (*q*), parson, vicar, or any other person having any spiritual or ecclesiastical living, or any houses, lands, tithes, or other hereditaments being part of the possessions of or appertaining to any parsonage or other spiritual promotion (*r*), other than a lease

(*k*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 20; Improvement of Lands (Ecclesiastical Benefices) Act, 1884 (47 & 48 Vict. c. 67).

(*l*) *Scottish Widows' Fund v. Craig* (1882), 20 Ch. D. 208; *Northern Assurance Co. v. Harrison*, [1889] W. N. 74.

(*m*) *Re Louth and East Coast Rail. Co., Ex parte Grimoldby (Rector)* (1876), 2 Ch. D. 225; *Re Hull Railway and Dock Act, Ex parte Kirkcleston (Rector)* (1882), 20 Ch. D. 203; *Ex parte Castle Bytham (Vicar) and Ex parte Midland Rail. Co.*, [1895] 1 Ch. 348.

(*n*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 69, 78, 79; Land Tax Redemption Act, 1805 (45 Geo. 3, c. 77), s. 1; Land Tax Redemption Act, 1810 (50 Geo. 3, c. 58), s. 2; Land Tax Redemption Act, 1813 (53 Geo. 3, c. 123), ss. 26—31; *Kilderbee v. Ambrose* (1854), 10 Exch. 454.

(*o*) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), ss. 77, 78; Tithe Act 1839 (2 & 3 Vict. 62), s. 16.

(*p*) Burn, Ecclesiastical Law, Vol. II., p. 298.

(*q*) A lease by dean and chapter, executed for them by the dean, though signed by the dean only, binds the chapter (*Ely (Dean and Chapter) v. Stewart (Sir Simon)* (1740), 2 Atk. 44), but the fact that a majority of the chapter have signed an entry as to a lease in the chapter books does not bind the chapter (*Carter v. Ely (Dean)* (1835), 7 Sim. 211); nor will an agreement not under seal unless it has been in part executed (*Winne v. Bampton* (1747), 3 Atk. 473).

(*r*) Where by statute South Sea Annuities were vested in a rector as an endowment, with a proviso for reinvestment in land with consent of the bishop, and the proceeds were without consent invested in land which was conveyed to a succeeding rector, his heirs and assigns, and was by him conveyed to his successor, his heirs and assigns, it was held that as the purchase of the land did not

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for twenty-one years, or three lives, at the accustomed yearly rent or more, are utterly void and of no effect (*s*). From this date until the year 1842 (excepting between the years 1803 and 1817 (*t*)) it was not possible for the incumbent, even with the consent of his bishop or of the patron and ordinary, to grant a lease of glebe lands which was not within the above reservation, nor could he open mines in the glebe or let any mines in the glebe which had not been open before that date (*u*). Where a lease, though not made in accordance with the statutory provisions, can be regarded as voidable only, and not as absolutely void, it may be good as against the grantor during his incumbency if he is a corporation sole (*v*), or during the lifetime of the head if the grantor is a corporation aggregate (*w*), and may be adopted by the grantor's successors (*x*); but a lease for more than twenty-one years of ecclesiastical property of which the grantor is a trustee within the Charitable Trusts Acts is absolutely void unless made with the approval of the Charity Commissioners (*a*).

1489. Since the year 1842 it has been possible for any incumbent of an ecclesiastical benefice, with the consents of the bishop and patron (*b*), and when the lands are of copyhold or customary tenure, with the consent also of the lord of the manor, to let (*c*) any part of the glebe or other lands of or belonging to the benefice (*d*), with or

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leases.

purport to be and was not made under the private statute, the land did not form part of the benefice and was not subject to stat. (1571) 13 Eliz. c. 10 (*Power v. Banks*, [1901] 2 Ch. 487).

(*s*) Stat. (1571) 13 Eliz. c. 10, s. 2. A lease not within the provisions of the section is utterly void, and consequently the right of the grantors to re-enter exists from the moment of the execution of it, and where no rent is reserved the Statute of Limitations begins to run from that date (*Magdalen Hospital (President and Governors) v. Knotts* (1879), 4 App. Cas. 324), but not if a rent, however small, were reserved so as to create a tenancy from year to year (*ibid.*, per Lord SELBORNE, at p. 335). Where under a private Act a lease by a dean and chapter is voidable only and not void, it may be set up by the receipt of rent (*Doe d. Pennington v. Taniere* (1848), 12 Q. B. 998), so as to be binding for the life of the dean who received the rent (*Pennington v. Cardale* (1858), 3 H. & N. 656). So also a lease for years may bind a parson personally if he so long continues parson, and if he voluntarily breaks such term by resigning he may be liable in damages (*Price v. Williams* (1836), 1 M. & W. 6).

(*t*) During this period stat. (1571) 13 Eliz. c. 10, having been repealed by stat. (1803) 43 Geo. 3, c. 84, was not in force, but it was resuscitated by the repeal of the latter Act by stat. (1817) 57 Geo. 3, c. 99 (*Doe d. Cates v. Somerville* (1826), 6 B. & C. 126).

(*u*) *Ecclesiastical Commissioners v. Wodehouse*, [1895] 1 Ch. 552.

(*v*) *Salisbury's (Bishop), Case* (1613), 10 Co. Rep. 58 b.

(*w*) *Doe d. Berkeley (Earl) v. York (Archbishop)* (1805), 6 East, 86, 103; Co. Litt. 45 a.

(*x*) Co. Litt. 45 a.

(*a*) *Bangor (Bishop) v. Parry*, [1891] 2 Q. B. 277.

(*b*) In the case of a perpetual curacy, where the patron is a vicar, the consent of the rector as patron paramount is also required (*Doe d. Brammall v. Collinge* (1849), 7 C. B. 939).

(*c*) Ecclesiastical Leases Act, 1842 (5 & 6 Vict. c. 27). This Act does not abridge any right of leasing which incumbents enjoyed independently of it (*Green v. Jenkins* (1860), 1 De G. F. & J. 454, O. A.).

(*d*) Including any lands vested in any trustee for the benefit of any incumbent (Ecclesiastical Leases Act, 1842 (5 & 6 Vict. c. 27), s. 13); but not including any part of the churchyard (*St. Gabriel, Fenchurch Street v. City of London Real Property Co.*, [1896] P. 95).

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without any farm-houses, cottages, or other agricultural buildings on it, on lease at the best rent obtainable for farming purposes for fourteen years, or on an improving lease for twenty years, provided the parsonage house and ten acres of land adjoining it are reserved, or if there is not ten acres adjoining, then ten acres, or as much, being less than ten acres, as is within five miles of the parsonage or of the church where there is no parsonage (*e*). The lease must contain covenants to pay outgoings, not to sublet without the consents of the bishop, patron, and incumbent, to cultivate according to the most improved system of husbandry in the locality so far as such system is not inconsistent with any express stipulation in the lease, to keep all lands and fixtures thereon in good condition and repair, and to repair and insure against fire all buildings; the lease must contain reservations of all timber saplings and underwood and of all mines and minerals, but the lessor may covenant that the lessee may take brick, earth, stone, lime, timber, or other materials for the erection or repair of buildings or gates or for other improvements (*f*), and the lease must be reported on by a surveyor appointed by the bishop, patron, and incumbent, who must provide by actual survey, or by copy from an existing map, a plan showing the lands to be leased and the other lands belonging to the benefice (*g*). Where the patron or lord of the manor is under incapacity or abroad, consent may be given on his behalf by the guardian, committee, or attorney as the case may be (*h*), and when the patronage is in the Crown, the consent may be testified by the First Lord of the Treasury if the benefice is above the value of £20, or by the Lord Chancellor if it is not (*i*). All the incumbent's documents relating to the lease are deposited in the diocesan registry (*k*), and a receipt in writing of a counterpart or attested copy of the lease indorsed on the lease and signed by the lessor is conclusive evidence that the lease has been duly executed by him, and the execution of the lease by the bishop and patron is conclusive evidence that the lands leased might properly be included, and that the conditions as to rent and covenants have been complied with (*l*).

Building
lease.

1490. An incumbent or other ecclesiastical corporation (*m*), with

(*e*) Ecclesiastical Leases Act, 1842 (5 & 6 Vict. c. 27), ss. 1, 2. For form of lease, see Encyclopædia of Forms, Vol. III., p. 668.

(*f*) *Ibid.*, s. 1.

(*g*) *Ibid.*, s. 3. The practice of the Ecclesiastical Commissioners, where their approval is required under the Ecclesiastical Leasing Acts (see pp. 763, 764, *post*), is to accept in general an extract from the 25-inch scale Ordnance Survey map for the purpose of showing the land to be dealt with and the ownership of all adjoining property, which must be marked thereon, and to accept, at any rate in the first instance, a 6-inch scale map where a considerable quantity of land is to be dealt with.

(*h*) *Ibid.*, s. 7.

(*i*) *Ibid.*, s. 8.

Ibid., s. 14.

Ibid., s. 4.

(*m*) *Ibid.*, as amended by the Ecclesiastical Leasing Act, 1858 (21 & 22 Vict. c. 57), and the Ecclesiastical Leases Act, 1865 (28 & 29 Vict. c. 57). These Acts make it lawful for any ecclesiastical corporation, aggregate or sole, except any college or corporation of vicars choral, priest vicars, senior vicars,

the consent of the Ecclesiastical Commissioners (*n*) and with the consent of the patron, and, when required, with the consent of the lord of the manor (*o*), may also grant a building lease of any land (*p*), excepting any house of residence of any corporation sole or of any member of a corporation aggregate, and any offices, gardens, orchards, or pleasure grounds convenient for actual occupation therewith, and except any mines or easements the grant whereof might be

custos and vicars, or minor canons, and except also any ecclesiastical hospital or the master thereof, to grant leases subject to the restrictions set out in the Acts.

(*n*) By the Ecclesiastical Leasing Acts (see note (*m*), p. 762, *ante*), it is competent to an incumbent, with the consent of the patron of his living and with the approval of the Ecclesiastical Commissioners to sell, lease, or exchange any lands, houses, mines, minerals, or other property belonging to his benefice, including the dealing with glebe lands for building purposes either by way of lease or ground rents or grant on chief or fee farm rents, and the creation of easements in or over land, but parsonage houses and their appurtenances and tithe rent-charges or corn rents are not dealt with under these Acts, and in cases where the property has been acquired for the benefice under the Acts administered by the Governors of Queen Anne's Bounty, the Commissioners do not take proceedings for its sale under the Ecclesiastical Leasing Acts, unless a reservation of or special questions in connection with minerals have to be considered. Exchanges of properties of equal value can in certain cases be effected with greater facility under the Tithe and Inclosure Acts (see p. 748, *ante*, and title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 544). Excepting moneys payable by way of perpetual annual chief or fee farm rent or rentcharge, the whole of the proceeds from the sale of glebe, or from the sale or working of minerals belonging to a benefice, is required to be paid to the Commissioners. The provisions (see p. 800, *post*) for the appropriation in certain cases of part of the proceeds to the Commissioners' common fund do not affect the incumbent in possession, and are subject to the conditions that the average annual income of the benefice shall not be left at less than £600, if the population amounts to 2,000, nor at less than £500 if the population amounts to 1,000, nor in any case at less than £300, and that in making provision for the cure of souls out of the proceeds, the wants and circumstances of the place in which the lands or minerals dealt with are situated are to be primarily considered. In the case of a lease the costs, which, in accordance with the usual practice, are payable by the lessee, should include the costs of the Commissioners. In the case of a sale the Commissioners allow such costs as they in their discretion think fit to be deducted out of the proceeds of sale, but as a rule they do not consider it necessary that the patron should be separately represented, nor allow anything for such separate representation, and in no circumstances do they allow the incumbent's solicitor remuneration in excess of the scale which they have fixed, excepting that they allow a small fee for a duplicate conveyance where necessary, and a further fee, not exceeding £2, when the incumbent's solicitor also acts for the patron. The scale commences with £2 2s. on a purchase price not exceeding £50; £3 3s. up to £100; £4 up to £150; £5 up to £200; £6 up to £300; £2 per cent. additional up to £1,000; £1 per cent. additional up to £3,000; 10s. per cent. additional up to £10,000; 5s. per cent. additional up to £25,000; and 2s. 6d. per cent. additional above £25,000. Where the consideration is not less than £250 the Commissioners are, with the concurrence of the incumbent, prepared to consider the acceptance of 15 to 20 per cent., according to the circumstances of the price, in cash, together with a mortgage deed providing for payment of the balance by equal half-yearly instalments of principal and interest combined.

(*o*) Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), s. 20.

(*p*) Including any land held in trust for the corporation (*ibid.*, s. 28), or held upon trusts under which not less than three-fourths of the net income is payable to the incumbent of a benefice (Ecclesiastical Commissioners' directions); but not including any portion of the churchyard (*St. Gabriel, Fenchurch Street (Rector etc.) v. City of London Real Property Co.*, [1896] P. 95).

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prejudicial to the enjoyment of such residence (*q*), for not more than ninety-nine years, to any person willing to improve or repair existing houses, or to erect new houses on the land, or to annex any part of the land to buildings erected or to be erected thereon, and may grant a renewal of such a lease, so long as one-fourth part of the term remains unexpired (*r*), and may grant a mining lease for any term not exceeding sixty years (*s*). A building lease so granted must reserve the best rent obtainable (*t*), excepting that a smaller rent may be reserved for the first six years (*a*), and must contain covenants for erecting, repairing, and insuring any buildings to be erected pursuant to the lease (*b*). The incumbent or other ecclesiastical corporation may, with the like consents, appropriate any part of the land which might be leased for streets, or squares, or for places convenient for the carrying on of any manufacture or trade, or otherwise for the general improvement of the estate or the accommodation of the occupiers (*c*). Provisions as to the consent of the Crown as patron, and of any patron or lord of a manor who is under incapacity, similar to those set out above in respect of leases at a rack rent, apply (*d*).

General power
of permanent
improvement.

1491. The incumbent or other ecclesiastical corporation may also, with the same consents, in cases where it is made to appear to the satisfaction of the Ecclesiastical Commissioners that it will be to the permanent advantage of the estate, lease in any manner, sell, exchange, or otherwise dispose of any part of the property in any manner and on any terms which the Commissioners by an order under their seal approve, but no sale by an incumbent can be so authorised until one month's notice has been given to the bishop of the diocese (*e*). All moneys paid by way of premiums on any lease, or by way of royalties on minerals, or on any sale, exchange, or partition are to be paid to the Ecclesiastical Commissioners, and may by them be reinvested in lands convenient to be held by the corporation on whose behalf the money was received (*f*).

Sale of glebe
lands.

1492. The incumbent may, if he is desirous of selling any of the glebe except the parsonage house and any lands appurtenant

(*q*) Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), s. 9.

(*r*) *Ibid.*, s. 5. A lease for twenty-one years made by a vicar within three years of the expiration of a former lease of premises in London belonging to the vicarage, not being the residence nor above ten acres, was held not to be within stat. (1571) 13 Eliz. c. 10, nor the amending Acts (*Vivian v. Blomberg* (1836), 3 Scott, 681).

(*s*) *Ibid.*, s. 6.

(*t*) *Ibid.*, s. 1.

Ibid., s. 2.

Ibid., s. 1.

Ibid., s. 3.

(*i*) *Ibid.*, ss. 22, 23, 34.

(*e*) Ecclesiastical Leasing Act, 1858 (21 & 22 Vict. c. 57), s. 1. The notice of sale required to be given to the bishop is now limited to one month, and is issued from the Ecclesiastical Commissioners' office. Where the sale was to trustees of a settlement and the purchase was not authorised by the trust for investment, it was held that the Ecclesiastical Commissioners had no remedy against the owners of the settled estates for specific performance (*Ecclesiastical Commissioners v. Pinney*, [1900] 2 Ch. 736, O. A.).

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thereto (g), apply to the Board of Agriculture and Fisheries for their approval of the proposed sale, but before so doing he must give notice to the bishop of the diocese and to the patron of the living (h), and also to the parishioners and to the sanitary authority of the district (i) of his intention to make such application. If the land is subject to any mortgage or other debt, notice, which must be in the prescribed form, must also be given to the mortgagee or other creditor (k). After the notices have been given to the bishop and the patron the incumbent may apply to the Board of Agriculture and Fisheries to approve the sale, and the Board, if satisfied of the *prima facie* expediency of the proposed sale, will nominate a competent valuer and instruct him to report as to the value and quality of the land, value of timber, existence and value of minerals, state of the buildings, whether the value is likely to be diminished by any dilapidations which the incumbent is liable to make good (l), whether the land possesses any accommodation value to adjoining owners, whether there is likely to be a demand for small allotments (m), and as to the outgoings. If the Board are then satisfied that the application has been duly made by an incumbent authorised to apply, that the prescribed notice has been given to the bishop and patron that an objection to the sale either has not been made, or if made ought not to prevail, and that the sale will be for the permanent benefit of the benefice, they may approve the sale subject to the provisions of the Glebe Lands Act, 1888 (n), but the Board cannot

(g) This exception includes the outbuildings, garden, or other appurtenances of the parsonage house, or such part of the glebe as the Board of Agriculture and Fisheries consider to be necessary for the convenient enjoyment of that house (Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), ss. 2, 3 (1); Sale of Glebe Land Rules, 1909, r. 2). For the Sale of Glebe Land Rules, 1909, dated August 13th, 1909, see [1909] W. N. 317.

(h) The notices must be in the form in the schedule to the Sale of Glebe Land Rules, with map annexed, and must contain such particulars of the objects and advantages of the proposed sale, and of the situation of the land as will enable the bishop and patron to judge whether they ought to object. If the patron is a minor, idiot, lunatic, or *feme covert*, the notice must be given respectively to the guardian, committee, or husband and wife (Sale of Glebe Land Rules, 1909, r. 1). It was held in a case under a private Act, which gave trustees the right of presentation during a minority, that this did not constitute them patrons for the purpose of consenting to a sale of glebe, and that the guardian was the proper person to consent (*Leigh v. Leigh*, [1902] 1 Ch. 400).

(i) The notice to the parishioners must be posted on the notice board of the parish church, at the post office, and other usual places, on three successive Sundays, and if the land is in another parish notice must be given in both places (Sale of Glebe Land Rules, 1909, r. 1).

(k) *Ibid.*, r. 1; for the prescribed form, see *ibid.*, schedule, Form No. 3.

(l) If there are any such dilapidations, either the incumbent must make them good before the sale, or the Board must provide for the amount of such diminution of value being recouped to the benefice by an immediate money payment or by the application of part of the income of the benefice, with a continuing liability on the incumbent until the amount is made good (Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), s. 5 (1); Sale of Glebe Land Rules, 1909, r. 8).

(m) Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), s. 8 (1); Sale of Glebe Land Rules, 1909, rr. 4, 5.

(n) 51 & 52 Vict. c. 20. If a bishop or patron has objected, the Board must

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approve any sale of land subject to a lease originally created for a term exceeding twenty-one years, or let for any term where through the rent reserved being less than two-thirds of the value, or for any other reason, the incumbent is not in possession of the full rents and profits, or of mines or minerals which appear likely to become of considerable value (o).

Investment of
proceeds.

1493. Where the Board have approved the sale the incumbent may sell the land subject to the conditions required by the Board and to the provisions of the Glebe Lands Act, 1888 (p). The expenses of the sale are defrayed out of the purchase-money, and the balance of the purchase-money, after discharging any mortgage or other debt which the Board decide ought to be discharged (q), is paid to the Board (r), and by them invested in trustee securities selected by the incumbent if he desires, in the name of the Ecclesiastical Commissioners (s), or in redemption of land tax, chief rent or

inform the person objecting in writing of their reasons for being so satisfied (Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), s. 3 (2)).

(o) Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), s. 5 (2); Sale of Glebe Land Rules, 1909, r. 2.

(p) 51 & 52 Vict. c. 20. Although lands are vested in the incumbent "and his successors," this does not constitute a trust for "persons by way of succession" so as to make it a settlement within the meaning of the Settled Land Acts, and consequently the incumbent has not the powers of a tenant for life under those Acts (*Ex parte Castle Bytham (Vicar) and Ex parte Midland Rail. Co.*, [1895] 1 Ch. 348, approved in *Re Bath and Wells (Bishop)*, [1899] 2 Ch. 138), but the Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), by s. 8 (4) expressly provides that in effecting the sale the incumbent has as far as circumstances admit powers similar to those of a tenant for life under the Settled Land Acts (for which see title SETTLEMENTS), and may enter into a contract for the sale as a tenant for life may. No contract should be entered into, nor should any material expense be incurred (Sale of Glebe Land Rules, 1909, r. 4), until the Board has decided that the sale is expedient. The prescribed notice of the proposal to sell having been given to mortgagees and creditors, any mortgagee or creditor may within one month (*ibid.*, r. 1) object on the ground that his security will be damaged, and the Board may make provisions for securing his rights, or if satisfied that he will not be damaged may approve the sale. Where a mortgage debt is repayable by annual instalments or the land is subject to any permanent annual charge in favour of another benefice, these become payable by the incumbent out of the interest of the purchase-money, and the Board may make any provisions for preventing prejudice to the future interest of the benefice, which will be binding on the incumbent for the time being, and the Ecclesiastical Commissioners may set apart an adequate part of the security for the purpose of meeting any such permanent annual charge (Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), ss. 6 (2), 7).

(q) *Ibid.*, s. 5 (1). Where purchase-money of glebe lands taken by a railway company had been paid into court before the Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), the court allowed part of it to be devoted to repairs of the rectory, and refused to allow any part to be devoted to repaying money borrowed from Queen Anne's Bounty (*Re Louth and East Coast Rail. Co., Ex parte Grimoldby (Rector)* (1876), 2 Ch. D. 225), and in another case refused to allow it to be applied in the repayment of money already spent on repairs (*Re Nether Stowey Vicarage* (1873), L. R. 17 Eq. 156).

(r) The receipt of the Board is a good discharge to the purchaser (Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), s. 4 (1)).

(s) The securities may from time to time be varied on the request of and at the expense of the incumbent with the approval of the Commissioners (*ibid.*, s. 4 (3)). Where land belonging to an ecclesiastical corporation was subject to a lease and was purchased compulsorily and the lessee's interest was acquired independently, the sum paid for the reversion was ordered to be accumulated

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quit rent charged on any unsold part of the glebe, or in the purchase of lands adjacent to the parsonage the possession of which in the judgment of the Board would be for the benefit of the benefice and for the convenient enjoyment of the parsonage house (t).

(vi.) *Dilapidations and Waste.*

1494. A dilapidation is the pulling down or destroying in any manner any of the houses or buildings belonging to a spiritual living (a) or suffering them to run into ruin or decay, or wasting (b) or destroying the goods of the church, or committing or suffering any wilful waste (b) in or upon the inheritance of the church (a). It is Dilapidation.

until the expiration of the lease (*Ex parte Gloucester (Dean and Chapter)* (1850), 15 Jur. 239; *Ex parte Christchurch (Dean and Chapter)* (1853), 23 L. J. (CH.) 149); and where such land was subject to a lease with fines upon renewal the corporation was held entitled to so much only of the dividends as represented the rent reserved, with liberty to apply as to accumulations (*Ex parte St. Paul's (Dean and Chapter)* (1863), 11 W. R. 482; but see *Ex parte Merton College (Warden)* (1862), 1 New Rep. 176).

(t) Any land so purchased is conveyed to the incumbent and forms part of the glebe (Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), s. 4 (6)). Where purchase-money of part of a churchyard was in court the court allowed it to be expended in part in purchase of a house of residence which was not suitable but was capable of being made so, and in part in alterations and repairs required to make it suitable (*Ex parte St. Botolph, Aldgate (Vicar)*, [1894] 3 Ch. 544). Generally, the court sanctions beneficial expenditure out of capital for the building (*Ex parte Bradfield St. Claire (Rector)* (1875), 32 L. T. 248), completion (*Ex parte Hartington (Rector)* (1875), 23 W. R. 484), or permanent improvement (*Ex parte Claypole (Rector)* (1873), L. R. 16 Eq. 574) of a parsonage house or of other buildings belonging to the benefice (*Re Whitfield (Incumbent)* (1861), 1 John. & H. 610; *Ex parte Shipton-under-Wychwood (Rector)* (1871), 19 W. R. 549), or in the inclosure of other lands belonging to the benefice (*Ex parte Lockwood* (1851), 14 Beav. 158), and even in some cases in repayment of money already expended (*Ex parte Holywell-cum-Needlingworth (Rector)* (1879), 27 W. R. 707; *Ex parte Gamston (Rector)* (1876), 1 Ch. D. 477), but not in paying off money borrowed for the purpose (*Williams v. Aylesbury and Buckingham Rail. Co.* (1874), 43 L. J. (CH.) 825, O. A.; and note (q), on p. 766, ante), nor without the consent of the patron in reducing a rentcharge (*Ex parte Castle Bytham (Vicar)* and *Ex parte Midland Rail. Co.*, [1895] 1 Ch. 348), nor in restoration of the chancel (*Re Louth and East Coast Rail. Co.*, *Ex parte Grimoldby (Rector)* (1876), 2 Ch. D. 225). The combined effect of s. 32 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and s. 69 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), is that when purchase-money of glebe has been paid into court under the last-named Act, it may be dealt with as capital moneys under the Settled Land Acts (*Ex parte Castle Bytham (Vicar)* and *Ex parte Midland Rail. Co.*, supra); as, for instance, in discharging incumbrances or buying up leases on other lands held on the same trusts (*Re Byron's Charity* (1883), 23 Ch. D. 171; *Ex parte London (Bishop)* (1860), 2 De G. F. & J. 14, O. A.; *Ex parte Manchester (Dean and Canons)* (1873), 28 L. T. 184; *Re Queen Camel (Vicar)* (1863), 11 W. R. 503).

(a) This includes in the case of a benefice all such houses of residence, chancels, walls, fences, and other buildings and things as the incumbent is by law or custom bound to maintain in repair (Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 4). Before this Act it was held that a vicar could not recover in respect of repairs of buildings which were held by a college in trust, to permit the vicar to receive the rents after deducting the expense of repairs (*Browne v. Ramsden* (1818), 2 Moore (O. P.), 612).

(b) It is waste for a rector to cut trees in the churchyard except for repairing the chancel of the church (stat. (1306—7) 35 Edw. 1, stat. 2), or for a bishop to cut down and sell the trees of his bishopric (*Burn, Ecclesiastical Law*, Vol. II., p. 146 c; *Winchester (Bishop) v. Woolgar* (1629), 3 Swan. 349, n.), or for a parson to open mines (*Knight v. Moseley* (1753), Amb. 176), without the

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the duty of every person occupying a spiritual office and receiving the emoluments thereof to prevent the dilapidation of the property belonging to it, and any breach of this duty may be visited with ecclesiastical censures, while the next occupant of the office, in respect of any dilapidations outstanding on the office becoming vacant, may recover damages in the spiritual court or at common law against the predecessor or his estate (c).

1495. In order to make provision for the better sustentation of buildings which ecclesiastical persons are thus liable to repair, as well

consent of the patron and ordinary (*Holden v. Weekes* (1860), 1 John. & H. 278; *Huntley v. Russell* (1849), 13 Q. B. 572), but not for a parson before the restraining Acts of Elizabeth with the consent of the patron and ordinary to dig new coal mines in a glebe (*Rutland's (Countess) Case* (1663), 1 Lev. 107), or since the restraining Acts for him to work mines already opened, provided the opening was duly authorised (*Ecclesiastical Commissioners v. Wodehouse*, [1895] 1 Ch. 552), or to cut trees for the purpose of repairs (*Strachy v. Francis* (1741), 2 Atk. 217), or for the purpose of applying the proceeds of sale to purchasing other timber for repairs of buildings belonging to the benefice (*Sowerby v. Fryer* (1869), L. R. 8 Eq. 417; *Wither v. Winchester (Dean etc.)* (1817), 3 Mer. 421; *Marlborough (Duke) v. St. John* (1852), 5 De G. & Sm. 174), or to alter the system of cultivation for the purpose of meliorating the land (*St. Albans (Duke) v. Skipwith* (1845), 8 Beav. 354), or to suffer a building to go to decay if he replaces it by a better building (*Huntley v. Russell, supra*). As to the removal of fixtures placed by the incumbent, see *Martin v. Roe* (1857), 7 E. & B. 237. As to trees in the churchyard, the statute "Ne rector prosternat arbores in cemeteris" stat. (1306—7) 35 Edw. 1, stat. 2, enacts that "Forasmuch as a churchyard that is dedicated is the soil of a church and whatsoever is planted belongeth to the soil it must needs follow that those Trees which be growing in the churchyard are to be reckoned amongst the goods of the Church the which Laymen have no authority to dispose but as the Holy Scripture doth testify The charge of them is committed only to Priests to be disposed of And yet seeing those trees be often planted to defend the force of the wind from hurting the church We do prohibit the Parsons that they do not presume to fell them down unadvisedly, but when the Chancel of the Church doth want necessary reparations; neither shall they be converted to any other use except the body of the Church doth need like repair, In which case the Rectors of poor parishes of their charity shall do well to relieve the Parishioners with bestowing upon them the same Trees which we will not command to be done but we will commend it when it is done."

(c) The action is based not on the general law of the land, but on custom which had become part of the common law, and therefore all the incidents of the custom attached (*Bryan v. Clay* (1852), 1 E. & B. 38). The principle is that the law cast a duty on the incumbent or prebendary (*Radcliffe v. D'Oyly* (1788), 2 Term Rep. 630) to maintain the houses, buildings, and other premises belonging to the benefice because he enjoyed the benefit of them, but that neglect to perform it constituted no civil tort during his lifetime, and occupation of the benefice either to his successor who was unknown, or to the patron who had no right of action for spoil or waste, and only enured to the successor when he was ascertained (*Jones v. Hill* (1690), 3 Lev. 268; *Wheatley v. Lane* (1669), 1 Wms. Saund. 216 a, b; *Mason v. Lambert* (1848), 12 Q. B. 795; *Sollers v. Lawrence* (1743), Willes, 413; *Bird v. Relph* (1835), 2 Ad. & El. 773; *Wise v. Metcalfe* (1829), 10 B. & C. 299; *Bunbury v. Hauseron* (1849), 3 Exch. 558; *Huntley v. Russell, supra*), not as a debt, but as a liability to damages which was to be satisfied out of assets after simple contract debts (*Bryan v. Clay, supra*). It is confined to dilapidations to houses and buildings, and does not extend to waste by digging gravel in the glebe (*Ross v. Adcock* (1868), L. R. 3 C. P. 655). The action for damages of which the above-named cases afford examples has been practically abolished by the Ecclesiastical Dilapidations Act, 1871 (*Re Monk, Wayman v. Monk* (1887), 35 Ch. D. 583, 588). As to the liability of a bishop to account for waste, see *Crampton v. Meath (Bishop)*, (1837), Sau. & So. 297.

as for the relief of such persons and their representatives (*d*), a surveyor or surveyors of ecclesiastical dilapidations is or are appointed for each diocese (*e*) by the archdeacons and rural deans at a meeting at which the bishop, or in his absence the senior archdeacon, presides (*f*). The appointment is subject to the approval of the bishop, who has power to hear any complaint against a surveyor of neglect, breach of duty, or unfitness for his office, and to remove him after giving him an opportunity of showing cause to the contrary (*g*). The surveyor is paid according to a rate of charges fixed or revised at a meeting of the bishop, archdeacons, rural deans, and the chancellor of the diocese (*h*). The surveyor must not be interested directly or indirectly, except as shareholder in a public company, in any work or contract to be entered into for the repair of ecclesiastical dilapidations (*i*).

At the request of an incumbent, or on complaint in writing of an archdeacon or rural dean or patron of a benefice (*k*), that the buildings of a benefice (*l*) are in a state of dilapidation, or within three calendar months after the avoidance of a benefice (*m*), unless the late incumbent is free from all liability to dilapidations, or where a benefice is under sequestration within six months after the sequestration issues,

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(*d*) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), preamble. It was formerly necessary for every bishop as soon as he was installed, and for every rector or vicar as soon as he was inducted, to procure a survey of the state of the premises, and evidence of the amount required to repair them (Burn, Ecclesiastical Law, Vol. II., p. 147).

(*e*) A building belonging to a benefice is deemed to be in the diocese of the bishop under whose jurisdiction the benefice is (Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 5).

(*f*) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 8.

(*g*) *Ibid.* The appointment may be general or for a term, and for the whole or part of the diocese.

(*h*) *Ibid.*, s. 10.

(*i*) *Ibid.*, s. 11.

(*k*) *Ibid.*, s. 12. A copy of the complaint must be forwarded to the incumbent one month before the inspection is ordered. An agreement by two incumbents, made with the assents of their respective patrons and bishops, to exchange their livings without any payment for dilapidations on either side was not simoniacal, nor is it so contrary to the policy of the Act as to be invalid (*Wright v. Davies* (1876), 1 O. P. D. 638, O. A.; *Goldham v. Edwards* (1856), 18 O. B. 389, Ex. Ch.), but the mere fact that at the time of the agreement to exchange neither party contemplated such a claim will not estop either party from enforcing it (*Downes v. Craig* (1841), 9 M. & W. 166).

(*l*) Benefice includes all rectories with cure of souls, vicarages, perpetual curacies, donatives, endowed public chapels, and parochial chapelries, and chapelries or districts belonging or reputed to belong to, or annexed or reputed to be annexed to, any church or chapel (Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 3).

(*m*) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 29. The Act contains two distinct sets of provisions: ss. 12—24, relate to inspection when a benefice is not vacant; ss. 29—43 relate to inspection when it is vacant; s. 20, therefore, has no bearing on an inspection made under the latter sections, and, consequently, where a benefice was under sequestration at the death of the incumbent and the inspection was made after the avoidance, and the bishop's order was made pursuant to s. 34, it was held that the sequestrator was not liable for, nor entitled to deduct out of the profits in his hands, the cost of the repairs required (*Jones v. Dangerfield* (1875), 1 Ch. D. 438).

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and thenceforth every fifth year while it continues (*n*), the bishop may direct the surveyor to inspect the buildings of the benefice.

1496. Where such a complaint is made, if within twenty-one days of notice thereof the incumbent informs the bishop that he intends to do the repairs, the bishop may allow him a reasonable time to execute them (*o*), but if he does not or the bishop during the time so directs (*p*), then the surveyor inspects, and within one month sends to the bishop his report, and a copy to the incumbent and to the sequestrator (if any) (*q*), showing, if any works are needed for putting into repair any dilapidated building belonging to the benefice, what they are, specifying them in detail, what he estimates to be the probable cost, and at or within what time or times such work respectively ought to be executed, or, in the case of an avoidance of the benefice, stating what sum will be required to make good the dilapidations (*r*).

The incumbent (*s*) or sequestrator may, within one month, state in writing to the bishop objections (*t*) to the report on any grounds of fact or law, and the bishop may, at the expense of the objector, direct a second report by another surveyor or take counsel's opinion on a question of law, and shall, after due consideration, make an order giving his decision in writing, which is final (*a*).

The incumbent must then proceed to execute the repairs within the time named or such extended time as the bishop shall allow (*b*). For that purpose he may borrow, and the Governors of Queen Anne's Bounty upon his request, with the consent of the bishop, may lend, upon the security of the possessions of the benefice, the whole or any part of the sum stated as the cost, with such sum as the Governors think fit in respect of costs and expenses (*c*). If the benefice is under sequestration the sum stated (*d*) becomes a

(*n*) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 13.

(*o*) *Ibid.*, s. 22.

(*p*) In the case of avoidance of a benefice the Act says (*ibid.*, s. 29), "The bishop shall direct"; but it was held that the section is directory and not imperative, and that a direction made by the bishop more than three months after the avoidance (*Caldow v. Pixell* (1877), 2 O. P. D. 562) and an inspection made after three months pursuant to a direction within three months are valid (*Gleaves v. Marriner* (1876), 1 Ex. D. 107).

(*q*) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 14.

(*r*) In the case of an avoidance of the benefice the report may state any special circumstances, and a copy is to be sent both to the new incumbent and to the late incumbent, his executors or administrators (*ibid.*, s. 30), and either the new incumbent or the late incumbent, his executors or administrators, may state objections to the report.

(*s*) Including both the new and the late incumbent in the case of a vacant benefice (*ibid.*, ss. 16, 32).

(*t*) *Ibid.*, ss. 16, 32. An objection by letter from the executor of a deceased incumbent should be considered by the bishop, even though it does not expressly purport to be within s. 32 of the Act (*De Beauvais v. Green* (1907), 24 T. L. R. 43, O. A.).

(*a*) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), ss. 16, 34—35. The placing of the bishop's signature on the order by means of a stamp is a sufficient signature (*De Beauvais v. Green* (1906), 22 T. L. R. 816, reversed on another point (1907), 24 T. L. R. 43, O. A.).

(*b*) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), ss. 19, 42. This section says eighteen months for a new incumbent.

(*c*) *Ibid.*, ss. 17, 38.

(*d*) The sequestrator has no authority to expend on repairs out of the profits

charge upon the net profits of the benefice in priority to all other charges except the stipends of the curate or curates appointed to perform the duties (e). If the benefice becomes vacant while under sequestration a fresh inspection and report is made by the surveyor (f), and in all cases of a benefice becoming vacant a report already made stands good, subject to any modification which may be made in it (g).

If the incumbent refuses or neglects to duly execute the repairs, the bishop may raise the prescribed sum, if not otherwise provided by the incumbent, together with all costs, by sequestration of the profits of the benefice (h).

In the case of an avoidance of the benefice the order is signed by the bishop in triplicate (i), and the sum stated in the order as the cost of the repairs (k) is a debt to the new incumbent recoverable from the late incumbent or his estate (l), which is recoverable *pari passu* with other debts due from the estate (m), and the new incumbent, as and when he receives it or any part, is bound forthwith to hand it over to the Governors of Queen Anne's Bounty (n), and at the end of six months from the date of the order, or such further period not exceeding twelve months as the bishop may allow, is bound to pay to the Governors whatever sum is required to make up the sum so stated as the cost of the repairs (o). The new incumbent may, with the consent of the patron and bishop, elect to rebuild the premises and apply the said sum thereto, but if not he must execute the repairs within eighteen months (p).

1497. Where money is standing to the credit of a dilapidation account in the books of the Bounty, the repairs must be executed to the satisfaction of the surveyor (q), and in the cases of sequestration or refusal to execute they must be executed under the direction of the surveyor (r), who certifies (s) from time to time for payments out of the money so standing until the whole of the repairs have been executed or the money is exhausted, and when the repairs

of the benefice a larger sum than that estimated in the surveyor's report (*Kimber v. Paravicini* (1865), 15 Q. B. D. 222).

(e) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 20.

(f) *Ibid.*, s. 21.

(g) *Ibid.*, ss. 24, 49.

(h) *Ibid.*, ss. 23, 43. A failure to repair by reason of inability to pay for repairs may be equivalent to a refusal or neglect (*Ex parte Loughman* (1907), 52 Sol. Jo. 47).

(i) One copy is sent to the new incumbent, one to the late incumbent, his executors or administrators, and the third is filed in the diocesan registry (*ibid.*, s. 35).

(k) If in doing the repairs timber growing on the glebe is used, the value of it should not be included in the cost charged against the late incumbent's estate (*Percival v. Cooke* (1826), 2 C. & P. 460).

(l) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 36.

(m) *Re Monk, Wayman v. Monk* (1887), 35 Ch. D. 583; *Bisset v. Burgess* (1856), 23 Beav. 278.

(n) *Ibid.*, s. 37.

(o) *Ibid.*, ss. 40, 41.

(p) *Ibid.*, s. 42.

(q) *Ibid.*, s. 44.

(r) *Ibid.*, s. 45.

(s) The certificate is countersigned by the bishop.

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Property
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its Nature.

In case
incumbent
refuses.

In case of
avoidance of
the benefice.

Certificates.

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Repair of
episcopal
property.

have been finished to his satisfaction, the surveyor gives a final certificate, which is filed in the registry and is conclusive evidence of the due execution of the works (*t*) and protects the incumbent and his estate from any claim in respect of the buildings for dilapidations, except for wilful waste, in the event of the benefice becoming vacant within five years (*a*).

The Estates Committee of the Ecclesiastical Commissioners may (*b*) inspect any property assigned as an endowment for any see, and may serve notice on the archbishop or bishop of such see of any want of repair, and requiring him at his own expense, or at the expense of his tenants, to do the repairs specified in such notice, and they may, at the request of any archbishop or bishop, undertake or authorise any permanent improvements of such property and advance money for the purpose out of their common fund and charge it thereon (*c*). The Estates Committee are also clothed with all the rights which any archbishop or bishop might have had against his predecessor or his estate in respect of dilapidations on the estate forming the endowment of the see other than the houses of residence, and are empowered in enforcing such rights to have regard to the state of repair at the preceding succession (*d*).

Repair of
episcopal
residence.

1498. Any archbishop or bishop, or the holder of any dignity or office in any cathedral or collegiate church, may employ a surveyor approved by the Ecclesiastical Commissioners to report what works are needed for putting into a proper state of repair any residence which he is bound to maintain in repair at his own personal cost (*e*), and a certificate by such surveyor that such works have been duly executed is, when filed in the registry, conclusive evidence of the due execution of such works, and protects such dignitary and his estate from any claim for dilapidations other than wilful waste or damage by fire arising on the office becoming vacant within five years (*f*).

(vii.) *Insurance.*

Insurance.

1499. The incumbent of every benefice is obliged to keep insured against fire, in at least three-fifths of the value, the parsonage house and farm and other buildings standing on land belonging to the benefice, and their outbuildings and offices, and also the chancel of the church if the incumbent is liable to repair it (*g*). The insurance must be effected with an office approved by the Governors of Queen Anne's Bounty in the joint names of the incumbent and the Governors, and the receipt must be produced at the first visitation

(*t*) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 46.

(*a*) *Ibid.*, s. 47.

(*b*) Either at the request of the archbishop or bishop, or without such request (Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111), s. 13.

(*c*) Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), ss. 9, 10.

(*d*) Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111), s. 12.

(*e*) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 25.

(*f*) *Ibid.*, ss. 27, 28.

(*g*) *Ibid.*, s. 54. As to the inclusion of a covenant to insure in ecclesiastical leases, see pp. 762, 764, *ante*.

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after payment (*h*). If a building is burnt and the insurance office elects to pay instead of reinstating it, the sum paid is received by the Governors and dealt with as if it were a payment in respect of dilapidations (*i*). If the building is not insured, or a further sum beyond the insurance money is required to reinstate the building, the surveyor certifies in triplicate to the bishop, the Governors, and the incumbent or sequestrator the amount required, and unless the incumbent pays the sum certified within three months to the Governors, the bishop raises it by sequestration, or, if the benefice is already sequestrated, the sequestrator pays the sum certified out of the net profits of the benefice, and the sum is expended in reinstating the buildings as if it were a sum provided for making good dilapidations (*k*). The incumbent of a benefice which is subject to a mortgage for the building of a house of residence is also under a liability to keep such house insured in an office in London or Westminster at a sum to be determined by the bishop (*l*). Any house of residence built, rebuilt, altered, or improved under the Ecclesiastical Houses of Residence Acts must also be kept insured by the bishop, dean, or canon for the time being in occupation in such offices and to such amount as the Ecclesiastical Commissioners deem fit (*m*).

(ix.) *Private Benefactions.*

1500. Private benefactions given for a spiritual purpose for the benefit of the Church of England are donations for a charitable purpose (*n*). A trust for the building of a church or for maintaining and propagating the worship of God, without any more precise expression of intention as to the denomination to be benefited, is construed as for the advancement of the Church of England as the established religion of the country (*o*), and this exceptional position of the Church of England is expressly preserved by the Charitable Trusts Acts (*p*). Every gift, appointment, settlement, devise, or bequest for a spiritual purpose is an assurance for the benefit of a charitable use, and if the subject-matter is land, or personal estate to be laid out in the purchase of land, it comes within the scope of the laws as to mortmain and charitable uses, and must comply with the provisions required by those laws unless it is within some exemption. If such assurance is to a corporation it must be under the authority of a licence from the Crown or of a statute for the

Benefactions

(*h*) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 55. The incumbent must also include the name of the office and the date and amount of the last annual payment in the return which he has to make under the Pluralities Act, 1838 (*ibid.*, s. 55, and Pluralities Act, 1838 (1 & 2 Vict. c. 106), Sched. I.).

(*i*) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 56.

(*k*) *Ibid.*, s. 57.

(*l*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 67.

(*m*) Ecclesiastical Houses of Residence Act, 1842 (5 & 6 Vict. c. 26), s. 11.

(*n*) See title CHARITIES, Vol. IV., pp. 112, 113. A gift of money upon trust to invest and pay the income to the incumbent of a church as long as no pew rents are charged is not void for perpetuity (*Re Randell, Randell v. Dixon* (1888), 57 L. J. (CH.) 899).

(*o*) See title CHARITIES, Vol. IV., p. 162.

(*p*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 46.

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tion of
benefice.

time being in force (g), and, whether it is to a corporation or not, it must, in so far as it is not exempt (r), comply with the provisions required to be fulfilled in order to validate an assurance of land to charitable uses (r).

1501. The effective augmentation of the endowment of the incumbent of a benefice by means of a private benefaction may be enhanced whenever the benefaction consists of money or Government securities, or other securities approved by the Ecclesiastical Commissioners, or of land, house, tithe, or rentcharge (s), and exceeds £100 in value by the addition by the Ecclesiastical Commissioners of an annuity payable half-yearly out of their common fund at the rate of £3 per annum for every £100 of the capital value of the benefaction, and similar grants are made to meet benefactions of not less than £100 for the provision or improvement of parsonage houses (t). The addition by the Commissioners takes the form of a grant of an equivalent capital sum, which in the case of any one benefice or proposed district may not be larger than £1,000, and which, with any part of the benefaction which is paid to the Commissioners in money, will, while in their hands, bear interest at £3 per cent. per annum, or may, in the case of an existing benefice, with the consent of the Commissioners and the bishop, be laid out in the purchase of land or hereditaments within the parish or district, or the purchase or erection or improvement, not already executed, of a parsonage house for the benefice.

Similar grants, not exceeding £60 per annum, are made to meet

(g) As to corporations and other bodies and persons having authority to accept assurances for ecclesiastical purposes, see pp. 792, 802, *post*.

(r) As to exemptions see p. 721, *ante*; and as to the laws relating to mortmain and charitable uses, see title CHARITIES, Vol. IV., pp. 124 *et seq.* If a bequest is for a purpose which involves expenditure in building, as for building a parsonage, if there is land already in mortmain available as a site the bequest is valid (*Cresswell v. Cresswell* (1868), L. R. 6 Eq. 69). Where an estate in a parish was admittedly liable to a rentcharge of £40 a year in favour of the vicar, and there was evidence from which it might be inferred that an additional £60 per annum had been claimed as of right, and paid for over a century, it was held that the estate was liable to a rentcharge for the full £100 a year (*Robinson v. Smith* (1908), 24 T. L. R. 573).

(s) A benefaction which is to be so met may be the gift of an individual, or of a number of contributors, or of a diocesan or other society, and may take either of the forms indicated above, or may consist of ground rents or chief rents, but must not include grants from Queen Anne's Bounty or benefactions met by such grants, money borrowed on mortgage of a benefice or arising from a sale of any property of a benefice or church, or land intended as a site for a church, burial ground, church hall, or mission room, or money to be expended in building a church, church hall, or mission room, a temporary or reversionary interest, or transfer or surrender of or charge on any revenues of an ecclesiastical corporation, a gift already secured for the benefit of a benefice or church, or any consideration given for the transfer of the patronage of an existing benefice. As to grants from Queen Anne's Bounty to meet benefactions, see p. 782, *post*.

(t) Applications for grants to be made in the ensuing year must be made not later than December 1st, and must contain an offer of a specific benefaction in favour of a benefice or proposed district; but where such proposed district is being formed under Acts administered by the Commissioners no grant will be made unless the scheme or representation has been sealed by the Commissioners on or before January 1st, or the benefaction or grant will raise the endowment to £150 per annum without, in the case of a Peel district, including the parsonage house. As to other augmentations of benefices and grants in aid of pensions by the Ecclesiastical Commissioners, see p. 783, *post*.

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benefactions of not less than £500 value towards the maintenance of assistant curates at stipends of not less than £120 in parishes or cures containing a population of not less than 5,000. Such a grant and benefaction are held for the permanent spiritual benefit of the parish or cure, and if, owing to material alteration in the circumstances, the Commissioners think right to withdraw the grant, they continue to hold the benefaction on the same trust.

1502. Easter offerings are a well-known and widely recognised form of contributions to the emoluments of the clergy (*a*).

Easter
offerings.

By the rubric it is directed that yearly at Easter every parishioner shall reckon with the parson, vicar or curate, or his or their deputy or deputies, and pay to them or him all ecclesiastical duties accustomedly due then and at that time to be paid, and every person who by the laws or customs of the realm ought to make or pay any offering is bound, if he has not already paid in the preceding year, to pay at Easter (*b*).

Easter offerings are due of common right from every householder in the parish at the rate of twopence for every member of his family of sixteen years of age (*c*), unless a larger sum is due by custom (*d*), and where due they may be recovered summarily before two justices (*e*).

(*a*) *Cooper v. Blakiston*, [1907] 2 K. B. 688, 700, C. A. Even though they are not demanded as of right but are paid voluntarily, they are profits accruing to the incumbent by reason of his office, and as such are subject to income tax (*ibid.*; affirmed *Blakiston v. Cooper*, [1909] A. C. 104). Similarly, wherever a payment is received by an incumbent substantially in respect of his services as incumbent (*Poynting v. Faulkner* (1905), 93 L. T. 367, C. A.) without the fulfilment of any further condition on his part (*Herbert v. McQuade*, [1902] 2 K. B. 631, C. A.) it accrues to him by reason of his office, while if it is a gift of an exceptional kind having particular relation to him as an individual (*Turner v. Cuzon* (1888), 22 Q. B. D. 150; *Turton v. Cooper* (1905), 92 L. T. 863), such as a testimonial or a contribution for a specific purpose, as to provide for a holiday or a subscription peculiarly due to the personal qualities of the particular clergyman, it may be regarded not as a voluntary payment for services, but as a mere present (*Blakiston v. Cooper*, [1909] A. C. 104, 107), and therefore not subject to income tax. In computing the income of a benefice the Ecclesiastical Commissioners take into account income from all sources, including fees, pew rents, offertories and Easter offerings, while as to outgoings they follow the rule for estimating annual value in the Pluralities Act, 1850 (13 & 14 Vict. c. 98), s. 4, which provides that there shall be deducted from the gross amount of the income of a benefice all taxes, rates, tenths, dues, and permanent charges and outgoings, but not any stipend of a curate, nor such taxes or rates in respect of the house of residence or of the glebe as are usually paid by the occupier, nor moneys expended in the repair or improvement of the house of residence and buildings and premises belonging thereto. The Ecclesiastical Commissioners do not allow deductions in respect of income tax or property tax, or a pension to a retired incumbent, or instalments or interest in respect of a mortgage of the endowment.

(*b*) Stat. (1548) 2 & 3 Edw. 6, c. 13, s. 10.

(*c*) *Lawrence v. Jones* (1724), 1 Eag. & Y. 801; *Egerton v. Still* (1725), Bunb. 198; *Carthew v. Edwards* (1749), 2 Eag. & Y. 121.

(*d*) *R. v. Hall* (1866), L. R. 1 Q. B. 632.

(*e*) Stat. (1695) 7 & 8 Will. 3, c. 6. This statute and stat. 2 & 3 Edw. 6, c. 13, were repealed by the Statute Law Revision Act, 1887 (50 & 51 Vict. c. 59), except as to tithes, offerings and duties which have not been commuted or are otherwise still payable. Easter offerings are expressly excepted from the law as to commutation of tithes (Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 90), unless a special provision relating to them was inserted in the parochial agreement, and stat. (1648) 2 & 3 Edw. 6, c. 13, and stat. (1695) 7 & 8 Will. 3, c. 6, remain in

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Surplice fees.

(ix.) Fees, Dues, and Offerings.

1503. In addition to the tithes, which were matter of ecclesiastical jurisdiction, fees have from very early times been recognised by custom as due for the performance of the services of the Church (*f*). In particular, fees, now called surplice fees, are recognised as due on the performance of those offices of the Church which are for the benefit of individual members of the Church (*g*), namely, marriages, churchings, and burials. On marriage, the bridegroom is directed by the rubric, when laying the ring upon the book, to lay with it the accustomed duty to the priest and clerk, and on being churching, the woman who comes to give her thanks is directed by the rubric to offer accustomed offerings. It is a law of the Church that no sacrament should be denied on account of non-payment of money, and neither must matrimony be hindered, nor must burial be denied (*h*), on account of the non-payment of the fee, but a moderate fee may be shown to be due by custom on marriage (*i*) or on burial (*j*), and where so shown to be due is recoverable (*k*). A table of fees may, with the consent of the bishop, be fixed by the Ecclesiastical Commissioners for any parish with the consent of the vestry, or persons exercising the powers of vestry or for any extra-parochial place, or in or for any district chapelry, or parochial chapelry, in which any church or chapel is built or appropriated under the Church Building Acts, and fees where so fixed are recoverable in the same manner as any ancient legal fees (*l*). When a new parish for ecclesiastical purposes is constituted under the New Parishes Acts, the chancellor of the diocese may fix the fees to be due for marriages, churchings, and burials in the church of such new parish (*m*).

force in respect of such Easter offerings as are still payable. By the Tithe Act, 1839 (2 & 3 Vict. c. 62), s. 9 (now repealed), it was provided that the land-owners and tithe owners might at any time before confirmation include in the parochial agreement an agreement for the commutation of Easter offerings, mortuaries, or surplice fees. If the custom to pay a particular sum is *bonâ fide* disputed, the jurisdiction of the justices is ousted (*R. v. Kidd* (1867), 16 L. T. 203).

(*f*) In the time of King Alfred light scot, plough alms, and Rome scot were paid (Thorpe, *Ancient Laws and Institutes*, p. 73). In the time of Athelstan church scots and soul scots were payable at the places to which they rightly belonged, and plough alms yearly as a reward for serving the Church (*ibid.*, p. 83). An ordinance of Ethelred and his witan provided that plough alms should be paid fifteen days after Easter and light scot thrice in the year (*ibid.*, p. 131), and the Council of Ensham (1009) directed that soul scot should be paid at the grave, but that if the corpse was buried out of its proper district (*ibid.*, p. 136) nevertheless soul scot should be paid to the minister to which it belonged.

(*g*) No fee is payable in respect of baptism (see p. 688; *ante*).

(*h*) Lynd. 278; Burn, *Ecclesiastical Law*, Vol. I., p. 268; Vol. II., p. 480; and p. 712, *ante*.

(*i*) As to fees on marriage, see p. 707, *ante*.

(*j*) As to fees on burial, see also p. 712, *ante*.

(*k*) *Bryant v. Foot* (1868), L. R. 3 Q. B. 497, Ex. Ch.; *Gilbert v. Buzzard and Boyer* (1821), 2 Hag. Con. 333. Sir Simon Degge says that the accustomed fee to the parson for breaking the soil in the churchyard is for the most part 3s. 4d., and for breaking the floor in the chancel 6s. 8d. (Burn, *Ecclesiastical Law*, Vol. I., 268).

(*l*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 11; and see note (*p*), p. 712, *ante*.

(*m*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 15.

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1504. Every burial authority is required to submit to the Secretary of State a table of fees to be received in respect of services rendered by any minister of religion or sexton in their burial grounds (*n*).

Fees for
monuments.

1505. In addition to the customary fee for burial, a fee may be due by custom to the rector or vicar for allowing the erection of a monument in the church (*o*), and a charge may also be made by the parson, as owner of the freehold of the churchyard, for permitting the erection of a monument over a grave in the churchyard (*p*). It is in the power of the ordinary to permit or to refuse to permit the erection of such a monument, and a faculty will not be granted for the erection if the monument, or an inscription on it, tends to superstition or is contrary to the law and doctrine of the Church of England (*q*), and while the inscription is in the first instance subject to the control of the incumbent, any decision by him is subject to review by the ordinary (*r*). The payment demanded must not include any sum in respect of the ground occupied by the grave of a parishioner or person dying in the parish, nor of the performance of the office, but may take account of the particular place in the churchyard in which the burial is permitted or the longer occupation of the ground by reason of the nature of the monument or of the mode of burial (*s*).

On burial
of non-
parishioner.

1506. In the case of a person who is not a parishioner and neither lived nor died in the parish, a fee beyond the usual fee may be demanded for permission to be buried in the churchyard (*t*). In each of these cases the rector exacts the fee by virtue of the same right, namely, his right to the occupation of the soil of the churchyard, and he is, therefore, rateable in respect of such occupation (*u*).

On cremation

1507. A faculty may be granted and a proper fee be demanded for the permanent placing of an urn containing the cremated ashes of a dead body in a niche formed for the purpose in the wall of a church, even though the church has been closed for burials (*a*). Fees may be fixed by the Secretary of State for the Home Department in respect of a burial service before, at, or after cremation, and if no

(*n*) See title BURIAL AND CREMATION, Vol. III., p. 479. As to the law relating to such fees, and to the provisions as to fees in the Burial Acts, see *ibid.*, pp. 428—432, 473—483.

(*o*) *Rich v. Bushnell* (1827), 4 Hag. Ecc. 164.

(*p*) *Winstanley v. North Manchester Overseers*, [1910] A. C. 7. See p. 730, *ante*; and title BURIAL AND CREMATION, Vol. III., p. 430.

(*q*) *Egerton v. All of Odd Rode*, [1894] P. 15; and see p. 672, *ante*.

(*r*) *Pearson v. Stead*, [1903] P. 66. Where the proceedings are civil in form, the burden lies on the person asking for a faculty confirmatory of the retention of an inscription to satisfy the court that it is unobjectionable (*ibid.*, at p. 73).

(*s*) *Andrews v. Cawthorne* (1745), Willes, 536; affirmed on error (1748), *Gilbert v. Buzzard and Boyer* (1821), 2 Hag. Con. 333; as to the quantum of such a fee, see *ibid.*, pp. 363 *et seq.*

(*t*) *Nevill v. Bridger* (1874), L. R. 9 Exch. 214. No fee is due for burial of common right, but where a licence is required the parson may stand upon his own price (*Exeter (Dean and Chapter) Case* (1707), 1 Salk. 334).

(*u*) *Winstanley v. North Manchester Overseers*, *supra*.

(*a*) *Re Kerr*, [1894] P. 284.

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Right to fees
of new
districts.

fee is fixed the fee, if any, fixed in respect of a burial service applies (b).

1508. Provisions have been made in the various Acts under which new parishes or ecclesiastical districts are formed for preserving the rights to fees of existing incumbents of the mother church (c). Under the Church Building Acts the fees continue payable to the incumbent of the mother church until avoidance of the mother church, unless he receives compensation for or relinquishes them (d), except in the case of an endowed chapelry made into a separate parish in which the offices of the Church may be performed and the fees received by the incumbent of the new parish after separation (e); and in the case of a district chapelry formed under the Church Building Act, 1819, in which the Ecclesiastical Commissioners may, with the bishop's consent, determine how the fees shall be appropriated, until avoidance or relinquishment (f). When a benefice is separated by scheme under the Pluralities Act the fees, after avoidance or with the consent of the incumbent of the benefice affected before avoidance, may be given to the new benefice under the scheme (g). Under the New Parishes Acts, when a new parish is formed, the incumbent is entitled to perform all the offices and to take all the fees (h), but where the fees have been reserved or of right belong to the incumbent of the original parish, until the first avoidance or payment of compensation awarded by the bishop to or relinquishment of fees by such incumbent, the incumbent of the district is bound to receive and account for the fees (i) to the incumbent or incumbents out of whose parishes the district has been formed (k). In a Peel district, until a church is consecrated for the district, no burials or marriages can be performed nor fees taken for them (l), and the

(b) See title BURIAL AND CREMATION, Vol. III., p. 569.

(c) See pp. 445—450, *ante*. Until such rights have been legally transferred, any minister receiving fees at any chapel is accountable for them to the parson of the mother church (*Moysey v. Hillcoat* (1828), 2 Hag. Ecc. 30, 48; *Liddell v. Rainsford* (1868), 37 L. J. (ECC.) 83; *King v. Alston* (1848), 12 Q. B. 971; and see Inclosure Act, 1846 (8 & 9 Vict. c. 70), s. 10.

(d) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 32; Church Building Act, 1822 (3 Geo. 4, c. 72), s. 12; Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 14; Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 18; Church Building (Banns and Marriages) Act, 1844 (7 & 8 Vict. c. 56), ss. 1, 2; Church Building Act 1851 (14 & 15 Vict. c. 97), s. 18; Church Building Act, 1845 (8 & 9 Vict. c. 70), ss. 10, 15.

(e) Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 23; Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 7.

(f) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 16. As to a consolidated chapelry under this Act, see *ibid.*, s. 6, and Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 10.

(g) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 26; Church Building Act, 1839 (2 & 3 Vict. c. 49), ss. 6, 8.

(h) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 15; *Fuller v. Alford* (1883), 10 Q. B. D. 418.

(i) *Ibid.*, s. 12.

(k) *Jones v. Gough* (1865), 3 Moo. P. O. O. (N. S.) 1; and see p. 450, *ante*.

(l) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 11. The incumbent of a chapel of a district chapelry must pay over the alms collected at an unconsecrated chapel within his district, notwithstanding that he has the exclusive cure of souls therein (*Liddell v. Rainsford* (1868), 38 L. J. (ECC.) 15).

incumbent can only take such fee as is specified in his licence for churchings (*m*).

1509. A fee is due to the incumbent for making a search in or an extract from the parochial registers of baptisms, marriages, and burials (*n*).

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Property
Eccle-
siastical in
its Nature.

Fees for
search.
Customary
fees.

1510. In addition to Easter offerings, which have been already considered, other dues and offerings may be payable by custom. Any person who by law or custom is liable to pay any offerings must pay the same on the four offering days to the parson of the parish where he happens to dwell, or in default must pay them at Easter (*o*). Mortuaries or corse presents can only be demanded in places where they were payable by custom in 1529, and then only in respect of persons who have had their most usual habitation in the parish (*p*).

(*x*.) *First Fruits and Tenths. Queen Anne's Bounty.*

1511. First fruits, *primitiæ*, or *annates*, were the first year's whole profits of the spiritual preferment according to a valuation determined in 1292. Tenths, or *decimæ*, were the tenth part of the annual profit of each living by the same valuation (*q*).

First fruits
and tenths.

The payment of any sum for annates to the Pope having been made illegal (*r*), the Crown was given the right to have from every person nominated, elected, presented, collated or otherwise appointed to any archbishopric, bishopric, college, archdeaconry, deanery, parsonage, vicarage, chauntry, free chapel, or other dignity, benefice, or spiritual promotion the first fruits, revenues, and profits for one year (*s*), and also one yearly rent or pension amounting to the tenth part of all the revenues, rents, farms, tithes, offerings, emoluments, and other profits, spiritual and temporal, belonging to any archbishopric, bishopric, archdeaconry, deanery, college, prebend, cathedral church, conventual church, parsonage, vicarage, chauntry, free chapel, or other benefice or spiritual promotion (*t*), and a new valuation was made (*a*), provided

(*m*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 13.

(*n*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 16; Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 49. By s. 35 of the latter Act the fee for a search over a period of one year is 1*s.* and 6*d.* additional for every additional year, and the fee for a certificate is 2*s.* 6*d.*

(*o*) Stat. (1548) 2 & 3 Edw. 6, c. 13, s. 10. The four offering days are Christmas, Easter, Whitsuntide, and the feast of the dedication of the church; as to the qualified repeal of this statute, see note (*c*), p. 775, *ante*.

(*p*) Stat. (1528) 21 Hen. 8, c. 6, s. 2. If the person dying leaves movable estate clear of debts worth less than 10 marks nothing is due, if 10 marks or over but less than 30 marks 3*s.* 4*d.* is paid; from 30 to 40 marks 6*s.* 8*d.*; and if 40 marks or over, 10*s.* is paid. See further title BURIAL AND CREMATION, Vol. III., pp. 431, 432.

(*q*) First fruits and tenths were first introduced into this country by Pandulph, the Pope's Legate during the reigns of King John and Henry III. (1 Bl. Com. p. 284; *Rochester (Bishop) v. Le Fanu*, [1906] 2 Ch. 513).

(*r*) Stat. (1533—4) 25 Hen. 8, c. 20, s. 2.

(*s*) Stat. (1534) 26 Hen. 8, c. 3, s. 1.

(*t*) *Ibid.*, s. 8.

(*a*) *Ibid.*, s. 9. The names of the benefices liable will be found with few exceptions in Bacon's Liber Regis.

SECT. 2.
Property
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its Nature.

that for the first year the year's tenth is to be deducted from the first fruits (*b*). Exemptions have been granted to the Universities and to Eton and Winchester (*c*), and benefices with cure of souls not exceeding £50 per annum are discharged from the payment (*d*). The persons accountable become debtors to the Crown, and the debt is enforceable by writ of extent (*e*), but an incumbent can, if he so desires, enter into a bond with a surety to pay the sum due by four equal half-yearly instalments, commencing from the date of vacancy of the preferment, provided such bond is given immediately after presentation and before meddling with the profits of the preferment (*f*).

Queen Anne's
Bounty.

1512. By letters patent passed pursuant to statute (*g*), and dated 3rd November, 1704, a corporation was established by the name of "The Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy," and to this corporation Queen Anne granted all her revenue of first fruits and tenths (*h*), which are collected by the treasurer of the Governors (*i*), who exercises all the powers of the collector and receiver formerly appointed by the Crown (*k*), including the power to compel payment of any amount due as a Crown debt (*l*).

(*b*) Stat. (1535—6) 27 Hen. 8, c. 8. The marginal note in Ruffhead's Statutes to s. 1, which runs, "No spiritual persons shall pay any tenths the same year they pay their first fruits," is misleading, since s. 3 expressly provides that they shall pay their tenths, and s. 1 provides that they may deduct the amount out of the first fruits.

(*c*) Stat. (1558—9) 1 Eliz. c. 4, s. 7.

(*d*) Queen Anne's Bounty Act, 1706 (6 Ann. c. 24).

(*e*) Stat. (1541—2) 33 Hen. 8, c. 39, s. 37. This statute expressly mentions first fruits and tenths. As to the writ of extent, see title CROWN PRACTICE, Vol. X., pp. 14 *et seq.*

(*f*) Stat. (1534) 26 Hen. 8, c. 3; stat. (1558—9) 1 Eliz. c. 4. The bond is issued by the Bounty Office without any charge for costs, the only charge being for stamp duty.

(*g*) Stat. (1703) 2 & 3 Ann. c. 20. By letters patent which were passed under the Great Seal on November 3rd, 1704 (see s. 3 of Queen Anne's Bounty Act, 1714 (1 Geo. 1, stat. 2, c. 10), the Governors include the archbishops, bishops, including bishops of newly founded sees (Queen Anne's Bounty Act, 1838 (1 & 2 Vict. c. 20), s. 16), deans, Speaker of the House of Commons, Master of the Rolls, Privy Councillors, lieutenants and *custodes rotulorum* of counties, judges, Attorney and Solicitor General, Advocate-General, chancellors and vice-chancellors of Oxford and Cambridge, mayor and aldermen of London, and by a supplemental charter, King's Counsel and the clerks of the Privy Council. The Governors are bound to hold one general meeting annually between February 1st and July 1st (Queen Anne's Bounty Act, 1838 (1 & 2 Vict. c. 20), s. 17). They may recommend rules to be made by the Crown under the sign manual for the collection of first fruits and tenths (*ibid.*, s. 19). Five of the members, of whom three at least must be archbishops or bishops, constitute a quorum, and suffice at any court for the conduct of business by a majority (Parsonages Act, 1865 (28 & 29 Vict. c. 69), s. 5).

(*h*) *Rochester (Bishop) v. Le Fanu*, [1906] 2 Ch. 513.

(*i*) Queen Anne's Bounty Act, 1716 (3 Geo. 1, c. 10).

(*k*) Queen Anne's Bounty Act, 1838 (1 & 2 Vict. c. 20), s. 4. The Governors have been advised by Treasury counsel that they have no power to forego these payments, or to alter or vary the amounts in any way.

(*l*) The first fruits and tenths, being Crown debts, are not affected by the Apportionment Act, and are not apportionable against the Crown.

SECT. 2.
Property
Eccle-
siastical in
its Nature.

By an Order in Council (*m*) first fruits have been commuted for an annual payment of £1 for every £100 of the annual value, and tenths for an annual sum of 17s. 6d. for every £100 of the annual income, and these annual sums represent a proportionate part of each year's income payable to the Crown, and as between the incoming and the outgoing holder must be regarded as accruing *de die in diem* (*n*).

In addition to first fruits and tenths, the Governors of the Bounty also receive such portion of the profits of a benefice sequestered for non-residence as the bishop orders to be paid to them for the purposes of the Bounty (*o*).

The Governors also, in numerous classes of cases, receive sums which are appropriated for the purpose of augmenting particular benefices (*p*).

1513. The primary object of the Bounty is the augmentation of the maintenance of parsons, vicars, curates, and ministers officiating in any church or chapel in England or Wales where the liturgy and rites of the Church of England are used and observed (*q*). By the letters patent the Governors are authorised to propose rules for the receiving, managing, and distributing the Bounty and any other gifts which might be given or bequeathed for the same purpose (*r*), and such rules become effectual when approved by the Crown under the sign manual (*s*). The rules in force are:—

Objects of
the Bounty.

No benefice is eligible for a grant the net income of which exceeds £200 per annum.

Rules as to
grants.

No grant can be made unless a church shall have been provided and consecrated; and the Governors require that a district shall have been assigned.

Each grant consists of a capital sum, the amount of which is determined by the number of applications under consideration and the amount of the Governors' available surplus revenue. No grant

(*Bishop*) v. *Le Fanu*, [1906] 2 Ch. 513). The archbishops and bishops make half-yearly returns to the judges of the King's Bench Division of all institutions, and thereupon an application is made by the treasurer to the incumbents liable to first fruits. The yearly tenths become due on December 25th, and in accordance with the provisions of Queen Anne's Bounty Act, 1716 (3 Geo. 1, c. 10), must be paid at the beginning of each year without other notice than that in the London Gazette.

(*m*) Made November 27th, 1852, pursuant to Queen Anne's Bounty Act, 1838 (1 & 2 Vict. c. 20), s. 19.

(*n*) *Rochester (Bishop) v. Le Fanu*, *supra*.

(*o*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 54.

(*p*) For the proceeds of sales of parsonage houses and glebe, see p. 754, *ante*; and for proceeds of redemption of tithes, p. 750, *ante*. Compensation money may be paid to the Governors under the Copyhold Act, 1894 (57 & 58 Vict. c. 46), for the use of any spiritual person in respect of any benefice or cure, which must be appropriated by the Governors for the augmentation of the benefice or cure (*ibid.*, s. 7).

(*q*) Stat. (1703) 2 & 3 Ann. c. 20, s. 1.

(*r*) A benefaction may be offered and a grant sought for the following objects: (1) the augmentation of the endowment of a benefice; (2) providing, altering, or improving a parsonage; (3) the purchase of land or other real estate. As to grants for fixtures, see p. 782, *post*.

(*s*) Queen Anne's Bounty Act, 1714 (1 Geo. 1, stat. 2, c. 10), s. 3.

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can exceed the benefaction offered or be more than £600 in any one year (i).

In endowment cases no benefaction may consist of a less sum than £100, or land, tithe rentcharge etc. of the capital value of £100. In parsonage cases the minimum benefaction is £10.

The Governors do not make grants to meet grants by the Ecclesiastical Commissioners, nor to meet benefactions which have been accepted by the Ecclesiastical Commissioners.

Money previously expended in or towards the building of a parsonage, standing on glebe, cannot be treated by the Governors as part of a benefaction.

Transfer of
benefaction
to Governors.

1514. On the Governors agreeing to make a grant the benefaction must be transferred to them on behalf of the benefice (a), and in cases where no grant is made any gift of personal or real estate in augmentation of a benefice may be transferred to them, and they may accept such gifts for the use or benefit of any church or chapel built, or to be built, under the Church Building Acts, or under any other authority, or for the use or benefit of the incumbent of, or the spiritual person serving, such church or chapel (b).

Grants for
fixtures.

1515. The Governors also have power, where the net annual value of a benefice does not exceed £200, to make a grant for the purpose of acquiring for the benefice such movable fixtures in the parsonage house and premises as should in their opinion belong to it when such fixtures are the personal property of an incumbent or his representatives (c), and on such fixtures being so acquired they become part of the property of the benefice, and are liable to be surveyed for dilapidations.

Other powers
of the
Governors.

1516. The Governors also have power to lend money for the improvement of residence houses (d), and to lend, receive, and expend money in respect of dilapidation of ecclesiastical property (e), and powers in relation to the approval of insurance of such property against fire and the receipt of the proceeds of such insurance (f). The Governors have also power to authorise an incumbent of an ecclesiastical benefice to exercise any of the powers which are conferred on him by the Agricultural Holdings Act as landlord in respect of any lands belonging to the

(i) The offer of a benefaction is absolutely necessary to secure a grant. Where the benefaction is derived from one of the special charities which augment benefices in conjunction with the Bounty, such benefaction must be supplemented by at least an equal sum from local or private sources.

(a) The whole transaction, both on such transfers and on a sale of glebe land, can be carried out through the Bounty office, so that the whole of the benefaction, without deduction on account of costs, may go for the benefit of the fund.

(b) Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 12.

(c) A detailed list and valuation by the diocesan surveyor must be obtained at the cost of the incumbent applying for a grant and submitted to the Governors; one-half of the surveyor's charges may be included in the grant. No grant is made if the value of the fixtures is less than £10. If a grant is made, three lists of the fixtures purchased are made, one to be kept by the Bounty, one to be kept in the diocesan registry, and one to be kept in the parish chest.

(d) See p. 756, *ante*.

(e) See p. 759, *ante*.

(f) See p. 772, *ante*.

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benefice (*g*), and to pay on his behalf out of money in their hands, if they think fit, to the tenant any compensation due to him under that Act (*h*), and to obtain from the county court a charge on the holding in respect thereof in favour of themselves, which is effectual notwithstanding any change of incumbent (*i*).

(xi.) *Common Fund of Ecclesiastical Commissioners.*

1517. All the moneys and revenues paid to, and all rents, profits of lands, tithes, and other hereditaments vested in the Ecclesiastical Commissioners, and all accumulations of interest arising therefrom, are, in so far as they are not allocated to specific purposes by statute, carried to a common fund (*j*), in order that additional provision may be made by the Commissioners for the cure of souls in parishes where such assistance is most required in such manner as may be deemed most conducive to the efficiency of the Established Church (*k*), due regard being had to the wants and circumstances of the places in which such tithes arose or in which lands or hereditaments are situate which are or have been vested in the Commissioners or from which they have derived any income (*l*).

Common
fund.

Such provision may be made not only by payments or investments out of the fund, but by an actual assignment of lands, tithes, or hereditaments (*m*), and preference may be given without prejudice

(*g*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 40 (2). The incumbent may also exercise such powers, with the previous approval in writing of the patron of the benefice, and he may enter for the purpose of viewing the state of the holding without any previous authorisation (*ibid.*, s. 40 (1)).

(*h*) *Ibid.*, s. 40 (3).

(*i*) *Ibid.*, ss. 15, 16.

(*j*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 67.

(*k*) The provision of grants out of the common fund to meet benefactions has been dealt with (see p. 774, *ante*). The Commissioners have framed a scheme for making grants in aid of pensions for retired incumbents with the view of facilitating retirements in proper cases, not merely by increasing the provision for retiring incumbents (see p. 629, *ante*), but also by lightening the burdens imposed upon benefices by the charges for pensions. The grants, which must be met by an equivalent additional provision apart from any pension out of the benefice, are confined to cases of retirement under the Incumbents Resignation Acts, 1871 and 1887 (34 & 35 Vict. c. 44; 50 & 51 Vict. c. 23) (see p. 630, *ante*), and to cases in which the value of the benefice when diminished by the pension charged under these Acts is not greater than £300. The grant does not exceed £50, in each case, and where the value of the benefice as diminished by the pension charged on it is not less than £250, the whole grant is paid to the retired incumbent; where such value is less than £250 the grant is apportioned, such part not exceeding two-fifths as will rest on the value as diminished to £250 or to the value as undiminished by the charge if less than £250, being applied to increase the income of the benefice. Where the value as diminished by the charge is less than £150, an additional grant may be made sufficient to restore the income to £150, or to the value as undiminished by the charge if less than £150. The required additional provision to meet the grant may be made by a grant of an annuity from the Clergy Pensions Institution or other society approved by the Commissioners, whether purchased by the retired incumbent or not, or by an assured annual contribution from a diocesan fund.

The Commissioners have also framed a scheme for the augmentation of benefices in public patronage where the population exceeds 6,000 and the income is less than £300, or where the population is not less than 500 and the income is less than £200.

(*l*) Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), s. 12. The fund is not applicable for the benefit of the diocese of Sodor and Man.

(*m*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 67.

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to the considerations above mentioned to places in respect of which contributions from other sources are made (*n*), and such grants to meet benefactions may in mining districts be for the purpose of making temporary provision for the cure of souls (*o*).

The moneys and revenues received by the Ecclesiastical Commissioners do not include any moneys provided by Parliament, and are derived solely from properties vested in or transferred to them for the benefit of the Church of England (*p*).

SECT. 3.—Property Ecclesiastical by reason of its Ownership.

Property
owned by
ecclesiastical
person.

1518. Property which is owned by any person in the capacity of a representative of the Church of England is ecclesiastical property (*q*). The capacity in which a person owns property may be limited by reference to the spiritual functions to be performed on behalf of a church not only by limiting the functions of such person, but also by limiting the relation between the person owning anything and the thing owned, and where such relation arises out of and can be defined by reference to spiritual functions to be performed on behalf of the Church of England, the property is owned by the person in the capacity of a representative of the Church of England, and is ecclesiastical property.

Thus, ecclesiastical property includes every legal right and every description of property which is vested in any person for the purpose of furthering the spiritual work of the Church, such as the right to levy a church rate, the right to demand pew rents, and buildings or other property conveyed upon trust to be used for furthering the spiritual work of a parish or of the Church at large.

SUB-SECT. 1.—Church Rates.

Church rates.

1519. As the churchwardens have various duties imposed on them which involve the expenditure of money on behalf of the

(*n*) Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), s. 14; and see p. 774, *ante*.

(*o*) *Ibid.*, s. 15.

(*p*) During the first half of the nineteenth century grants for ecclesiastical purposes were made by Parliament not only in connection with the Church of England, but also towards the support of dissenting ministers both in England and Ireland. From the year 1804 (see stat. 44 Geo. 3, c. 110, s. 19) to the year 1843 (see stat. 6 & 7 Vict. c. 99, s. 21) the Appropriation Act included provision for allowances to Protestant dissenting ministers. In the year 1818, as a thank-offering for the successful close of the Napoleonic war, a sum of one million pounds was provided by Parliament for the purpose of erecting and maintaining for the celebration of divine service according to the rites of the United Church of England and Ireland additional churches and chapels containing a certain number of free seats in great and populous parishes, and extra-parochial places where the church accommodation was inadequate for the inhabitants, and a body of Church Building Commissioners was constituted to administer the fund and any private benefactions contributed for the same purpose (Church Building Act, 1818 (58 Geo. 3, c. 45)), and, this grant having proved inadequate for the purpose, an additional sum of half a million was voted in the year 1824 (Church Building Act, 1824 (5 Geo. 4, c. 103)). The powers and duties of Church Building Commissioners are now exercised by the Ecclesiastical Commissioners; see p. 801, *post*.

(*q*) *St. George's, Hanover Square (Rector and Churchwardens) v. Westminster Corporation* (1910), 26 T. L. R. 327, H. L.; reversing [1909] 1 Ch. 592, C. A. See also p. 713, *ante*.

SECT. 3.
Property
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siastical
by reason
of its
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parish, it is the duty of the parishioners who are members of the Church of England to provide them with the funds so required, and it is the duty of the churchwardens to take all reasonable steps to obtain such funds. The regular mode by which the parishioners and churchwardens may perform their duties in so far as the required funds are not otherwise provided is by making and levying a church rate (*r*). Such a rate cannot be recovered by legal process (*s*) except in case (1) where a rate called a church rate is in fact applicable to secular purposes (*t*); (2) where a sum of money was on the 31st July, 1868, due on the security of church rates or of rates in the nature of church rates, or any money in the name of church rates was ordered to be raised under the provisions of any statute (*a*); or (3) where, under the authority of any private or local Act of Parliament, church rates may be levied in consideration of the extinguishment or appropriation to other purposes of any property previously appropriated to ecclesiastical purposes, or upon any contract made or for good consideration given (*b*); but the making of a rate affords to the churchwardens the means of informing each parishioner of the amount of money required, and of what is the share of that amount which, according to the law of the Church of England, he may reasonably be expected to pay.

Making of
rate.

When such a rate becomes necessary the churchwardens lay before the parish in vestry assembled an estimate of the amount which they require for the due performance of their duties, and the vestry thereupon make a rate which is assessed on the parishioners who are members of the Church of England in proportion to their rateable value. Although such a rate cannot be enforced except in the cases above mentioned, yet in all other respects the rate is valid, and the inhabitants of any district legally constituted out of a parish and having within it a consecrated church used for divine worship may make and assess themselves to a rate in relation to their church instead of joining in and being assessed to a rate in relation to the parish church (*c*). Any person refusing to pay a church rate is precluded from exercising any right in respect of the expenditure of such rate, and when an occupier refuses to pay, the owner may pay and become entitled to stand in the occupier's place (*d*). All bodies

(*r*) As a church rate applicable to ecclesiastical purposes can no longer be recovered by legal process, the necessity for considering the numerous points which have been raised in cases as to the legal validity or recovery of such rates no longer exists. For the law as to meetings of a vestry for ecclesiastical purposes, such as the making of a church rate, see pp. 453 *et seq.*, *ante*.

(*s*) Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), s. 1.

(*t*) *Ibid.*, s. 2. If it is made in part for ecclesiastical and in part for secular purposes it may be good as to the secular part and bad as to the rest (*Watson v. All Saints, Poplar, Vestry* (1882), 46 L. T. 201).

(*a*) Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), s. 3.

(*b*) *Ibid.*, s. 5. "Ecclesiastical purposes" is defined to mean the building, rebuilding, enlargement, and repair of any church or chapel and any purpose to which by common or ecclesiastical law a church rate is applicable or any of such purposes, and "church rate" means any rate for ecclesiastical purposes as so defined (*ibid.*, s. 10). The contract made or the consideration given must be found in or gathered from the Act which authorises the levy (*R. v. St. Marylebone Vestry*, [1895] 1 Q. B. 771, C. A.).

(*c*) *Ibid.*, s. 6.

(*d*) *Ibid.*, s. 8.

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Ownership.

corporate, trustees, guardians, and committees who, or whose *cestuis que trustent*, are occupiers of property may pay any church rate made in respect of such property (*e*). In parishes where, by reason of a local Act, a church rate may still be recovered, it stands upon the same footing as an ordinary rate (*f*).

SUB-SECT. 2.—*Pew Rents*.

Pew rents.

1520. There is no right by the common law to let or sell any seat or pew in a church (*g*), but express power has in many cases been given by statute to the Ecclesiastical Commissioners or other bodies or persons to fix a scale of payment to be received for sittings or pews in certain churches and chapels in order to provide funds for repaying the expense of building or for maintaining the ministrations of the Church in connection therewith. The Ecclesiastical Commissioners may fix a scale of pew rents to be charged in any church or chapel in aid of the building of which they have made a grant either in a district parish (*h*) or in a consolidated (*i*) or district chapelry, or with the consent of the bishop if sufficient funds cannot be provided from other sources in parochial districts or new parishes formed after July, 1856 (*k*).

Disposal of
sittings.

Before consecration of any church or chapel built under the Church Building Acts (*l*), ten sittings for which no charge is to be made are assigned to the minister, and one-fifth of the sittings are to be marked with the words "free seats" (*m*), and thereafter the remainder of the sittings may be disposed of privately (*n*) to parishioners with a preference to subscribers (*o*) to the building, who may be discharged from the payment of rent for life (*p*), and where no parishioner desires to take sittings, then to parishioners of adjoining parishes (*q*).

Readjustment
on union of
benefices.

1521. Upon any union of benefices the bishop is required by faculty to alter and readjust the seats and the appropriation thereof in the church of the united benefice, so that not less than one-half

(*e*) Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), s. 7.

(*f*) *Rose v. Watson*, [1894] 2 Q. B. 90. It can be recovered although the rector for whom it makes provision no longer performs duties within the parish (*Hay's Wharf, Ltd. v. St. Olave's, Southwark, Rectory Rate (Trustees)* (1909), 25 T. L. R. 648).

(*g*) See p. 471, *ante*.

(*h*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 63.

(*i*) Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 6, 15; Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 11.

(*k*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 6.

(*l*) The same rules apply to a church built by subscription under the Church Building Act, 1824 (5 Geo. 4, c. 103), s. 10.

(*m*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 75; see also Church Building Act, 1824 (5 Geo. 4, c. 103), s. 10.

(*n*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 32.

(*o*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 76.

(*p*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 33; Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 21.

(*q*) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 24. A pew so let must be advertised as vacant at the end of each year in case a parishioner desires to take it (*ibid.*).

of the sittings are left unappropriated, and all the seats are to be made as near as possible of the same size and appearance (*r*).

SECT. 3.
Property
Eccle-
siastical
by reason
of its
Ownership.

Payment
of rents.
Alteration
of rents.

1522. Pew rents are payable in advance (*s*), and in case of non-payment of such rents of any pew or seat the wardens of the church or chapel may enter upon and sell the same, or may bring an action for the rents (*t*). Pew rents in any church or chapel provided under the Church Building Acts may be altered by the church or chapel wardens, with the consents of the bishop, patron, and incumbent, and, where the pew rents have been assigned to the parish, with the consent of the vestry (*u*). Under the New Parishes Act, 1856, the Commissioners, with the consent of the bishop, may make an alteration in any instrument fixing pew rents under that Act to take effect on avoidance, or with the consent of the incumbent (*b*).

1523. The Ecclesiastical Commissioners, with the consent of the bishop, may apply part or the whole of any surplus pew rents, not invested for a fund for building or providing a residence, to augment the stipend of the minister (*c*), and may declare that any pew rents fixed by them shall cease in the whole or part of a church or chapel where such pew rents have not been assigned or appropriated under any local Act, if a permanent endowment has been provided in lieu of such pew rents which is satisfactory to them and the bishop, and thereafter the seats are at the disposal of the wardens, as in a parish church (*d*), or they may with the like consent, where a permanent endowment is provided and the pew rents are not appropriated by law for any specific purpose, either make a reduction in the scale of charge or declare certain sittings to be free (*e*).

Application
of surplus.

1524. Where a new church is made the parish church and the old church becomes a district church or chapel of ease, the Ecclesiastical Commissioners may, with the consent of the bishop, make such provision as they think fit out of the pew rents of either church for the maintenance of the minister and clerk of the respective churches (*f*), and revoke or alter such provision from time to time (*g*).

Allocation
between old
and new
church.

Union of Benefices Acts Amendment Act, 1871 (34 & 35 Vict. c. 90), s. 7.

(*s*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 32.

(*t*) Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 16. Under the Church Building Acts such action may be brought in the name of "the churchwardens of the church or chapel of X." without giving the names of the churchwardens (Church Building Act, 1818 (58 Geo. 3, c. 45), s. 73).

(*u*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 78; Church Building Act, 1819 (59 Geo. 3, c. 134), s. 31. In a church built by subscribers under the Church Building Act, 1824 (5 Geo. 4, c. 103), s. 15, a surplus of pew rents is applied to a rateable reduction or to making seats free as the bishop directs.

(*b*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 8.

(*c*) Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 5.

(*d*) Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 1.

(*e*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 7.

(*f*) Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 18; Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 1.

(*g*) New Parishes Acts and Church Building Acts Amendment Act, 1884 (47 & 48 Vict. c. 65), s. 4.

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Eccle-
siastical
by reason
of its
Ownership.
—
Payment of
stipend.

1525. The Ecclesiastical Commissioners, with the consent of the bishop (*h*), may assign a stipend to the minister or clerk to be paid out of the pew rents, but the parish is not liable to pay more than the amount of rent actually received in the preceding year (*i*). A duty is imposed on the churchwardens to pay over the pew rents applicable to the stipend accrued due to the minister as soon as they are received (*k*). Surplus pew rents above such stipend are to be accumulated to form a fund to be used for the purchase of a house of residence, and after the completion of such purpose for the augmentation of the stipend or the reduction of the pew rents or the increase of the accommodation as directed by the bishop, or if the Commissioners think fit, are to be chargeable with money raised for the purpose of building or repairing a church or chapel, or purchasing a site therefor (*l*).

SUB-SECT. 3.—*Chapels, Mission Rooms, Sunday Schools, and other Buildings.*

Chapel.

1526. The word "chapel" is commonly applied to any building habitually used for the purpose of divine worship, whether in connection with the Church of England or not (*m*), but in strict legal parlance a chapel is a building consecrated (*n*) for the purposes of divine worship in accordance with the tenets of the Church of England (*o*) other than the church of a parish or the cathedral church of a diocese (*p*).

(*h*) In case of difference between the Commissioners and the bishop the amount is to be settled by the Archbishop (Church Building Act, 1818 (58 Geo. 3, c. 45), s. 64).

(*i*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 64; Church Building Act, 1819 (59 Geo. 3, c. 134), s. 26.

(*k*) *Lloyd v. Burrrup* (1868), L. R. 4 Exch. 63. This duty does not extend to the payment over of pew rents received in advance until the stipend in respect of which they ought to be paid over has accrued due (*ibid.*).

(*l*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 27.

(*m*) Thus, the Short Titles Act, 1896 (59 & 60 Vict. c. 14), entitles the Act for the regulation of suits relating to meeting-houses and other property held for religious purposes by persons dissenting from the Church of England and Ireland (7 & 8 Vict. c. 45) the Nonconformists Chapels Act, 1844. In *Hornsey Local Board v. Brewis* (1890), 60 L. J. (M. C.) 48, the court apparently assumed that the Nonconformist meeting-house to which the case referred was capable of being a "chapel."

(*n*) The word "chapel" is derived from *capella*, a little cloak. The *capella* or cloak of St. Martin, preserved by the Frankish kings as a sacred relic, was borne before them in battle and used to give sanctity to oaths, and hence the name was applied to any sanctuary or holy place used for worship not being a church. In earlier times it was always consecrated (New English Dictionary, *sub nom.* "Chapel"). Private chapels were anciently all consecrated by the bishop of the diocese and ought to be so still (Burn, Ecclesiastical Law, Vol. I., p. 296).

(*o*) The legal meaning of the term "chapel" is a chapel of the Church of England (*Caiger v. St. Mary, Islington, Vestry* (1881), 50 L. J. (M. C.) 59). The New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), s. 14, defines the meaning of "church" and "chapel" in that Act as applying only to churches and chapels of the Established Church of England, and therefore, seeing that it applies to a "chapel consecrated or unconsecrated" (*ibid.*, s. 2), seems to imply that a building may be legally a chapel of the Church of England although it is not consecrated.

(*p*) A chapel may be annexed to or form part of the structure of a parish church or cathedral church, and where this is the case the question whether it does or does not form part of such church is one of fact to be decided by

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Property
Eccle-
siastical
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of its
Ownership.

A chapel may have a district attached to it called a chapelry (*q*), or it may be built for the convenience in prayer and preaching only of parishioners who live far from the parish church, in which case it is called a chapel of ease (*r*). A chapel which has an ancient division of a parish attached to it by immemorial custom, with the parochial rights of christening and burying, is a parochial chapel (*s*).

1527. A chapel of ease can only be erected with the consent of the ordinary, patron, and incumbent (*t*), and the person serving such chapel is, unless some exceptional provision applies, subordinate to the incumbent of the mother church (*a*), to which church all the rights of performing the sacraments appertain, but, as already stated, such a chapel may by virtue of statutory provisions be separately endowed and have an ecclesiastical district assigned to it, and become either the church of a distinct and separate parish or the chapel of such district (*b*).

Chapel of
ease.

A chapel may be founded by the King, or by a subject specially authorised by him, without being subject to the jurisdiction of the ordinary. A chapel so founded is called a free chapel (*c*).

Free chapel.

1528. Private chapels are such as persons have at their own charge built in or near their own houses for them and their families to perform religious duties in (*d*). They are repaired and maintained at the expense of the person to whom they belong, who may appoint whom he pleases to minister there, provided that divine service may not be performed there without the consent of the bishop (*e*), and that the owner and his family must once in every year receive the communion at the parish church (*f*).

Private
chapel.

The attendance at divine worship in a private chapel need not be confined to the members of the family of the owner (*g*),

Proprietary
chapel.

reference to the history of the foundation (*Norfolk (Duke) v. Arbuthnot* (1880), 5 C. P. D. 390, C. A.). Where it does form part of such church and is intended to be separately used for the performance of divine worship and of the sacraments, it should be physically separated from the aisle of the church (*St. Peter's, Eaton Square (Vicar etc.) v. Parishioners of Same*, [1894] P. 350).

(*q*) A chapelry is the same thing to a chapel as a parish to a church, being the precinct and limits thereof. It is mentioned in stat. (1662) 14 Car. 2, c. 9 (Jacob, *Law Dictionary*, *sub nom.* "Chapelry").

(*r*) Jacob, *Law Dictionary*, *sub nom.* "Chapel." In such case sacraments and burials ought to be performed in the parish church (2 Roll. Abr. 340; Selden, *History of Tithes*, 265).

(*s*) A parochial chapelry must be coeval with the parish, but its existence may be inferred from modern usage, provided such usage is immemorial (*Carr v. Mostyn* (1850), 5 Exch. 69).

(*t*) Burn, *Ecclesiastical Law*, Vol. I., p. 301.

(*a*) See p. 646, *ante*.

(*b*) See pp. 446, 447, *ante*.

(*c*) Burn, *Ecclesiastical Law*, Vol. I., p. 298; and see p. 652, *ante*.

(*d*) *Ibid.*, p. 296.

(*e*) *Ibid.*, p. 297.

(*f*) Canon 71.

(*g*) Open Prayer, in the Act for Uniformity of Service and Administration of Sacraments, 1548, is defined as meaning that prayer which is for others to come unto or hear either in common churches or private chapels or oratories (stat. (1548) 2 & 3 Edw. 6, c. 1, s. 2).

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siastical
by reason
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Ownership.
—

and any person or several persons together may provide a building for the purpose of celebrating divine worship and the sacraments for the benefit of such persons as desire to attend and the proprietors of the building are willing to admit (*h*). Such a building is commonly called a proprietary chapel. It need not necessarily be consecrated (*i*). The sanction for the performance of divine service by a minister of the Church of England therein can in England only be derived from a licence from the bishop, given with the consent of the incumbent of the parish and valid during his incumbency (*k*), but not beyond it (*l*).

Chapels in
Wales.

In Wales, wherever ten or more inhabitants in any parish, district, or place certify to the bishop that they desire to have divine service and the sacraments administered in the English tongue, and undertake to provide a building to be used as a chapel for the purpose, and to provide for a minister and for other expenses, the bishop may license any building so provided from year to year, or for a term not exceeding two years, as a chapel, the minister being nominated by the incumbent of the parish, district, or place, or in case of the incumbent's failure to nominate, or of dispute, being nominated by the bishop subject to an appeal to the archbishop (*m*).

Chapel of
army district.

1529. Where an extra-parochial district is formed in connection with an army station, a chapel may be consecrated as the chapel of such district (*n*), or an unconsecrated building may be certified by a Secretary of State to the bishop of the diocese as used, or intended to be used, by His Majesty's forces as an unconsecrated chapel (*o*).

School
chapel.

1530. The chapel of any one of the great public schools (*p*), and the chapel of any other endowed school if it is consecrated or authorised in writing by the bishop to be used as a chapel for such school (*q*), may be used for the performance of public worship and the administration of the sacraments free from the control of the incumbent of the parish.

Mission
room.

1531. An unconsecrated building may be used by the incumbent of a parish or with his authority as a place of assembly for the purpose of religious worship in accordance with the liturgy of the Church of England (*r*). When an unconsecrated building is habitually so used, it is commonly called a "mission room." Buildings used for this and for cognate purposes, such as Sunday schools, and parish halls or rooms, and parochial schools, are

(*h*) The proprietors may refuse to admit any one at their discretion (*Bosanquet v. Heath* (1860), 3 L. T. 290).

(*i*) *Hodgson v. Dillon* (1840), 2 Curt. 388.

(*k*) See pp. 662, 663, *ante*.

(*l*) See p. 647, *ante*.

(*m*) Church Services (Wales) Act, 1863 (26 & 27 Vict. c. 82).

(*n*) Army Chaplains Act, 1868 (31 & 32 Vict. c. 83), s. 7.

(*o*) *Ibid.*, s. 8; and see p. 647, *ante*.

(*p*) Public Schools Act, 1868 (31 & 32 Vict. c. 118), s. 31; and see p. 651, *ante*.

(*q*) Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 53.

(*r*) Liberty of Religious Worship Act, 1855 (18 & 19 Vict. c. 86), s. 1; as to the necessity of the licence of the bishop, see p. 662, *ante*.

ecclesiastical property, if the purpose for which they were founded or built is a spiritual purpose (s). Where the question whether such purpose is a spiritual purpose can be answered by reference to a trust deed or deeds relating to such property, it must be so answered, but in many cases (t) there is either no trust deed or the terms of such deed cannot be ascertained or are insufficient to determine the purpose, and in such cases the question must be answered by reference to the history of the foundation of the charity or of the erection of the building, and this history if otherwise in doubt must be ascertained by reference to the purposes for which the property has in fact been used (a).

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Ownership.

1532. The exemption from rates which applies to all consecrated churches and chapels does not extend to other buildings used for parochial purposes, which are capable of being let at a rent, but no person is liable to be rated or to pay any poor rate in respect of any church, chapel, or premises exclusively appropriated to public religious worship in accordance with the liturgy of the Church of England on the ground that they or any vestry rooms belonging to them are used for charitable education (b), and any rating authority may exempt any Sunday school (that is, any school used without any pecuniary benefit being derived therefrom for giving religious

Exemption
from rates.

Sunday
school.

(s) See pp. 713, 784, *ante*.

(t) Parochial property, whether held for ecclesiastical or secular purposes, was formerly vested in the churchwardens and overseers on behalf of the parish and was dealt with by them by the direction of the inhabitants in vestry assembled with the consent in cases of alienation of two justices (Poor Relief Act, 1819 (59 Geo. 3, c. 12), ss. 8, 9 (now repealed); and see title POOR LAW). By the Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), powers of dealing with parochial property held for poor law purposes was given to the overseers and guardians, and by the School Sites Acts power was given to grant land held for parochial purposes to trustees to be held for the purposes of the School Sites Acts, which include religious education of children and adults and theological training (see School Sites Act, 1841 (4 & 5 Vict. c. 38), s. 6; School Sites Act, 1852 (15 & 16 Vict. c. 49)). By the Church Building Acts the commissioners under those Acts had power to appropriate any land given gratuitously with the consent of the grantor (Church Building Act, 1822 (3 Geo. 4, c. 72), s. 34; see also School Sites Act, 1841 (4 & 5 Vict. c. 38), s. 19), or any land for which they had given valuable consideration (Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 19), to any ecclesiastical purpose or for the purpose of any parochial or charitable school or any other charitable or public purpose relating to the parish or place concerned. The result of these and other enactments giving similar powers is that until the division of parochial charities into ecclesiastical charities and non-ecclesiastical charities was effected by the Local Government Act, 1894 (56 & 57 Vict. c. 73), and the London Government Act, 1899 (62 & 63 Vict. c. 14) (see note (c), p. 355, *ante*), the nature of a parochial charity could not in general be ascertained by reference to the persons in whom the property was vested, and as the former Act did not affect the trusteeship, management, or control of any elementary school (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 66), the question whether such a school is or is not an ecclesiastical charity has in general been unaffected by it and remains undetermined. See title CHARITIES, Vol. IV., p. 155.

(a) The printed reports of the Charity Commissioners appointed in 1818 are *prima facie* evidence of the facts therein stated (Charitable Trusts (Recovery) Act, 1891 (54 & 55 Vict. c. 17), s. 5). As to schools, see Education Act, 1902 (2 Edw. 7, c. 42), s. 11 (4); and title EDUCATION.

(b) Poor Rate Exemption Act, 1833 (3 & 4 Will. 4, c. 30), s. 2. See title RATES AND RATING.

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of its
Ownership.

education on Sundays, and on weekdays for the holding of classes and meetings in furtherance of the same object)(c), and must exempt any voluntary school(d) (that is, any public elementary school not provided by a local education authority)(e), from the payment of rates.

SECT. 4.—*Ecclesiastical Persons and Corporations as Owners of Property.*

SUB-SECT. 1.—*In General.*

Ecclesiastical
persons as
owners of
property.

1533. Property which is owned by a person solely in the capacity of a representative of the Church of England is ecclesiastical property—that is to say, whenever the relation between the person owning property and the thing owned arises out of and can be defined by reference to the person regarded as performing spiritual functions on behalf of the Church of England, the property is ecclesiastical property(f). Thus, property may be affected with an ecclesiastical character by being vested in a person or succession of persons as trustees thereof for spiritual purposes(g). So far as the relation of the owner to the thing owned is concerned, a corporation is within the limits of its powers as capable of standing in that relation as a person or body of persons(h), and having regard to the necessity of securing that property given for the purpose of promoting the performance of particular functions shall be permanently devoted to that purpose, and the impossibility of any individual holder of an office affording such permanent security(i), ecclesiastical property is in general vested in an ecclesiastical corporation recognised by the law as having a permanent capacity in right of some office or function of holding property, and thereby securing that it shall be applied to the purpose intended(k).

Ecclesiastical
corporations.

1534. A corporation sole which is recognised by the law as having perpetual succession in right of an office or function of a spiritual character is an ecclesiastical corporation(l). A corporation aggregate which is constituted for a spiritual purpose is an ecclesiastical corporation(m).

(c) Sunday and Ragged Schools (Exemption from Rating) Act, 1869 (32 & 33 Vict. c. 40).

(d) Voluntary Schools Act, 1897 (60 & 61 Vict. c. 5), s. 3.

(e) *Ibid.*, s. 4. See title EDUCATION.

(f) *St. George's Hanover Square (Rector and Churchwardens) v. Westminster Corporation* (1910), 26 T. L. R. 327, H. L., reversing [1909] 1 Ch. 592, C. A. See also p. 713, *ante*.

(g) It does not necessarily follow that the person in whom the property is so vested is an owner thereof for the purposes of the Metropolis Management Acts (*Angell v. Paddington Vestry* (1868), L. R. 3 Q. B. 714).

(h) Interpretation Act, 1889 (52 & 53 Vict. c. 63), ss. 2 and 19. A body corporate is capable of acquiring and holding any real or personal property in joint tenancy as if it were an individual (Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20).

(i) 1 Bl. Com., p. 470.

(k) See title CORPORATIONS, Vol. VIII., pp. 301, 305.

(l) Burn, Ecclesiastical Law, 8th ed., Vol. II., p. 30.

(m) It is not the description of the persons who are the members of a corporation, but the purpose of its institution, which characterises it to be a lay or a

All ecclesiastical corporations, whether sole or aggregate, are public, that is, they do not aim only at private objects but contemplate some benefit to the public or the undertaking some public duty or responsibility (*n*).

1535. Archbishops, bishops, some deans, prebendaries, vicars choral (*o*), canons (*p*), all archdeacons (*q*), parsons, including rectors and vicars and perpetual curates, are corporations sole (*r*). They are all ecclesiastical corporations excepting a rector while the rectory is in lay hands (*a*).

SECT. 4.
Ecclesiastical
Persons etc
as Owners
of Property.

Ecclesiastical
corporations
sole

1536. A corporation aggregate may be either composed of constituent parts not essentially different, or it may be a body with one or more members or classes of members essentially differing from other members (*b*). Any of the constituent members may themselves be corporations (*c*), and where the members are entirely spiritual, that is to say, where they are members solely in their spiritual capacities, the corporation is an ecclesiastical corporation (*d*); but even where the members are all spiritual persons, unless they are such in an entirely spiritual capacity, the corporation is not ecclesiastical unless the intention of its foundation is spiritual (*e*).

Ecclesiastical
corporations
aggregate.

Chapters of cathedrals are ecclesiastical corporations aggregate (*f*), as are also colleges or corporations of vicars choral, priest vicars, senior vicars, custos and vicars, or minor canons (*g*), which are expressly excepted from the powers of leasing given by the Ecclesiastical Leasing Acts to ecclesiastical corporations in general. A hospital may be an ecclesiastical corporation (*h*); the question whether it is so or not depends upon the object for which it is founded (*i*).

1537. A body corporate of church trustees may be appointed in any parish for the purpose of receiving and holding any property for

Church
trustees.

spiritual foundation (Kyd on Corporations, Vol. I., p. 23). See also Hargraves, note to 1 Bl. Com. 470.

(*n*) Grant, Law of Corporations, p. 9.

(*o*) See title CORPORATIONS, Vol. VIII., p. 306.

(*p*) See p. 427, *ante*.

(*q*) 1 Bl. Com. 470.

(*r*) See p. 563, *ante*.

(*a*) See p. 718, *ante*, and pp. 801, 802, *post*.

(*b*) See title CORPORATIONS, Vol. VIII. p. 305.

(*c*) Thus a dean and chapter is a corporation aggregate, while the canons are, and the dean may be, a corporation sole.

(*d*) Burn, Ecclesiastical Law, 8th ed., Vol. II., p. 30.

(*e*) See note (*m*), p. 792, *ante*; *A.-G. v. St. Cross Hospital* (1853), 17 Beav. 435.

(*f*) As to their constitution, see pp. 423—425, *ante*; and as to their patronage, see p. 426, *ante*.

(*g*) Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), s. 1.

(*h*) *Ibid*.

(*i*) *A.-G. v. St. Cross Hospital, supra*. By the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 65, the Commissioners are required to inquire and report as to all hospitals which were returned as promotions spiritual in the reign of Henry VIII., and to make suggestions for affording a better provision for the cure of souls within the parishes with which they were connected in cases where there was a surplus available after satisfying the founder's bounty.

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Eccle-
siastical
Persons etc.
as Owners
of Property.

ecclesiastical purposes in the parish (*k*), and the trustees of any charity for religious charitable purposes may apply to the Charity Commissioners to be registered as a corporate body, and, if the Charity Commissioners deem expedient, may thereupon become a body corporate (*l*). Churchwardens are for some purposes a corporation (*m*), and the minister and churchwardens of a parish or ecclesiastical district are also for some purposes a corporation (*n*).

Leases by
ecclesiastical
corporations.

1538. Ecclesiastical corporations, sole or aggregate, may, excepting those above mentioned as excepted, grant building leases not exceeding ninety-nine years and mining leases not exceeding sixty years (*o*), and may, with the consent of the Ecclesiastical Commissioners, sell, exchange, or enfranchise any of their lands (*p*).

SUB-SECT. 2.—*The Ecclesiastical Commissioners.*

(i.) *Constitution.*

Ecclesiastical
Commis-
sioners.

1539. The Ecclesiastical Commissioners (*q*) are a corporate body constituted by Act of Parliament for the purpose in the first instance of laying before the King in Council such schemes as appeared to them best adapted for carrying into effect the recommendations made by two commissions which had been appointed to consider the amount of the revenues and the duties assigned to the episcopal sees and the state of the cathedral and collegiate churches in England and Wales and had suggested measures to render them more conducive to the efficiency of the Established Church and to provide in the best mode for the cure of souls, with special reference to the residence of the clergy in their benefices (*r*).

The members of the corporation, originally thirteen in number (*s*),

(*k*) See p. 474, *ante*.

(*l*) Charitable Trustees Incorporation Act, 1872 (35 & 36 Vict. c. 24).

(*m*) See p. 465, *ante*.

(*n*) See the School Sites Act, 1841 (4 & 5 Vict. c. 38), s. 7, amended by the School Sites Act, 1844 (7 & 8 Vict. c. 37), s. 4; and see title EDUCATION. In the City of London the minister and churchwardens are by custom always a corporation.

(*o*) See Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), amended by Ecclesiastical Leasing Act, 1857 (21 & 22 Vict. c. 57); and pp. 762—764, *ante*.

(*p*) Episcopal and Capitular Estates Act, 1851 (14 & 15 Vict. c. 104), amended by Episcopal and Capitular Estates Act, 1854 (17 & 18 Vict. c. 116), and Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124).

(*q*) In any Act the expression "Ecclesiastical Commissioners" means the Ecclesiastical Commissioners for England for the time being (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (15)).

(*r*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 1. For an account of the royal commissions of inquiry into the state of the various dioceses in England and Wales, their revenues and the distribution of episcopal duties, and other ecclesiastical matters, which preceded the establishment of the Ecclesiastical Commission, and the reports and recommendations of those commissions, see the preamble to the Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77). The object of the first Ecclesiastical Commissioners Acts of 1836 and 1840 was to carry out the recommendations above referred to; the subsequent Ecclesiastical Commissioners Acts have gone far beyond the recommendations of the early commissions. For the existing functions of the Commissioners, see pp. 796—801, *post*.

(*s*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 1.

were subsequently added to (t), and now consist of the following spiritual and lay persons, the majority being *ex officio*, namely, the two archbishops, all the bishops of England and Wales, and the deans of Canterbury, St. Paul's, and Westminster, the Lord Chancellor, the Lord President of the Council, the First Lord of the Treasury, the Chancellor of the Exchequer, a principal Secretary of State nominated by the Sovereign, the Lord Chief Justice and the Master of the Rolls, and the two judges of the Probate, Divorce and Admiralty Division. The Sovereign has also power to appoint seven, and the Archbishop of Canterbury two, lay persons as commissioners (a).

SECT. 4.
Ecclesiastical
Persons etc.
as Owners
of Property.

1540. Three other Ecclesiastical Commissioners were subsequently added, styled Church Estates Commissioners—two appointed by the Crown, by the title of First and Second Church Estates Commissioners, and one by the Archbishop of Canterbury (b).

Church
Estates
Commis-
sioners.

Any non-official Ecclesiastical Commissioner may be appointed a Church Estates Commissioner. Removal from or resignation of the office of Church Estates Commissioner does not *ipso facto* involve loss of office as Ecclesiastical Commissioner (c).

1541. The Church Estates Commissioners are constituted a committee of the Ecclesiastical Commissioners, and styled "The Estates Committee." The Ecclesiastical Commissioners may appoint annually, in the month of February, two members of the corporation, one of whom at least shall be a non *ex-officio* member, to be members of the Estates Committee in addition to the other Church Estates Commissioners, to hold office for a year and to be capable of being re-appointed (d).

The Estates
Committee.

Any two members of the Estates Committee may do all acts required by law to be done by the committee (e), and any two Church Estates Commissioners may do all acts required by law to be done by the Church Estates Commissioners (f).

The Ecclesiastical Commissioners may from time to time make general rules, which shall be laid before Parliament, for the direction of the Estates Committee relating to the business to be transacted by

(t) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 78.

(a) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77) s. 1; Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 78. The holders of certain other judicial offices, since abolished, were also made Commissioners by the latter Act.

(b) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 1. Publication in the London Gazette of the notice of the appointment of a Church Estates Commissioner is conclusive evidence of the fact (Episcopal and Capitular Estates Act, 1859 (22 & 23 Vict. c. 46), s. 2). As to the salaries of the Church Estates Commissioners, which are payable out of the common fund, see Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 2. The first Church Estates Commissioner may sit if elected in the House of Commons (*ibid.*, s. 3).

(c) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 1.

(d) *Ibid.*, s. 7. See *ibid.*, s. 9, for appointment of chairman of this committee. He has a casting vote in case of equality.

(e) Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111), s. 2. See Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 10.

(f) Episcopal and Capitular Estates Act, 1859 (22 & 23 Vict. c. 46), s. 1.

- SECT. 4.** them, and declaring the general principles which shall guide the decision of the committee (*g*).
- Ecclesiastical Persons etc. as Owners of Property.** **1542.** Non-official members of the Ecclesiastical Commission are not removable except for improper execution of their duties (*h*). But the Church Estates Commissioners hold office only during the pleasure of their respective appointors (*i*).
- Tenure of office.** Vacancies occurring by death or resignation among the non-official Ecclesiastical Commissioners, and vacancies occurring by death, resignation, or removal among the Church Estates Commissioners are filled up by the Sovereign or the Archbishop of Canterbury, as the case may be (*k*).
- Membership of Church of England.** Every lay commissioner, including lay Church Estates Commissioners, must be a member of the Church of England, and must, before acting as such commissioner, subscribe a declaration to that effect in the minute book of the proceedings of the Commissioners (*l*).
- Treasurer.** **1543.** The three Church Estates Commissioners are joint treasurers of the Ecclesiastical Commission, and the receipt of any two of them, or of any one of them, with the counter-signature in the latter case of the accountant or assistant accountant, is a good discharge for money due and payable to the Commissioners (*m*).

(ii.) *General Administrative Functions and Powers.*

- Meetings.** **1544.** At a meeting of the Ecclesiastical Commissioners, of which due notice has been given to all, five form a quorum for transacting business (*n*), provided that two or more of the Church Estates Commissioners are of the number (*o*). Proceedings which require to be ratified by the corporate seal cannot be finally concluded, nor can the seal be affixed to any deed or instrument, unless two at least of the episcopal Commissioners are present. If two only of such Commissioners are present, and object, the ratification of the proceedings cannot take place at that meeting (*p*).
- Due notice of intended meetings must as a rule be given to all the Ecclesiastical Commissioners (*q*); but notice need not be given

(*g*) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 12.
 (*h*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 81.
 (*i*) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 1.
 (*k*) Ecclesiastical Commissioners Acts, 1836 (6 & 7 Will. 4, c. 77), s. 2; 1840 (3 & 4 Vict. c. 113), s. 79; 1850 (13 & 14 Vict. c. 94), s. 1.
 (*l*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), ss. 1, 2, 3; Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), ss. 78, 80; Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 4.
 (*m*) Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111), s. 3; see also Ecclesiastical Commissioners Acts, 1836 (6 & 7 Will. 4, c. 77), s. 7; 1850 (13 & 14 Vict. c. 94), s. 5; Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), s. 43. As to the appointment, removal, and salaries of officers, clerks etc. of the Ecclesiastical Commission, see Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 7, and as to superannuation allowances to such persons, see Ecclesiastical Commissioners (Superannuation) Act, 1865 (28 & 29 Vict. c. 68).
 (*n*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 4. As to minutes of the proceedings of the Commissioners, see *ibid.*, s. 8.
 (*o*) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 10.
 (*p*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 5.
 (*q*) *Ibid.*, s. 4.

to Commissioners who are out of England and Wales, or who have intimated to the secretary their inability to attend. Nothing affecting any Commissioner, being a bishop or dean, or the see, or diocese, or cathedral, or collegiate church of such Commissioner, is to be done at any meeting of which due notice has not been given to the Commissioner affected, unless his written consent has been previously obtained (*r*).

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siastical
Persons etc.
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of Property.

Meetings may be adjourned from day to day if necessary (*s*).

The Archbishop of Canterbury, if present at the commencement of a meeting, is to be chairman; if not present, the chairman is to be chosen by the votes of the Commissioners present (*t*).

1545. The Commissioners, by summons under the hand of the chairman, may cause the attendance of and examine witnesses, make inquiries, and call for answers and returns, and require the production of all documents relating to any matter within their jurisdiction. They are empowered also to administer oaths or to require witnesses to make declarations regarding the truth of their evidence (*a*).

Power to
take evidence.

1546. In each year, on or before March 1st, the Ecclesiastical Commissioners must furnish a report to one of the Secretaries of State of all their proceedings for the year preceding the previous November 1st, annexing copies of the schemes sanctioned and approved by the Sovereign in Council during the year and also an abstract of the accounts of the commission, and the report must be laid before Parliament (*b*). Copies of all instruments made under the sole authority of the seal of the commission without an Order in Council are to be annexed to the report (*c*).

Annual
report to
Parliament.

The Church Estates Commissioners must similarly furnish reports of their general proceedings, with a schedule of all applications for enfranchisement or purchase of interests of lessees, specifying the terms proposed, the terms on which such enfranchisement or purchase has been effected, and, if refused, the ground of such refusal (*d*).

1547. The duty of the Estates Committee, or any two of them, being Church Estates Commissioners (*e*), is to consider all matters relating to the sale, purchase, exchange, letting, or management, by or on behalf of the Ecclesiastical Commissioners, of any lands, tithes, or hereditaments, and for these purposes, and subject to the general rules made by the Ecclesiastical Commissioners (*f*), to do

Duties of
Estates
Committee.

(*r*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 82.

(*s*) Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 1.

(*t*) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 13.

(*a*) Ecclesiastical Commissioners Acts, 1836 (6 & 7 Will. 4, c. 77), s. 9; 1840 (3 & 4 Vict. c. 113), s. 90; 1841 (4 & 5 Vict. c. 39), s. 30.

(*b*) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 26; Episcopal and Capitular Estates Act, 1854 (17 & 18 Vict. c. 116), ss. 8, 10.

(*c*) Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111), s. 6.

(*d*) Episcopal and Capitular Estates Acts, 1851 (14 & 15 Vict. c. 104), s. 10; 1854 (17 & 18 Vict. c. 116), ss. 8, 10.

(*e*) Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111), s. 2.

(*f*) See p. 795, *ante*.

SECT. A.
Eccle-
siastical
Persons etc.
as Owners
of Property.

any act, including the affixing of the corporate seal to any scheme or other instrument, within the power of the Ecclesiastical Commissioners (g).

The Ecclesiastical Commissioners may from time to time refer to the consideration of the Estates Committee special matters in addition to those referred to (h), for the report of the Estates Committee, and by an instrument under their common seal may authorise such Committee, or the Church Estates Commissioners, or any two of them, to do any act within the powers of the Ecclesiastical Commissioners, in addition to those referred to, except affixing the common seal to any scheme to which the Estates Committee are not authorised to affix such seal without reporting to or requiring further instructions from the Ecclesiastical Commissioners (i).

The Estates Committee are also intrusted with sundry powers relating to the improvement, management, and re-arrangement of episcopal and capitular estates (k), and in respect of claims for dilapidations on estates forming the endowment of a see (l). Their consent is also necessary before a bishop, being a landlord, can exercise the powers conferred on landlords by the Agricultural Holdings Act, 1908 (m). The Commissioners may employ and pay agents in the management of their estates and for the transaction of their business generally (n).

Schemes and
Orders in
Council.

1548. The principal function of the Ecclesiastical Commissioners is to prepare and lay before the Sovereign in Council such schemes as shall appear to the Commissioners best adapted for carrying into full effect the provisions of the various Acts giving jurisdiction to the Commissioners (o). Before laying such scheme before the Sovereign in Council, notice must be given to any corporation, aggregate or sole, which may be affected thereby, and the objections, if any, of such corporation, together with the scheme, are to be laid before the Sovereign in Council (p). The Commissioners may propose in any scheme modifications as to matters of detail and regulation which are not substantially repugnant to the provisions of the Ecclesiastical Commissioners Acts (q).

When a scheme has been approved by the Sovereign in Council, an Order in Council may be made ratifying it and specifying the date of its coming into operation (r).

(g) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 8.

(h) *Ibid.*, s. 11.

(i) *Ibid.*, s. 8.

(k) Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), ss. 5, 8—11. See further p. 800, *post*.

(l) Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111), ss. 12, 13. See further p. 772, *ante*.

(m) 8 Edw. 7, c. 28, s. 40 (1). See title AGRICULTURE, Vol. I., p. 269.

(n) Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 27.

(o) Ecclesiastical Commissioners Acts, 1836 (6 & 7 Will. 4, c. 77), s. 10; 1840 (3 & 4 Vict. c. 113), s. 83; 1841 (4 & 5 Vict. c. 39), s. 30.

(p) Ecclesiastical Commissioners Acts, 1836 (6 & 7 Will. 4, c. 77), s. 10; 1840 (3 & 4 Vict. c. 113), s. 83.

(q) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 83.

(r) Ecclesiastical Commissioners Acts, 1836 (6 & 7 Will. 4, c. 77), s. 12; 1840

1549. Every order must be registered by the registrar of the diocese, whereof the bishop, or within which any cathedral or collegiate church, dignitary, chapter, member of a chapter, officer, incumbent, or any other person or body corporate, may be affected thereby (s), and in cases coming within the Ecclesiastical Commissioners Act, 1866 (a), in the diocesan registries specified in the order (b).

Every such Order in Council, when made, is to be inserted as soon as may be in the *London Gazette*, and when registered and gazetted is to have the same force and effect as if every part thereof were included in the first Act establishing the Commissioners (c). Copies of Orders in Council must be laid before Parliament in January in every year, or if Parliament is not then sitting, within one week after the next meeting thereof (d).

In some cases schemes made under the Ecclesiastical Commission Act, 1868 (e), operate to vest the property expressed to be transferred without any further conveyance (f).

1550. Certain payments and investments or conveyances and assignments of lands are to be made by grants or instruments under the common seal of the Ecclesiastical Commissioners instead of by Orders in Council ratifying schemes (g).

Agreements as to the transfer of tithes to a district church may be ratified by any instrument under the corporate seal of the Ecclesiastical Commissioners made in pursuance of such agreement, instead of by Order in Council (h).

1551. Another important feature in the constitution of the Ecclesiastical Commissioners is that in their corporate capacity they are empowered to hold a large amount of the revenues of the Church of England as one common fund, and to apply the same by scheme ratified in the usual manner for such purposes as they may think fit to propose (i).

SECT. 4.
Eccle-
siastical
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as Owners
of Property.

Registration
of order.
Gazetting
of order.

Vesting of
property.

Instruments
under
common seal.

Common
fund.

(3 & 4 Vict. c. 113), s. 84; 1841 (4 & 5 Vict. c. 39), s. 30. Orders made under these Acts need not recite any of the provisions of the Acts (Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 85).

(a) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), ss. 12, 16; 1840 (3 & 4 Vict. c. 113), ss. 84, 88.

(b) 29 & 30 Vict. c. 111.

(c) *Ibid.*, s. 10. No fee is payable for registration, but a fee of 3s. is payable for searches for an order, and a fee of 4d. per folio of 90 words for every certified copy or extract of an order. Copies of entries certified by the registrar are admissible as evidence in all courts and places (Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 17; 1840 (3 & 4 Vict. c. 113), s. 89; see also title EVIDENCE).

(d) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), ss. 12, 13, 14.

(e) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 15; 1840 (3 & 4 Vict. c. 113), s. 87; 1841 (4 & 5 Vict. c. 39), s. 30.

(f) 31 & 32 Vict. c. 114.

(g) *Ibid.*, ss. 6, 12; see further, p. 800, *post*.

(h) Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111), ss. 5, 6; Ecclesiastical Commission Act, 1868 (31 & 32 Vict. c. 14), s. 15.

(i) District Church Tithes Act, 1865 (28 & 29 Vict. c. 42), s. 8; Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111), s. 22.

(j) The common fund was created by the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 67; see p. 783, *ante*.

SECT. 4.
Eccle-
siastical
Persons etc.
as Owners
of Property.

Other
properties.

Power to
enforce
payment.

Applicati-
on of common
fund.

The estates of all sees (*k*), suspended canonries (*l*), suspended deaneries (*m*), and the separate estates of non-suspended canonries and deaneries (*n*), archdeaconries (*o*), and sinecure rectories (*p*), are all carried over to the common fund, subject, in the case of the estates of sees and non-suspended canonries and deaneries and archdeaconries, to various provisions for the reassignment or transfer of part of the property as endowments (*q*).

The moneys and revenues payable to the Ecclesiastical Commissioners and carried over to the common fund include the rents and profits of land, tithes, and other hereditaments vested in them (*r*), the episcopal fund (*s*), any increase of income of ecclesiastical corporations resulting from sales, enfranchisements, exchanges, purchases, or investment (*t*), the produce of sales effected under the New Parishes Act, 1848 (*u*), penalties for not making returns of ecclesiastical fees (*a*), and fees of court payable in respect of proceedings taken under the Benefices Act, 1898 (*b*).

1552. The Ecclesiastical Commissioners, for the purpose of enforcing payment of all profits and emoluments to be paid to them and of obtaining possession of all lands, tithes, or other hereditaments vested in or accruing to them, and of recovering the rents and profits thereof, have all the legal and equitable rights, powers and remedies otherwise exercisable by the holder of the deanery, canonry, prebend, dignity or office, or the rector of the rectory, in respect to the property affected (*c*).

The Commissioners also have power to sell or exchange lands belonging to a see or chapter with the consent of the bishop or of the chapter as the case may be (*d*).

1553. The Commissioners are empowered to make payments for various purposes out of the common fund. These purposes include *inter alia* the augmentation of bishoprics, and poor livings, the endowment of new churches, the employment of additional ministers, and the payment of the Church Estates Commissioners (*e*).

(*k*) Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), s. 2.

(*l*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 49. As to the extent of their estate, see Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 6; Ecclesiastical Commission Act, 1868 (31 & 32 Vict. c. 114), ss. 7, 8; and *A.-G. v. Windsor (Dean and Canons)* (1857), 24 Beav. 679.

(*m*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 51.

(*n*) *Ibid.*, s. 50. See, as to effect of this section, *R. v. Champneys* (1871), L. R. 6 C. P. 384.

(*o*) Ecclesiastical Commission Act, 1868 (31 & 32 Vict. c. 114), s. 13.

(*p*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 54.

(*q*) Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), ss. 2, 3, 5; Ecclesiastical Commission Act, 1868 (31 & 32 Vict. c. 114), s. 13.

(*r*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 67.

(*s*) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 15.

(*t*) Episcopal and Capitular Estates Act, 1851 (14 & 15 Vict. c. 104), s. 8.

(*u*) 6 & 7 Vict. c. 37; Ecclesiastical Commissioners Act, 1875 (38 & 39 Vict. c. 71), s. 1.

(*a*) Ecclesiastical Fees Act, 1875 (38 & 39 Vict. c. 70), s. 4.

(*b*) 61 & 62 Vict. c. 48, s. 11.

(*c*) Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 57.

(*d*) *Ibid.*, s. 68.

(*e*) See Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94); and pp. 774, 783, *ante*.

1554. The Commissioners, their successors and assigns, are empowered as a corporation to take, purchase, and hold lands, tenements and hereditaments for the purposes of the Ecclesiastical Commissioners Acts, notwithstanding any mortmain restrictions (*f*).

Lands and hereditaments held in trust for the Ecclesiastical Commissioners are vested in the first Church Estates Commissioner (*g*).

The accounts of the Ecclesiastical Commissioners are subject to audit as directed by the Treasury (*h*).

The powers formerly exercisable by the Church Building Commissioners were upon the abolition of such Commissioners transferred to the Ecclesiastical Commissioners (*i*).

SECT. 4.
Ecclesiastical Persons etc. as Owners of Property.

Power to hold lands. Audit.

Church Building Commissioners.

SUB-SECT. 3.—Lay as distinguished from Ecclesiastical Corporations.

1555. Lay as distinguished from ecclesiastical corporations include all corporations sole or aggregate, whether the members are spiritual persons or not, the object whereof is not spiritual (*k*). Thus, the Universities of Oxford, Cambridge, and Durham, and the colleges therein, are lay foundations (*l*).

Lay corporations.

1556. At the dissolution of the monasteries and other religious and ecclesiastical houses and places, their property was transferred to the Crown, and such transfer was confirmed by statute (*m*). The statutes of dissolution provided that the persons to whom any grants should be made by letters patent from the Crown should hold the lands, tithes, churches, chapels, advowsons, patronages, and other hereditaments so granted, in like manner, form, and conditions as the abbots, priors, and other chief governors of the religious houses held them (*n*), but as such grants could be, and were in fact, made to laymen, who by the law of the Church could not have cure of souls, the effect of the patents in such cases was that benefices which had been appropriations in the hands of a

Dissolution of the monasteries.

Lay rectors.

(*f*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 1. As to mortmain restrictions, see generally title CORPORATIONS, Vol. VIII., pp. 367 *et seq.*

(*g*) Ecclesiastical Commissioners Act, 1850 (13 & 14 Vict. c. 94), s. 6.

(*h*) *Ibid.*, s. 14.

(*i*) Church Building Commissioners (Transfer of Powers) Act, 1856 (19 & 20 Vict. c. 55), s. 1. As to the powers of the Ecclesiastical Commissioners under the Church Building and New Parishes Acts, see further pp. 447 *et seq.* and 721 *et seq.*, *ante*.

(*k*) See p. 793, *ante*.

(*l*) *R. v. Cambridge (Vice-Chancellor etc.)* (1765), 3 Burr. 1647, 1656. As to the freedom from religious tests of these universities and the colleges already founded at the passing of the Universities Tests Act, 1871 (34 & 35 Vict. c. 26), see pp. 805, 812, *post*.

(*m*) Stat. (1535) 27 Hen. 8, c. 28, and stat. (1539) 31 Hen. 8, c. 13.

(*n*) Stat. (1535) 27 Hen. 8, c. 28, s. 2. Stat. (1539) 31 Hen. 8, c. 13, s. 2, provided that the King should hold, possess, and enjoy the possessions in as large and ample manner and form as the religious houses had held them, and that grants by the King's patent of any of the monasteries, abboties, priories, parsonages, appropriate advowsons, tithes, franchises, and other hereditaments should be good and effectual against the King and his successors without any other licence or dispensation (*ibid.*, ss. 18, 19).

SECT. 4.
Eccle-
siastical
Persons etc.
as Owners
of Property.

monastery became impropriations (o) in the hands of the lay persons or corporations to whom they were granted, while the impropiators who received such grants were, by virtue of the patent by which the grant was made, corporations and were recognised as lay rectors (p).

A lay rector is liable to repair the chancel (q), and is entitled to the chief seat in it, unless another person can show a prescriptive right thereto (r).

SUB-SECT 4.—*Diocesan Associations.*

Diocesan
associations.

1557. An association formed for the purpose of promoting or assisting the performance of the functions of some or all of the officers or organisations of that part of the Church of England which is included within the limits of a diocese (s) is called a diocesan association. There is no legal definition or limitation of such an association, but, as the principal objects for which it is formed usually include the acquisition of real and personal property, and the holding of it in trust for ecclesiastical purposes, it is essential that it should be in a position to comply with the provisions of the law relating to mortmain and charitable uses, and for that purpose, when incorporated, the incorporation, unless it is by licence from the Crown, must be under the authority of some statute (t).

Incorporated.

Without
incorporation.

A diocesan association may be formed without incorporation, the property being vested in a body of trustees appointed for the purpose (u); and for religious purposes in connection with Church of England elementary schools associations on a diocesan basis have in many dioceses been formed under the Voluntary Schools Act, 1897 (v).

(o) See *Portland (Duke) v. Bingham* (1792), 1 Hag. Con. 157; and p. 717, *ante*.

(p) 1 Bl. Com. 386.

(q) See pp. 516, 733, *ante*.

(r) *Hall v. Ellis* (1609), Noy, 133; *Spry v. Flood* (1840), 2 Curt. 353, 357; and see p. 470, *ante*.

(s) As to the division of England and Wales into dioceses, see pp. 395 *et seq.*, *ante*. As to the reasons for defining ecclesiastical functions by reference to the territorial limits of a diocese, see *Natal (Bishop) v. Gladstone* (1866), L. R. 3 Eq. 1, 30.

(t) The statutes under which such incorporation may be effected are—(1) the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 19, 20, under which the Board of Trade may permit an association for religious objects, not involving the acquisition of gain by the association or its members, to hold any quantity of land, and to be registered as a company without the addition of the word “limited”; (2) the Charitable Trustees Incorporation Act, 1872 (35 & 36 Vict. c. 24); see p. 794, *ante*. For a form of memorandum and articles of association of a diocesan association incorporated under the first-named Act, see *Encyclopædia of Forms and Precedents*, Vol. III., p. 634.

(u) Such a body of trustees may be appointed under the Trustee Appointment Act, 1860 (13 & 14 Vict. c. 28); as to which see p. 370, *ante*, and p. 821, *post*. For a foundation deed of an unincorporated diocesan association, see *Encyclopædia of Forms*, Vol. III., p. 651.

(v) Such associations remain in effective existence notwithstanding the repeal of s. 1 of the Voluntary Schools Act, 1897 (60 & 61 Vict. c. 5), under which they were originally formed (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 33 (2) (b)) by virtue of the approval by the Board of Education of their constitution where such approval has been given for a permanent purpose pursuant to s. 1 (3) of the Voluntary Schools Act, 1897 (60 & 61 Vict. c. 5), and to Sched. II., 12, of the Education Act, 1902 (2 Edw. 7, c. 42).

Part VII.—Religious Bodies other than the Church of England.

SECT. 1.—*Recognition by the State.*

1558. All religious bodies enjoy the same general recognition by law (a), strengthened in the single case of the Church of England (b) by the circumstances of its connection with the State, and modified in the case of other religious bodies by such special enactments as survive to mark in each case the history of its evolution.

It is now intended to examine the distinctive marks that attend the recognition of certain religious bodies, all of whom have this in common, that they are unconnected with the State (c).

SECT. 1.

Recognition
by the
State.

Recognition
by the State.

SECT. 2.—*Roman Catholics.*

1559. In the case of the religious body known as Roman Catholics (d) these distinctive marks have their origin in two facts, namely, that that body, unlike other nonconforming religious bodies, has its central authority outside this kingdom and derives the whole of its system of organisation from abroad; and that at earlier periods in the history of this kingdom the Church of England was within that system of organisation, and that jurisdiction was claimed and from time to time exercised over it by that central authority.

Roman
Catholics.

1560. A long series of statutes passed in the centuries succeeding the disruption of the ties between the Church of England and the See of Rome has, in spite of numerous repeals, left many traces of the conflict, and hence the law as it affects the Roman Catholic Church in England consists not alone of provisions affecting the

Conclusion
of papal
jurisdiction.

(a) Such general propositions as bear upon the mutual relations of the State and religious bodies of all kinds were considered in the preliminary note (see pp. 356—370, *ante*).

(b) Or in Scotland by the single case of the Church of Scotland.

(c) Such bodies are commonly known as Nonconformist or Dissenting bodies—terms that have their origin in the Acts of Uniformity (especially that of 1662 (14 Car. 2, c. 4)), refusal to comply with which rendered the persons so refusing liable to penalties. Those who refused to go to church and worship after the manner of the Church of England were classified as recusants. A popish recusant was a papist who so refused, and a popish recusant convict was a papist who was legally convicted of such offence (Burn, *Ecclesiastical Law*, Vol. III., p. 153). This terminology was rendered obsolete by the passing of the Toleration Act, 1688 (1 Will. & Mar. c. 18), and the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7); but the use of the words “Nonconformist” and “Dissenter” survives, owing to the convenience of having names that compendiously embrace all those who do not worship after the manner of the Established Church. They are, however, usually employed to signify Protestants who dissent from the government and ritual of the Church of England.

(d) Compare Roman Catholic Relief Act, 1791 (31 Geo. 3, c. 32), s. 1, and the form of declaration to be made by papists or persons professing the popish religion, or holding communion with the See of Rome: “I, A. B., do hereby declare that I do profess the Roman Catholic religion.” The Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), is entitled “An Act for the relief of His Majesty’s Roman Catholic subjects.” See also, generally, title CONSTITUTIONAL LAW, Vol. VI., p. 324.

SECT. 2.
Roman
Catholics.

members of that body or even the whole body of its members in this country, but also of provisions which are directed to limiting or excluding the exercise of the powers of the See of Rome within the realm.

No Roman Catholic can occupy the throne, for any person who is either in communion with the Church of Rome or marries a person in such communion is expressly excluded from the succession (*e*). Certain high offices of the State are also withheld from Roman Catholics. These are the position of Lord Chancellor of Great Britain, Lord Lieutenant of Ireland, and High Commissioner of the Church of Scotland (*f*).

Status of
Roman
Catholic.

1561. A Roman Catholic in his capacity of a private citizen is now on an equal footing with all other subjects of the Crown (*g*). There is no longer any bar to his holding real or personal property (*h*), or exercising the parliamentary or other vote (*i*). If otherwise qualified, he is entitled to sit and vote in the House of Lords (*k*), or, if a peer of the kingdom of Scotland or Ireland, is eligible as a representative peer, and may vote at elections of such representative peers (*l*). He is, if a layman (*m*) and otherwise qualified,

(*e*) Bill of Rights (1 Will. & Mar., sess. 2, c. 2), s. 9; Act of Settlement, (12 & 13 Will. 3, c. 2), s. 2.

(*f*) The Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 12, specifically excepted these offices, together with that of Lord Chancellor of Ireland, which was thrown open to Roman Catholics by the Office and Oath Act, 1867 (30 & 31 Vict. c. 75), s. 1, from the benefit of the provisions by which a new oath was substituted for the former oaths and declarations. The phrase "Lord Lieutenant of Ireland" includes a Lord Deputy or other chief Governor or Governors of Ireland (Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 12). The oaths now required on the assumption of the office of Lord Chancellor of Great Britain and Lord Lieutenant of Ireland are in the case of non-Roman Catholic subjects the oaths prescribed by the Promissory Oaths Acts, 1868 and 1871 (31 & 32 Vict. c. 72; 34 & 35 Vict. c. 48), but from the fact that s. 12 of the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), has not been repealed it has been assumed that Roman Catholic subjects are not relieved from the necessity of taking the ancient oaths; a Bill to provide this relief was introduced into Parliament in the year 1891, but was not proceeded with.

(*g*) Before the passing of the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), Roman Catholics were required to take oaths of allegiance and abjuration and to make a declaration against transubstantiation before they became eligible to fill any important office. By that Act a new oath was substituted to be taken by any Roman Catholic who held any office, with the exceptions already mentioned, either under the Crown or any municipality, or who voted for or sat as a member of either House of Parliament. This oath, however, contained words denying to the Pope any temporal or civil jurisdiction, power, superiority, or pre-eminence in this country, which were obnoxious to Roman Catholics, and is now dispensed with, and on such occasions as oaths are required those prescribed by the Promissory Oaths Acts, 1868 and 1871 (31 & 32 Vict. c. 72; 34 & 35 Vict. c. 48), namely, the oath of allegiance, official and judicial oaths which can be taken without offence to the conscience of Roman Catholics are alone required.

(*h*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 23.

(*i*) *Ibid.*, s. 5; Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), s. 1, Sched. I., Part II.

(*k*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 2; Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), s. 1, Sched. I., Part II.

(*l*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 5; Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), s. 1, Sched. I., Part II.

(*m*) As to persons in holy orders in the Roman Catholic Church, see Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 9, and p. 807, *post*.

eligible for a seat in the House of Commons, and if elected may sit and vote there (*n*).

A Roman Catholic may hold civil and military posts under the Crown, and be a member of or hold office under any lay corporation (*o*).

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1562. A Roman Catholic is disqualified from holding or enjoying or exercising any office, place, or dignity in the Church of England, or in any of its Ecclesiastical Courts or the Court of Appeal therefrom, or in any cathedral, collegiate, or ecclesiastical establishment or foundation (*p*).

Exclusion
from eccle-
siastical
office.

1563. A Roman Catholic may now hold any office in the Universities of Oxford, Cambridge, or Durham, or the colleges belonging to them (*q*), except that of Professor of Divinity (*r*), or any for which Holy Orders in the Church of England or membership of the Church of England and a degree in Divinity are required (*s*), but he may not hold an office in the colleges of Eton, Winchester, or Westminster, or any such college or school (*t*).

Offices in
universities
and schools.

1564. Roman Catholics, whether lay or clerical, are not debarred from acting as teachers or schoolmasters (*u*), but they may not hold the mastership of a school of royal foundation or endowed school for the education of youth, or of an endowed college or college of royal foundation except in the Universities of Oxford, Cambridge, or Durham (*v*). Roman Catholics who enter the Universities of Oxford and Cambridge or Durham as undergraduates are not to be required to attend any lectures to which they, or, if they are under age, their parents or guardians on their behalf, object on religious grounds (*x*). Similar provision for securing liberty of conscience is made in the case of day schools and boarding schools under the

Freedom
from

(*n*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 2; Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), s. 1, Sched. I., Part II. See title ELECTIONS.

(*o*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), ss. 10, 14; Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), s. 1, Sched. I., Part II.

(*p*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 16.

(*q*) Universities Tests Act, 1871 (34 & 35 Vict. c. 26), ss. 1, 8. This Act repealed so much of s. 16 of the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), as it was necessary to repeal for its purpose, but as it deals only with the Universities of Oxford, Cambridge, and Durham, any other universities for which tests are employed are not affected by it. So far as offices in colleges are concerned, the Act deals with colleges then subsisting. There is nothing to prevent the creation of new colleges the offices in which shall be confined to the members of any denomination (*R. v. Hertford College* (1878), 3 Q. B. D. 693, C. A.); as to university offices at Oxford or Cambridge, see also Universities of Oxford and Cambridge Act, 1877 (40 & 41 Vict. c. 48), s. 58.

(*r*) Universities Tests Act, 1871 (34 & 35 Vict. c. 26), s. 2.

(*s*) *Ibid.*, s. 3.

(*t*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 16.

(*u*) Roman Catholic Relief Act, 1791 (31 Geo. 3, c. 32), s. 13.

(*v*) *Ibid.*, s. 14; so much of this section as relates to any of the Universities of Oxford, Cambridge, and Durham is repealed by the Universities Tests Act, 1871, *supra*. As to repeal of the disabilities to hold posts at the Universities, see note (*g*), *supra*; and as to equality of treatment under the Endowed Schools Acts, 1869 and 1873 (32 & 33 Vict. c. 56; 36 & 37 Vict. c. 87), and exceptions therein, see note (*l*), p. 812, *post*; and, generally, title EDUCATION.

(*x*) Universities Tests Act, 1871 (34 & 35 Vict. c. 26), s. 7.

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Roman
Catholics.

Church
patronage.

Endowed Schools Acts (*y*), and in the case of public elementary schools by the Elementary Education Acts (*z*).

1565. A Roman Catholic may own the advowson and be the legal patron of a benefice in the Church of England, and he may buy or sell such advowson; but he may not exercise the right of presentation himself (*a*), or by the agency of another (*b*). If he attempts to do so the presentation is void (*c*). Where a Roman Catholic as a private person is the legal patron of a benefice the right of presentation is vested in the University of Oxford or the University of Cambridge (*d*), according to the county in which the benefice is situated. If he is the holder of an office under the Crown to which there attaches a right of presentation to benefices, the right of presentation is exercised by the Archbishop of Canterbury for the time being (*e*). For a Roman Catholic to advise the Crown as to an appointment to any office or preferment in the Church of England is a misdemeanor and disables the offender from ever holding any office, civil or military, under the Crown (*f*). If he is a member of any lay corporation he may not vote at or in any way join in the election, presentation, or appointment of any person to a benefice, or any office or place belonging to or in connection with the Church of England, which is in the gift, patronage, or disposal of the corporation. And a Roman Catholic, or a trustee or mortgagee for or under him, cannot make a valid grant of an advowson or right of patronage, except *bonâ fide* for a full and valuable consideration to some Protestant purchaser or purchasers for the benefit only of a Protestant or Protestants; nor can a Roman Catholic devise an

(*y*) Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), ss. 15, 16. There are certain exceptions in the case of modern endowments and cathedral schools, *ibid.*, s. 14. See p. 812, *post*, and, generally, title EDUCATION.

(*z*) Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 7; and see p. 812, *post*, and, generally, title EDUCATION.

(*a*) Stat. (1605) 3 Jac. 1, c. 5, s. 13; stat. (1688) 1 Will. & Mar. c. 26, s. 2. If a Roman Catholic is joint patron with another person who is not a Roman Catholic, then the patronage is to be exercised wholly by that other (*Edwards v. Exeter (Bishop)* (1839), 5 Bing. (N. C.) 652).

(*b*) Stat. (1605) 3 Jac. 1, c. 5, s. 13; stat. (1688) 1 Will. & Mar. c. 26, s. 2; Presentation of Benefices Act, 1713 (13 Ann. c. 13), s. 1. Where the presentation was made by a college on the nomination of a Roman Catholic patron, and it appeared on the face of it not to have been made in right of the college, but in trust for the patron, it was held void (*Boyer v. Norwich (Bishop)*, [1892] A. C. 417, P. O.).

(*c*) *Ibid.* Every grant of a benefice made by a Roman Catholic, either by himself or by an agent, is void unless it be made for a full and valuable consideration and to and for the exclusive benefit of a Protestant purchaser (Church Patronage Act, 1737 (11 Geo. 2, c. 17), s. 5).

(*d*) Stat. (1605) 3 Jac. 1, c. 5, s. 13; stat. (1688) 1 Will. & Mar. c. 26, s. 2; and see Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 7. The patronage is not, however, vested in the universities where there are several joint patrons, one of whom can legally exercise it (*Edwards v. Exeter (Bishop)*, *supra*; see note (*a*), *supra*).

The counties assigned to the respective universities are set out in notes (*e*) and (*f*) on p. 574, *ante*.

(*e*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 17.

(*f*) *Ibid.*, s. 18. In 1885, when the office of Home Secretary was filled by a Roman Catholic, appointments in the gift of that office were made by the First Lord of the Treasury, there being no benefices in the patronage of the Home Office.

advowson or right of patronage with intent to secure the benefit thereof to his heirs or family (g).

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1566. A Roman Catholic may be a churchwarden (h), but if he has conscientious scruples as to acting as such he may appoint a deputy (i). If in holy orders he is exempted from serving (k). Other offices to which, on his election, a Roman Catholic layman may appoint a deputy are that of high constable, or petty constable, overseer of the poor, or any other parochial or ward office (l).

Church-
warden.

1567. A Roman Catholic in holy orders is exempted from serving upon any jury or as overseer of the poor or in any other parochial or ward office, or in any office in any hundred of any shire, city, town, parish, division or wapentake (m). Roman Catholic clergy, though disabled from sitting in the House of Commons (n), may, if otherwise qualified, sit in the House of Lords. They are required to register themselves, with their description as priest or minister, with the clerk of the peace of any place where they intend to perform any ecclesiastical function (o), and it is an offence rendering them liable to a penalty of £50 for them to exercise any of the rites or ceremonies of their religion, or if a member of a religious order to wear the habit of their order, except within the usual places of worship of their religion or in private houses (p). They are protected from molestation while conducting a religious service in any place of public worship wherein they are authorised to preach or in a burial ground (q).

Exemption
of priest
from juries
and other
duties.

1568. Members of the Society of Jesus or of any other religious orders are forbidden to enter the country (r), and upon entering and being convicted of so doing, are liable to be banished (s), unless their entry is authorised by a special licence to be granted by a Secretary of State who is a Protestant (t). This licence is available for a period not exceeding six months, but may be withdrawn by a Secretary of State at any time (a). A register of licences granted during the preceding year is ordered to be laid before both

Religious
orders.

(g) Church Patronage Act, 1737 (11 Geo. 2, c. 17).

(h) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 15. Except in new parishes created under the Church Building Act, 1831 (1 & 2 Will. 4, c. 38), or the New Parishes Acts, 1843 and 1856 (6 & 7 Vict. c. 37; 19 & 20 Vict. c. 104). See note (d), p. 464, *ante*.

(i) Roman Catholic Relief Act, 1791 (31 Geo. 3, c. 32), s. 7

(k) *Ibid.*, s. 8.

(l) *Ibid.*, s. 7.

(m) *Ibid.*, s. 8.

(n) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 9; see p. 804, *ante*.

(o) Roman Catholic Relief Act, 1791 (31 Geo. 3, c. 32), s. 5. The prescribed fee for registration is sixpence, and the person so registered is to receive a certificate for which he may be charged two shillings.

(p) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 26.

(q) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 2; —ences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 36; see p. 817, *post*.

(r) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 29. Members who were in the country on April 23rd, 1829 (the time of the commencement of the Act), or who having been born British subjects were then abroad, but intended to return, were required to register themselves with the clerk of the peace in manner prescribed in the schedule to the Act (*ibid.*, ss. 28, 30).

(s) *Ibid.*, s. 29.

(t) *Ibid.*, s. 31.

(a) *Ibid.*

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Catholics.

Houses of Parliament (*b*). Persons in this country who are admitted to be members of any such order are liable on conviction to be banished for life (*c*), and any person admitting any person to become a member of such religious order, or assisting at the admission or the administration of vows to prospective members, is guilty of a misdemeanour (*d*). Proceedings to enforce penalties for such offences can only be begun in the High Court by information to be filed in the name of the Attorney-General (*e*), but this rule does not govern proceedings except as to penalties (*f*). The provisions do not apply to female religious orders (*g*).

Roman
Catholic
hierarchy.

1569. The recognition of the Roman Catholics as a religious body does not involve any recognition of the hierarchy (*h*) under which they are organised, except upon the basis of consent.

Ecclesiastical titles of honour or dignity can only be validly created, or any pre-eminence or coercive power conferred upon the holder, by the Sovereign (*i*), and it is an offence for any person not authorised by law to assume or use the name, style or title of archbishop of any province, bishop of any bishopric, or dean of any deanery (*j*), although where the title is not already legally appropriated (*k*) on behalf of the Church of England, the law (on the ground of expediency) does not impose penalties upon those ministers of religion who may, as among the members of their own religious

(*b*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 32.

(*c*) *Ibid.*, s. 34. If he does not depart within thirty days after the order for banishment is made, he may be expelled by force (*ibid.*, s. 35). If he remains at large in the country three months after the order without some lawful cause, he is liable on conviction thereof to a sentence of penal servitude for life (*ibid.*, s. 36); Penal Servitude Act, 1857 (20 & 21 Vict. c. 3), s. 2.

(*d*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 33.

(*e*) *Ibid.*, s. 38.

(*f*) *R. v. Kennedy* (1902), 86 L. T. 753. Although a private person may institute a prosecution for such an offence, a magistrate may exercise a wide discretion as to granting a summons (*ibid.*).

(*g*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 37.

(*h*) The Roman Catholic hierarchy was re-established in England in the year 1850. In the following year a statute was passed declaring the assumption of titles connected with places in the realm illegal, and imposing heavy penalties on the persons assuming them (stat. (1851) 14 & 15 Vict. c. 60). This Act was, however, repealed by the Ecclesiastical Titles Act, 1871 (34 & 35 Vict. c. 53); see note (*k*), *infra*.

(*i*) Ecclesiastical Titles Act, 1871 (34 & 35 Vict. c. 53), preamble.

(*j*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 24. The penalty which may be imposed is £100 (*ibid.*).

(*k*) While the enactment referred to in the last note could be made susceptible of an intention to include all titles whenever subsequently appropriated, the presence in the preamble of the section of the words "and whereas the right and title of the archbishops to their respective provinces, of bishops to their sees, and of deans to their deaneries, have been settled and established by law," the more natural interpretation is to confine its effect to those titles already appropriated in the year (1829) when the Act was passed. A case of some difficulty arose when, before the disestablishment of the Irish Church, the title of Archbishop of Armagh, Primate of all Ireland, was assumed by a Roman Catholic. It was suggested by Queen Victoria that this might be met by a prosecution of the obtuder by the Primate of the Church of Ireland (Letters of Queen Victoria, letter to Lord John Russell, December 14th, 1850). In the following year stat. (1851) 14 & 15 Vict. c. 60, was passed, providing for penalties to be imposed and sued for in an action which might be brought by any person. The Act was not, however, enforced, and was repealed by the Ecclesiastical Titles Act, 1871 (34 & 35 Vict. c. 53).

body, be designated by titles of distinction connected with some place within the realm. A bishop or other dignitary of the Roman Catholic Church is not a corporation (*l*).

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Catholics.

1570. The places used by Roman Catholics for public worship or schools are now under the same laws as those used by Protestant Nonconformist bodies (*m*). Places of public worship may be registered as such (*n*), and if registered may be used for the solemnisation of marriages (*a*).

Places of
worship.

Registration is not compulsory (*b*), but is attended by certain advantages (*c*), among which are exemption from local rates (*d*), and from the operation of the Charitable Trusts Act (*e*). Disorderly conduct in a Roman Catholic, as in any other, place of worship is an offence (*f*).

1571. In respect of the property held by Roman Catholics in connection with their places of religious worship or schools or for educational and charitable purposes, they are upon the same footing as Protestant Dissenters (*g*). All property to be acquired or held for any such purposes is subject to the provisions of the Mortmain and Charitable Uses Act, 1888 (*h*). Roman Catholic charities were at one time

Property.

(*l*) He differs in this from a dignitary of the Church of England; see title CORPORATIONS, Vol. VIII., note (*c*), p. 306.

(*m*) Liberty of Religious Worship Act, 1855 (18 & 19 Vict. c. 86), s. 2, extending the Roman Catholic Charities Act, 1832 (2 & 3 Will. 4, c. 115), s. 1.

(*n*) Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 2. The position of Roman Catholic places of worship in regard to registration, with the advantages accruing therefrom, is the same as that of Protestant Nonconformist places of worship (Roman Catholic Charities Act, 1832 (2 & 3 Will. 4, c. 115). As to the mode of registration, see p. 817, *post*.

(*a*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 18. The presence of the registrar is necessary unless the building enjoys the benefits of the Marriage Act, 1898 (61 & 62 Vict. c. 58), in which case the presence of the registrar is at the option of the contracting parties (ss. 4, 7, 10); but a person authorised by the governing body of the building, or the bishop or vicar-general of the diocese (ss. 1, 6), must be present. The provisions are the same as in the case of Protestant Nonconformists; see p. 818, *post*.

(*b*) Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), preamble and s. 1; see p. 818, *post*.

(*c*) Roman Catholic places of worship, being placed in the same position as those of Protestant Nonconformist congregations not duly registered and which do not meet in a private dwelling-house or a place not usually appropriated to religious worship, are exposed to the penalties imposed by the Places of Religious Worship Act, 1812 (52 Geo. 4, c. 155), s. 2; see p. 817, *post*.

(*d*) Poor Rate Exemption Act, 1833 (3 & 4 Will. 4, c. 30), s. 1; Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 27; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211; see p. 819, *post*; but it is doubtful whether Roman Catholic places of worship would be liable to improvement rates; see p. 819, *post*.

(*e*) Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 9; but the benefit of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 64, may be claimed if desired (*ibid.*; see p. 818, *post*).

(*f*) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32).

(*g*) Roman Catholic Charities Act, 1832 (2 & 3 Will. 4, c. 115), s. 1; see pp. 821, 822, *post*.

(*h*) *Ibid.*, s. 5, which makes such property subject to the provisions of the Charitable Uses Act, 1735 (9 Geo. 2, c. 36). This Act (except part of s. 5 as to college advowsons) was repealed by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), which, *inter alia*, provides in s. 13 (1) (a) that references in Acts not repealed to Acts which were then repealed were to be read as if the references to the repealed Act were references to that Act.

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Catholics.

excepted from the operation of the Charitable Trusts Acts, but the exception has been discontinued, and they are now subject to the general law of charitable trusts (i). All such charities which are endowed and are not statutorily exempt are within the jurisdiction of the Charity Commissioners in England and Wales (k).

Objects
prohibited.

1572. There are, however, certain grounds which render particular trusts or bequests invalid. Thus, the law prohibiting religious orders of males renders void gifts made to any such order (l), and the rule against superstitious trusts renders void bequests for masses or prayers for the repose of souls, whether of the testator or of others (m), or for maintaining a lamp in a church for a superstitious object (n), or for inculcating the doctrine of the supremacy of the Pope; a gift for the latter object is also void on the ground of public policy (o). Moreover, where a bequest or trust is for an object that is not within the legal definition of a charity, care must be taken to avoid infringing the rule against perpetuities (p). But gifts for the establishment of Roman Catholic bishops (q), the maintenance and support of Roman Catholic priests (r), chapels (s), colleges, and schools (t), and the general promotion of the Roman Catholic religion (u), may be valid.

Trust partly
valid.

A trust for the exclusive benefit of Roman Catholics is not invalidated by reason only of the inclusion in the trust of a gift of a superstitious or prohibited character (x). In every such case the property may be apportioned by a scheme to be framed by the Charity Commissioners, so as to satisfy the lawful charitable trust declared by the donor, the remainder being devoted to such lawful

Apportion-
ment.

(i) The exception was created by the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62, and was to last for a period of two years. It was extended by the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 47, and by stat. (1858) 21 & 22 Vict. c. 51, and stat. (1859) 22 & 23 Vict. c. 50, until July 1st, 1860, when the exception lapsed.

(k) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 9; Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134). In the latter Act "charity" is interpreted as having the same meaning as in the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 66. The classes of charities exempted are set out in s. 62 of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), as amended by the Charitable Trusts Amendment Act, 1855, s. 49; Charitable Trusts Act, 1869, s. 15; and Charitable Trusts (Places of Religious Worship) Amendment Act, 1894, s. 4. As to Roman Catholic charities, see, generally, title CHARITIES, Vol. IV., pp. 114, 120 *et seq.*, 164, 199, 295, 315.

(l) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7); see pp. 807, 808, *ante*; *Walsh v. Walsh* (1869), 4 L. R. Eq. 396, and other cases cited under title CHARITIES, Vol. IV., pp. 122—123.

(m) *Adams v. Lambert* (1602), 4 Co. Rep. 104 b; *West v. Shuttleworth* (1835), 2 My. & K. 684, and other cases cited under title CHARITIES, Vol. IV., p. 122.

(n) *A.-G. v. Vivian* (1826), 1 Russ. 226.

(o) *De Themmines v. De Bonneval* (1828), 5 Russ. 288.

(p) *Cocks v. Manners* (1871), L. R. 12 Eq. 574.

(q) *Robb and Reid v. Dorrian* (1877), 11 L. R. O. L. 292, Ex. Ch.; *A.-G. v. Power* (1809), 1 Ball & B. 145.

(r) *A.-G. v. Gladstone* (1842), 13 Sim. 7.

(s) *De Windt v. De Windt* (1854), 2 Eq. Rep. 1107.

(t) *Walsh v. Gladstone* (1842), 13 Sim. 261.

(u) *Bradshaw v. Tasker* (1834), 2 My. & K. 221; *West v. Shuttleworth* (1835), 2 My. & K. 684.

(x) Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 1.

charitable trusts as the framers of the scheme may consider most just (y).

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Roman
Catholics.

SECT. 3.—*Protestant Nonconformists.*

SUB-SECT. 1.—*In General.*

Religious
toleration.

1573. Historic events which from their cause and circumstances could not afford relief to Roman Catholics, for the very same reason brought relief to the various bodies of Protestant Nonconformists. Their emancipation began, therefore, at a much earlier date than did that of Roman Catholics. The Toleration Act, 1688 (a), relieved all Protestant Nonconformists who took the oaths and made the declaration prescribed by that Act (b) from prosecution in any ecclesiastical court by reason of their refusing to worship according to the forms of the Church of England (c). So far as such oaths are concerned, the Toleration Act is repealed and replaced by the Promissory Oaths Acts (d), which apply to all classes of His Majesty's subjects. At the present day Protestant Nonconformist laymen are under no personal disabilities whatever.

They may occupy any post under the Crown (e), whether civil or military, and may, if otherwise qualified, sit in either House of Parliament. They may also be members of or hold office under any corporation or local authority. They may be patrons of and present to benefices in the Church of England, and may be chosen as churchwardens (f), overseers of the poor, or other parochial or ward officers, exercising the duties thereof by a deputy if they have any scruple as to doing so themselves (g).

(y) Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 1.

(a) Stat. (1688) 1 Will. & Mar. c. 18, ss. 1, 2. Since 1688 the body known as the General Body of Protestant Dissenting Ministers of the Three Denominations (Presbyterian, Independent, and Baptist) residing in and about the Cities of London and Westminster, have been accustomed to present addresses to the Throne on suitable occasions. In 1909 permission was given by His Majesty to the body known as the Committee of Deputies of Protestant Dissenters, representing the congregations of the same three denominations in and within twelve miles of London, to unite with the former body in presenting addresses. (This information is derived from the clerk of the former and the secretary of the latter body.) In 1901 invitations to attend the coronation of His present Majesty were sent to representatives of the provincial churches through the National Council of the Evangelical Free Churches of England and Wales. (Information derived from secretary.)

(b) The oaths were those contained in stat. (1688) 1 Will. & Mar. c. 1, and the declaration that contained in stat. (1678) 30 Car. 2, stat. 2, c. 1.

(c) The statutes from the penalties imposed by which relief was given included the Act of Uniformity, 1558 (1 Eliz. c. 2), the Conventicles Act, 1670 (22 Car. 2, c. 1), and a number of Acts of the reigns of Elizabeth, James I., and Charles II. directed against Roman Catholics. Further relief from the duty imposed on them by the Act of Uniformity, 1662 (14 Car. 2, c. 4), was granted by the Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59), which also repealed the other Acts above mentioned.

(d) Promissory Oaths Acts, 1868 and 1871 (31 & 32 Vict. c. 72; 34 & 35 Vict. c. 48).

(e) But the Sovereign himself must be in communion with the Church of England (Act of Settlement (12 & 13 Will. 3, c. 2), s. 3).

(f) But they are not eligible as churchwardens in new parishes created under the Church Building Act, 1831 (1 & 2 Will. 4, c. 38), or the New Parishes Acts, 1843 and 1856 (6 & 7 Vict. c. 37; 19 & 20 Vict. c. 104).

(g) Toleration Act, 1688 (1 Will. & Mar. c. 18), s. 5.

SECT. 8.
Protestant
Noncon-
formists.

Offices in
 universities
 and schools.

Freedom
 from tests.

1574. All offices in the Universities of Oxford, Cambridge, and Durham, or the colleges therein, are open to them, except that of Professor of Divinity, or such other offices as are open only to persons in holy orders of the Church of England, or to persons who, being members of the Church of England, have taken a degree in divinity (*h*). Whether laymen or ministers, they are not debarred from teaching and instructing tutors or schoolmasters (*i*), and since the Endowed Schools Acts (*k*) they have been eligible as members of the governing body or as masters of endowed schools, with certain exceptions (*l*).

1575. Nonconformists who are undergraduates of the Universities of Oxford, Cambridge, and Durham are not to be required to attend any lecture to which they, or if they are not of age, their parents or guardians, object upon religious grounds (*m*), and similar provision for securing liberty of conscience is made, with certain exceptions, in the case of day and boarding schools under the Endowed Schools Acts (*n*), and in all public elementary schools under the Elementary Education Acts (*o*).

(*h*) Universities Tests Act, 1871 (34 & 35 Vict. c. 26), ss. 2, 3. So far as college officers are concerned, the Act deals with colleges then subsisting. There is nothing to prevent the creation of new colleges, the officers in which shall be confined to the members of any denomination (*R. v. Hertford College* (1878), 3 Q. B. D. 693, C. A.). As to university offices at Oxford and Cambridge, see also Universities of Oxford and Cambridge Act, 1877 (40 & 41 Vict. c. 48), s. 58.

(*i*) Nonconformist Relief Act, 1779 (19 Geo. 3, c. 44), s. 2.

(*k*) Endowed Schools Acts, 1869 and 1873 (32 & 33 Vict. c. 56; 36 & 37 Vict. c. 87).

(*l*) The exceptions are set out in the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 8, and include, *inter alia*, the public schools dealt with in the Public Schools Act, 1868 (31 & 32 Vict. c. 118), choir schools, and schools for the training of ministers of any denomination. As members of the governing body, Nonconformists are in every case eligible except where expressly excluded (*ibid.*, s. 17; and see *A.-G. v. St. John's Hospital, Bath* (1876), 2 Ch. D. 554). But the constitution of the governing body of schools (1) wholly or partially endowed for charitable uses within fifty years before the passing of the Act, or (2) attached to a cathedral or collegiate church, or (3) belonging to the Quakers or Moravians, or (4) forming part of the foundation of any college at Oxford and Cambridge, could not be altered under the Act (*ibid.*, s. 14); see *A.-G. v. Christ's Hospital (Governors)*, [1896] 1 Ch. 879. As to masterships, the obligation of obtaining the licence from the ordinary was formerly a bar to their being held by Nonconformists. This obligation, which was enjoined by Elizabeth in 1558, was the subject of Canon 77 of the year 1603, and was recognised by statute—for instance, by the Grammar Schools Act, 1840 (3 & 4 Vict. c. 77). The Nonconformist Relief Act, 1779 (19 Geo. 3, c. 44), expressly abstained from opening such masterships to Nonconformists except in the case of schools founded since 1688 for the immediate use and benefit of Protestant Dissenters (*ibid.*, s. 3).

The abolition by the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), of the obligation to obtain the licence of the ordinary (*ibid.*, s. 21), and of any necessity for the master to be in holy orders (*ibid.*, s. 18), has now opened all masterships to Nonconformists, except in the cases set out in *ibid.*, ss. 8, 14, *supra*. See generally, title EDUCATION.

(*m*) Universities Tests Act, 1871 (34 & 35 Vict. c. 26), s. 7.

(*n*) Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), ss. 15, 16. For the exceptions, see *ibid.*, ss. 8, 14, and note (*l*), *supra*. See also p. 805, *ante*; and, generally, title EDUCATION.

(*o*) Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 7.

SUB-SECT. 2.—*Ministers.*

SECT. 3.

Protestant
Noncon-
formists.

Ministers.

Privileges

1576. Protestant Nonconformist ministers (*p*) enjoy the same civil rights as laymen, save that they are ineligible, while holding a pastoral charge, for the offices of borough councillor or auditor (*q*). They may be required by any justice of the peace to make a prescribed declaration of faith (*r*), and if upon being so required they refuse to do so, they are liable to a fine every time they are convicted of preaching or teaching in a certified place of worship until they make the required declaration (*s*).

They are entitled to require a justice of the peace to administer the declaration to them (*t*), and to receive from him a certificate that they have made it (*a*). Ministers who have made the declaration are exempted from serving upon any jury (*b*), and from being chosen or appointed to bear the office of churchwarden, overseer of the poor, or any other parochial or ward office, or other office in any hundred of any shire, city, town, parish, division, or wapentake (*c*), and from serving in the militia (*d*). They are protected from molestation or interference while conducting a religious service either in a place of public worship or burial ground (*e*). But it is an offence for anyone to teach or preach in a congregation or assembly

(*p*) The mode of address commonly adopted by a Nonconformist minister, namely, "the Reverend . . ." is legally unimpeachable. The word "reverend" is not a title of honour or dignity appropriate only to those in holy orders of the Church of England, but an epithet—an adjective word as a laudatory or complimentary epithet, a mark of respect and of reverence, as the name imports, but nothing more (*Kent v. Smith* (1876), 1 P. D. 73, 79, P. C.).

(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 12 (1) (*b*), 25 (2). But an occasional preacher, even where there is an agreement to preach for a congregation for six months, is not disqualified (*R. v. Oldham* (1869), L. R. 4 Q. B. 290).

(*r*) Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 5. The declaration is that prescribed by the Nonconformist Relief Act, 1779 (19 Geo. 3, c. 44). They cannot, however, be required to go more than five miles from home for the purpose of taking it (Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 6). This does not apply to Quakers; see p. 822, *post*. The making of the declaration has long been obsolete.

(*s*) The amount of the fine may be from 10s. to £10 (*ibid.*, s. 5).

(*t*) *Ibid.*, s. 7.

(*a*) *Ibid.*, s. 8. A fee of 2s. 6d. may be charged for the certificate, the form of which is set out in this section. The declaration is in the following terms:—"I, A. B., do solemnly declare in the presence of Almighty God that I am a Christian and a Protestant, and as such that I believe that the Scripture of the Old and New Testament as commonly received among Protestant Churches contain the revealed will of God, and that I do receive the same as the Rule of my Doctrine and Practice."

(*b*) Toleration Act, 1688 (1 Will. & Mar. c. 18), s. 8; Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9, sched., the words of the latter being "Ministers of any congregation of Protestant Dissenters whose place of meeting is duly registered, provided they follow no secular occupation except that of a schoolmaster." In practice all recognised ministers are exempt, without making the declaration.

(*c*) Toleration Act, 1688 (1 Will. & Mar. c. 18), s. 8.

(*d*) Nonconformist Relief Act, 1779 (19 Geo. 3, c. 44), s. 1.

(*e*) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 36. This Act makes such an offence an indictable misdemeanor. Under the Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 2, the same offence is punishable summarily; see p. 817, *post*.

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formists.

in any place without the consent of the occupier of the premises (*f*), or in any place with the doors locked, bolted, barred, or fastened (*g*), except a private dwelling-house or the premises belonging thereto, or a place not usually appropriated to purposes of public worship (*h*).

Appointment.

1577. The appointment of a Protestant Nonconformist minister to a particular pastorate and his tenure thereof are dependent upon the terms of the trust, if any, by which it is maintained (*i*). If there is no trust deed, or if the trust deed is silent upon these matters, they are to be decided by the usage of the religious body to which the congregation adheres (*k*). There must, where necessary, be an inquiry into what that usage is (*l*); and if upon inquiry there appears to be a divergence between the doctrines professed by the founders of the pastorate and those of the subsisting trustees, the court will decide in favour of the course which will give effect to the intentions of the founders (*m*); though where a usage of twenty-five years is proved, that usage may be continued (*n*).

Where the appointment is vested in trustees, a succession of trustees of the same persuasion as the original office holders is contemplated (*o*). Accordingly, upon the decease of all the original trustees the duties of the office do not devolve upon the personal representative of the last survivor, but if there is no provision for the creation of fresh trustees inquiry must be held as to the proper mode of appointing them (*p*).

Where the pastorate is supported entirely by voluntary contributions, the right of appointing a minister, where there is no provision to the contrary, is in the congregation (*q*). In such case the minister will be elected by the majority of the congregation (*r*), and if there is a doubt as to what persons are entitled to participate in the election as members of the congregation, reference must be made to the facts of the particular case, including the rules, if any, of the religious body with which the pastorate is associated (*s*).

(*f*) Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 3. The penalty for the offence is from £2 to £30, in the discretion of the convicting magistrates.

(*g*) Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 11. The penalty is from £2 to £20 (*ibid.*).

(*h*) Liberty of Religious Worship Act, 1855 (18 & 19 Vict. c. 86), s. 1 (2), (3).

(*i*) *A.-G. v. Pearson* (1817), 3 Mer. 353; *Perry v. Shipway* (1859), 4 De G. & J. 353, C. A.

(*k*) *A.-G. v. Pearson*, *supra*.

(*l*) *Davis v. Jenkins* (1814), 3 Ves. & B. 151; *A.-G. v. Pearson*, *supra*.

(*m*) *A.-G. v. Pearson*, *supra*; *Foley v. Wontner* (1820), 2 Jac. & W. 245; *A.-G. v. Aust* (1865), 13 L. T. 235; compare *Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, [1904] A. C. 515.

(*n*) Nonconformists Chapels Act, 1844 (7 & 8 Vict. c. 45), commonly called Lord Lyndhurst's Act. See pp. 369, 370, *ante*.

(*o*) *Davis v. Jenkins*, *supra*.

(*p*) *Ibid.*

(*q*) *Ibid.*; *Porter v. Clarke* (1829), 2 Sim. 520.

(*r*) *Ibid.*; compare *Cooper v. Gordon* (1869), L. R. 8 Eq. 249.

(*s*) *Leslie v. Birnie* (1826), 2 Russ. 114, where persons who were hirers of pews and occupiers of seats in a building held in trust for the use of the congregation, but who did not take the sacrament there, were excluded from electing a minister, and upon applying for an injunction to restrain the person elected from acting as minister were :

The mode of election, where merely customary and not prescribed, may be altered, if the alteration is agreed to by all the candidates and approved by a resolution passed at a public meeting of those entitled to vote (t).

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Qualification.

1578. The eligibility of a particular candidate for any particular pastorate is determined upon general principles, by reference to the terms of the trust under which it was created, and by his acceptance of the formularies of the religious body to which it is attached (a).

Where membership of or communion with a specified religious body is a condition precedent to a person's holding the office of pastor, one who by his opinions or actions disavows such membership or communion is absolutely disqualified (b); and if already in office will be removed (c). An injunction to restrain trustees from electing such a person may be granted (d).

1579. The usual method for determining the validity of an election to an office of a public character is an application for a writ of mandamus (e), and where there are not sufficient grounds to justify the issue of that writ, the court may entertain a suit to establish the right to elect (f). Pending a decision as to the validity of his appointment, a minister will in general be permitted to officiate, and is entitled to be paid his salary while he continues to do so (g). If, however, he is not acting properly, he will be restrained from officiating at all (h).

Legal
remedy.

1580. Unlike a beneficed minister of the Church of England, a Nonconformist minister, in the absence of a special usage or agreement between the parties, holds his pastorate at the will of the persons who appointed him (i), whether they are the trustees in whom the building in which he officiates is vested (k), or the congregation

Tenure of
office and
buildings.

(t) *Davies v. Banks* (1836), 5 L. J. (OH.) 274.

(a) *Milligan v. Mitchell* (1833), 1 My. & K. 446.

(b) *A.-G. v. Murdoch* (1852), 1 De G. M. & G. 86, C. A.

(c) *Ibid.*; *A.-G. v. Munro* (1848), 2 De G. & Sm. 122. Trustees who are parties to an attempt by a minister who is thus disqualified to retain his office may also be removed (*A.-G. v. Murdoch, supra*). See also *Broom v. Summers* (1840), 11 Sim. 353; *contra, Westwood v. McKie* (1869), 21 L. T. 165.

(d) *Milligan v. Mitchell, supra*. Such a person may, however, be allowed to officiate pending the election (*ibid.*).

(e) *Davis v. Jenkins* (1814), 3 Ves. & B. 151; compare *R. v. Barker* (1762), 1 Wm. Bl. 300, 352. As to the remedy by mandamus, see R. S. C., Ord. 53, rr. 1—4, and title CROWN PRACTICE, Vol. X., pp. 77 *et seq.*

(f) *Davis v. Jenkins, supra*.

(g) *Foley v. Wontner* (1820), 2 Jac. & W. 247; *Daugars v. Rivaz* (1860), 28 Beav. 233; see also *Milligan v. Mitchell, supra*; *contra, Cooper v. Whitehouse* (1834), 6 O. & P. 545, which was not, however, decided upon the merits, but upon the joinder as defendants in an action for debt of two trustees who had not been parties to the appointment.

(h) *Perry v. Shipway* (1859), 4 De G. & J. 353, C. A.; *Broom v. Summers, supra*; *A.-G. v. Welsh* (1844), 4 Hare, 572.

(i) *A.-G. v. Pearson* (1817), 3 Mer. 353; *Porter v. Clarke* (1829), 2 Sim. 520; *Doe d. Jones v. Jones* (1830), 10 B. & C. 718; *Doe d. Nicholl v. McKaeg* (1830), 10 B. & C. 721; *Perry v. Shipway, supra*; *Cooper v. Gordon* (1869), L. R. 8 Eq. 249.

(k) *Doe d. Jones v. Jones, supra*.

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who worship there (*l*), or both (*m*). His tenure of the buildings, whether chapel or minister's dwelling-house, may therefore be terminated upon demand (*n*), and he is not entitled to receive notice or time in which to remove his goods (*o*). A resolution duly passed by the persons entitled to pass it calling upon a minister to resign is equivalent to dismissal (*p*). But where there is an agreement between a minister and a body of trustees for the payment of a salary out of the trust funds, and the arrangement amounts to a trust for the benefit of the minister, the court will inquire into the administration of the trust, and if the minister has been dismissed upon insufficient grounds will declare the dismissal void (*q*). In the absence of any usage or agreement, it is not necessary upon dismissing a minister that any grounds of misconduct should be alleged (*r*). If, however, such allegations are made, notice should be given to the minister, and he should be allowed an opportunity of meeting them (*s*).

Procedure
as to
dismissal.

Where the constitution of the religious body to which the pastorate is attached provides for a method of procedure in the dismissal of a minister, that procedure must be followed (*t*). Where a minister has been dismissed and desires to contest the validity of his dismissal, the proper remedy is an action to recover the profits of the office (*a*). A mandamus to restore him will not be granted except upon clear *prima facie* evidence of his right (*b*). Where a minister is in occupation of an unregistered building (*c*), and upon dismissal declines to relinquish it, possession may be given to the persons in whom the title to it is vested by a court of summary jurisdiction (*d*).

Right to vote
in respect of
residence.

1581. A minister who is appointed for life, and is in occupation of a house the title to which is vested in trustees, has an estate of freehold, and is entitled to a parliamentary vote (*e*), and a minister appointed and occupying such a house under a deed wherein he was specifically named would be in a similar position (*f*). But where the minister is not appointed expressly for life, and merely occupies a house as the minister for the time being, the question whether he is entitled to a vote depends upon the usage with regard to the

(*l*) *Porter v. Clarke* (1829), 2 Sim. 520.

(*m*) *Cooper v. Gordon* (1869), L. R. 8 Eq. 249.

(*n*) *Doe d. Jones v. Jones* (1830), 10 B. & C. 718.

(*o*) *Doe d. Nicholl v. McKaeg* (1830), 10 B. & C. 721. Should he return merely to remove his goods and not attempt to exclude the owners of the premises he would probably not be regarded as a trespasser (*ibid.*).

(*p*) *A.-G. v. Aked* (1835), 7 Sim. 321.

(*q*) *Daugars v. Rivaz* (1860), 28 Beav. 233.

(*r*) *Cooper v. Gordon*, *supra*.

(*s*) *Dean v. Bennett* (1870), 6 Ch. App. 489.

(*t*) *Warren's (Dr.) Case* (1835), Grindrod's Compendium, 371; compare *Long v. Cape Town (Bishop)* (1863), 1 Moo. P. O. O. (N. S.) 411.

(*a*) *R. v. Jotham* (1790), 3 Term Rep. 575; *Daugars v. Rivaz*, *supra*.

(*b*) *R. v. Jotham*, *supra*.

(*c*) See p. 817, *post*. An unregistered building may come within the operation of the Charitable Trusts Act. See Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 9.

(*d*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 13.

(*e*) *Burton v. Brooks* (1851), 11 O. B. 41.

(*f*) Rogers on Elections, 17th ed., Vol. I., p. 23; and see title ELECTIONS.

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Meeting for
religious
worship.

Places of
worship.

duration of the office, and upon the agreement, if any, with regard to such duration, entered into at the time of his appointment (*g*).

1582. No meeting, assembly, or congregation of persons for religious worship may take place with the doors locked, bolted or barred, or fastened so as to prevent the entry of any person (*h*). Disturbance committed in any place of public worship, whether during a religious service or not, is an offence (*i*), as also is the molestation of a minister engaged in conducting a religious service, either in a place of public worship or in a burial ground (*k*).

1583. Places used by Protestant Nonconformists as meeting-places or places of public worship may be registered as such (*l*).

Certificates of registration are to be delivered in duplicate to the superintendent registrar of births, deaths, and marriages in the district in which the meeting-place is situated, and must be forwarded by him to the Registrar-General (*m*), by whom a list of certified places of religious worship is to be from time to time made out (*n*), and who is to return one copy to the superintendent registrar, to be re-delivered by him to the certifying party (*o*). A fee of 2s. 6d. is payable to the superintendent registrar when the certificate is delivered to him (*p*). Upon payment of a like fee to the Registrar-General, a sealed or stamped certificate of registration may be obtained, which is available in evidence at any proceedings (*q*)

(*g*) *Collier v. King* (1861), 11 C. B. (N. S.) 14.

(*h*) Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 11. The penalty imposed upon the minister conducting service in such conditions is from £2 to £20, and is to be recovered summarily (*ibid.*). The provision does not, however, apply to Quakers (see p. 822, *post*).

(*i*) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 2. The offence is punishable summarily by imprisonment for two months. The Toleration Act, stat. (1688) 1 Will. & Mar. c. 18, s. 15, and the Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 12, provide for offenders upon proof of the charge before a justice being sent for trial at quarter sessions and on conviction thereat being fined £40. These provisions, however, apply only to places certified under those Acts or registered in accordance with the Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81) (*ibid.*, s. 3).

(*k*) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 2; see also Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 36; and note (*i*), p. 664, *ante*. The remedies granted by the Toleration Act, 1688 (1 Will. & Mar. c. 18), s. 15, or the Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 12, and mentioned in the last note, are applicable where the building is certified or registered.

(*l*) Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 2. Meeting-places already certified under the Toleration Act, 1688 (1 Will. & Mar. c. 18), and the Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), may be certified and registered under this Act. Meeting-places certified under the Places of Worship Registration Act, 1852 (15 & 16 Vict. c. 36), which is repealed by the Act of 1855, are not to be certified under it, as they are already registered by the Registrar-General. The form to be used is set out in Sched. A of the Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81). As to registration of places of worship belonging to the United Methodist Church, see also United Methodist Church Act, 1907 (7 Edw. 7, c. lxxv.).

(*m*) Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 2.

(*n*) *Ibid.*, s. 7.

(*o*) *Ibid.*, s. 2.

(*p*) *Ibid.*, s. 5.

(*q*) *Ibid.*, s. 11.

SMOY. 8.
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Noncon-
formists.

Effects of
registration.

Advantages
of registra-
tion.

Notice of the discontinuance of the use of any place for religious worship is to be given (r).

Registration is not compulsory (s), but is attended by certain advantages (t), and worship by more than twenty persons in a building without registration, except in the case of a congregation or assembly for religious worship either (1) meeting in a private dwelling-house or on the premises belonging thereto (a), or (2) meeting occasionally in a building or buildings not usually appropriated to purposes of religious worship (b), renders the occupier of the building, if it is used for such purposes with his consent, liable to penalties (c).

1584. A registered building is exempt from the operation of the Charitable Trusts Acts (d), but the benefit of certain provisions of them may be claimed (e). It may be registered for the purpose of marriages being solemnised there (f). The marriage must take place in the presence of some registrar of the district in which the registered building is situated and of two credible

(r) Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 6. The notice is to be given by the person who certified or last certified the place for registration, or by one of the trustees of the building or the occupier thereof. It is to be sent, on a form set out in Sched. B of the Act, through the superintendent registrar to the Registrar-General.

(s) *Ibid.* The preamble states that "whereas it is expedient that all places of religious worship, not being churches or chapels of the Established Church, should, if the congregation so desire, but not otherwise, be certified to the Registrar-General, be it therefore enacted," etc.

(t) The benefits given to places certified under the Toleration Act, 1688 (1 Will. & Mar. c. 18), and the Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), are enjoyed (Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 3).

(a) Liberty of Religious Worship Act, 1855 (18 & 19 Vict. c. 86), s. 1 (2).

(b) *Ibid.*, s. 1 (3).

(c) The penalties are those imposed by the Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 2. It was therein provided that no congregation or assembly for religious worship of Protestants at which there shall be present more than twenty persons besides the immediate family and servants of the person in whose house or upon whose premises it takes place should be lawful unless the place was duly certified. The occupier of an uncertified place who permits a congregation or assembly for religious worship to be held there is liable upon summary conviction to a fine of from £1 to £20 (*ibid.*).

(d) Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 9. The exemption includes school-houses and other buildings held upon the same or the like trusts as the registered building itself (Charitable Trusts (Places of Religious Worship) Amendment Act, 1894 (57 & 58 Vict. c. 35), s. 4). Where a Wesleyan chapel settled on the trusts of the Wesleyan model trust deed ceased to be used as a chapel, JOYCE, J., held that if it were sold, the proceeds of sale would be applicable for income, and that, therefore, it remained exempt from the Charitable Trusts Acts, although it had ceased to be registered (*Methodist Recorder*, December 10th, 1908).

(e) Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 9; Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 64.

(f) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 18. Marriages solemnised before 1855 in a building registered for marriages under this Act, but not otherwise duly certified as required by law, are valid (Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 13). Since that date the building must be a duly registered one, if the marriage is to be valid, but the presumption will be made that it was so unless the contrary is proved (*Sichel v. Lambert* (1864), 15 O. B. (N. S.) 781. Compare *R. v. Cresswell* (1876), 1 Q. B. D. 440, O. A.). As to Quaker marriages, see p. 823, *post*.

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witnesses (*g*), unless steps have been taken to obtain the benefit of the Marriage Act, 1898 (*h*), in which case the presence of the registrar is at the option of the contracting parties (*i*); but the ceremony must take place in the presence of a duly authorised person (*k*).

A registered building is not assessable to poor rate (*l*) or highway (*m*) or general district rate (*n*). Where the local authority compels the paving or sewerage of private streets, the minister of any building appropriated to religious worship and exempt from poor rate is not to be charged with any part of the expense (*o*); but such a charge may be made upon the trustees of a chapel (*p*), except where the Private Street Works Act (*q*) has been adopted.

SUB-SECT. 3.—*Property.*

1585. The general principles affecting, on the one hand, the evolution, division, and coalition of churches, and, on the other hand, the holding of property by a church, are dealt with in the introduction (*r*). Accordingly, it only remains here to apply those principles in conjunction to the property held by the various bodies of Protestant Nonconformists. Property.

Chapels and meeting-houses established specifically for the benefit of one body of Protestant Nonconformists cannot without a breach of trust be devoted to the use of another body essentially different from the first (*s*).

(*g*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 20.

(*h*) 61 & 62 Vict. c. 58. An authorised person must have been appointed by the trustees or other governing body of the building or of some registered building in the same registration district (s. 6), register books must have been supplied and the Registrar-General satisfied that due arrangements for registration provided (s. 7), and any regulation made by the Registrar-General and for the time being in force must be observed (s. 16). Before the ceremony the superintendent registrar's certificate must be delivered to the authorised person (s. 7), and in the course of the ceremony certain declarations must be made by the contracting parties (s. 6), but the form of the ceremony may be in other regards any that the contracting parties see fit to adopt (s. 4).

(*i*) Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 4. But he must attend if required to do so (*ibid.*, s. 10).

(*k*) *Ibid.*, s. 6 (3). See generally title HUSBAND AND WIFE.

(*l*) Poor Rate Exemption Act, 1833 (3 & 4 Will. 4, c. 30), ss. 1, 2.

(*m*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 27.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211.

(*o*) *Ibid.*, s. 151.

(*p*) Any building not rendered permanently extra commercium may be assessed on an apportionment of expenses for street improvements and the owner or occupier required to pay (*Hornsey Local Board v. Brewis* (1890), 60 L. J. (M. C.) 48). In the metropolis the wording of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), has led to similar decisions (*Caiger v. St. Mary, Islington (Vestry)* (1881), 50 L. J. (M. C.) 59; *Wright v. Ingle* (1885), 16 Q. B. D. 379). As to the ownership of a chapel which was a dangerous structure within the Metropolitan Building Acts, see *Mourilyan v. Labalmondiere* (1861), 1 E. & E. 533.

(*q*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57). This Act expressly includes the trustee as well as the minister of any place appropriated to religious worship and exempt from poor rate in exemption from such expenses (s. 16); see generally title RATES AND RATING.

(*r*) See pp. 361—370, *ante*.

(*s*) Endowments founded for the benefit of persons believing in the Trinity must not be converted to the use of Unitarians (*Drummond v. A.-G.* (1849), 2 H. L. Cas. 837; *Shore v. Wilson, Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, H. L.). Nor must endowments founded for the benefit of one body of

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Protestant
Noncon-
formists.

Effect of
schism.

Rights as
to meeting-
house.

1586. In the event of a schism among the members of one such body, the fact that the seceding party constitutes a majority either of the trustees or of the congregations does not of itself entitle the majority to claim possession of the premises (t).

The nature of the original constitution must alone be looked to as the guide in such a case (a), and the *ratio decidendi* must be the inclusion in or exclusion from such constitution of an inherent power of alteration (b). The claims of those who adhere to the original constitution will be enforced unless such an inherent power is proved to exist and to have been exercised by the body authorised in the original constitution to exercise it within such limits as may have been prescribed (c).

1587. In the case of a chapel or meeting-house not held under a trust attaching it to a specific religious body, the same principle will be followed (d). But where it subsists for the common benefit of those who in fact attend it either under no trust at all or under a trust of which the wording is indeterminate, the court will not intervene to enforce the alleged rights of a minority (e), and if it is

believers in the Trinity be converted to the use of another body whose system of worship or government is different (*Milligan v. Mitchell* (1837), 3 My. & Cr. 72; *A.-G. v. Welsh* (1844), 4 Hare, 572; compare *Dill v. Watson* (1836), 2 Jo. Ex. Ir. 48, and see *A.-G. v. Anderson* (1888), 57 L. J. (CH.) 543). But it has been held that a building originally intended for the use of one section of a religious body (in this case Baptists) might be subsequently used indifferently by another section of the same body (*A.-G. v. Gould* (1860), 28 Beav. 485; *A.-G. v. Etheridge* (1862), 32 L. J. (CH.) 161). Such a transfer would now, however, be closely scrutinised; see the cases cited in the next note.

(t) *Craigdallie v. Aikman* (1813), 1 Dow, 1, H. L.; *A.-G. v. Pearson* (1817), 3 Mer. 353; *Broom v. Summers* (1840), 11 Sim. 353; *A.-G. v. Aust* (1865), 13 L. T. 235; and see *Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, [1904] A. C. 515.

(a) *A.-G. v. Pearson*, *supra*, per Lord ELDON, at p. 400.

(b) *Craigdallie v. Aikman*, *supra*; *Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, *supra*, per Lord DAVEY, at p. 645.

(c) *Craigdallie v. Aikman*, *supra*, per Lord ELDON, at p. 16: "With respect to the doctrine of English law on this subject, if property was given in trust for A. B. C. etc. forming a congregation for religious worship if the instrument provided for the case of a schism, then the court would act upon it; but if there were no such provision in the instrument and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society at the expense of a forfeiture of their property by the *cestuis que trust* for adhering to the opinions and principles in which the congregation had originally united." Cited with approval by the Earl of HALSBURY, L.C., in *Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, *supra*, at p. 613.

In the case of *A.-G. v. Clapham* (1853), 10 Hare, 540, a Wesleyan chapel had been founded with the paramount object of association with the general body of Wesleyan Methodists, but the regulations of the general body had been altered in a manner inconsistent with the terms of the trust upon which the particular chapel was held. The court, in deciding to rectify the trust deed of the chapel so as to enable it to be consistent with the regulations of the general body, held that the parties themselves could not have made the requisite alterations, and allowed the costs of a minority who appeared to oppose the rectification.

(d) *A.-G. v. Aust*, *supra*. A proposal to transfer a chapel originally founded for the use of Presbyterians or Independents to the exclusive use of one of those bodies is such an alteration of the trust as could not be effected except by a unanimous vote of the congregation (*A.-G. v. Anderson*, *supra*).

(e) *A.-G. v. Bunce* (1868), L. R. 6 Eq. 563. Where moneys had been from time to time left for the benefit of members of one religious body which in fact made use of a certain chapel, but that chapel was also used by members of

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formists.

required to investigate such a case, the prevailing usage during a period of twenty-five years prior to the inquiry will be accepted as conclusive evidence of the doctrines and system of worship and government for the promotion of which the chapel or meeting-house was founded (*f*). Where the religious body in whose interests a chapel or meeting-house was founded has ceased to exist, the court will apply the endowment *cy-près* in favour of another religious body (*g*).

Any freehold, leasehold, copyhold, or customary property acquired by, or by trustees in connection with (*h*), any congregation or society or body of persons (*i*) associated for religious purposes as a chapel, meeting-house or other place of religious worship, or as a dwelling-house for the minister of such congregation with offices, garden and glebe or as an endowment or provision for expenses (*k*), or as a burial ground (*l*), or as a hall or rooms for the meeting or transaction of business of the congregation, society, or body, or as a place for education of students (*k*), may be conveyed or assured subject to any trust for the congregation, society, or body of persons, or in favour of the individual members composing it; and the effect of such conveyance or assurance will be not only to vest the estate in the parties named therein as trustees, but also effectually to vest the freehold, leasehold, copyhold, or customary property in their successors in office for the time being with the continuing trustees, if any, successors being chosen and appointed in the manner set out in the conveyance or assurance, or in any separate deed declaring the trusts, or if no such mode is prescribed, then in such manner as shall be agreed upon by the congregation, society, or body (*m*); and after the expiration of six months from the date of

Vesting of
estate in
trustees.

Appointment
of successors.

another body, who increased so much in numbers that ultimately the ministers chosen were all of the latter denomination, an attempt made by some who desired strict adherence to the first religious body to obtain control of the endowment was not sanctioned. Compare *Westwood v. McKie* (1869), 21 L. T. 165, where in a small colony an endowment was created for the benefit of a minister who was to perform the services of the Scottish Church, and the appointment of a minister of the Free Church of Scotland was held not to cause a failure of the charity.

(*f*) Nonconformists Chapels Act, 1844 (7 & 8 Vict. c. 45), commonly called Lord Lyndhurst's Act; see *A.-G. v. Bunce* (1868), L. R. 6 Eq. 563. In a case where usage for a shorter period than twenty-five years only could be proved, such usage, though not conclusive, might receive recognition by the court according to its length, and a minority that continued to use the chapel in which an altered usage was proved might be held to have acquiesced in the alteration (*Cairncross v. Lorimer* (1860), 3 Macq. 827, H. L.).

(*g*) *A.-G. v. Daugars* (1864), 33 Beav. 621; *A.-G. v. Stewart* (1872), L. R. 14 Eq. 17; *A.-G. v. Bunce*, *supra*.

(*h*) Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19), s. 2. This Act is commonly called Fowler's Act.

(*i*) Such body of persons may comprise several congregations or other sections or divisions or component parts (*ibid.*).

(*k*) *Ibid.*

(*l*) Trustee Appointment Act, 1869 (32 & 33 Vict. c. 26).

(*m*) The Trustee Appointment Act, 1860 (13 & 14 Vict. c. 28), commonly called Sir Morton Peto's Act, extended to land acquired for a burial ground, whether in use or closed by the Trustee Appointment Act, 1869 (32 & 33 Vict. c. 26), as amended by the Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19). The Trustee Appointment Act, 1860 (13 & 14 Vict. c. 28), contains provisions for payments in lieu of fines at intervals of forty years in respect of lands of

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Protestant
Noncon-
formists.

Evidence of
 appointment.

Provision of
 site for
 place of
 worship.

Effect of
 constitution
 of society.

Special
 provisions as
 to Quakers.

the instrument purporting to appoint trustees for such purpose, the persons appearing to be appointed are for the purpose of any sale or mortgage to be deemed to have been validly appointed (*n*). Every such choice and appointment of a new trustee must be made to appear by some deed under the hand and seal of the chairman of the meeting at which such choice and appointment are made, which must be executed in the presence of the meeting and attested by at least two witnesses, and may be given and must be received in any court as evidence of the truth of the matters contained in it.

1588. The facilities provided by the Places of Worship Sites Acts for the granting by limited owners of lands to be used, as sites for places of worship and for the residence of the ministers thereof (*o*), are not confined to places of worship and burial grounds to be used in connection with the Church of England, but extend to grants for the benefit of any religious denomination.

1589. Save for the due disposal and administration of property, there is no authority in the courts to take judicial cognisance of the rules of a voluntary society entered into merely for the regulation of its own affairs (*p*), unless such rules, as in the case of the United Methodist Church, have received legislative sanction (*q*). The other Protestant Nonconformist bodies have not hitherto obtained such legislative sanction of their rules (*r*). Accordingly they and the United Methodist Church, in so far as its constitution remains unaffected by statute, are at liberty to exercise all such powers of self-government and discipline as are not inconsistent with their original constitution.

SECT. 4.—Quakers.

1590. At the present day Quakers remain in a somewhat different position to other Nonconformists. The separate treatment accorded to them by the Toleration Act (*s*) led to their

copyhold or customary tenure (*s*. 2), and contains in a schedule a form, which may be followed, of memorandum of appointment of new trustees.

(*n*) Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19), s. 6.

(*o*) See p. 725, *ante*.

(*p*) *Forbes v. Eden* (1867), L.R. 1 Sc. & Div. 568, *per* Lord CRANWORTH, at p. 581.

(*q*) The United Methodist Church Act, 1907 (7 Edw. 7, c. lxxv.), provides *inter alia* for the union of various Methodist bodies and for future union with other bodies if approved by the Church Conference, for the vesting of all church property in the United Methodist Church, and for the community being able to sue and be sued through its officers.

(*r*) The rules of such churches are therefore not enforceable except as matters of contract between members who voluntarily subscribe to them. The rules governing the Wesleyan and Primitive Methodist Churches are to be found in their respective Model Deeds, which contain the trusts upon which their properties are held, and in the minutes of their Annual Conferences respectively. Those governing the Presbyterian Church of England are to be found in the Book of Order published by that Church, and those governing the Baptist Churches in the Baptist Handbook (appearing annually). The position of the Congregationalists or Independents differs from that of the above-mentioned bodies. The unit in their case is the congregation rather than the community. Such rules as they have in common must therefore be regarded as accidental rather than incidental to their constitution.

(*s*) Stat. (1688) 1 Will. & Mar. c. 18, s. 2. Under this Act Quakers were not required to take the oaths which were necessary in the case of other Dissenters, a special declaration being provided for them by s. 13. This has now

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Quakers.
—

exclusion from the operation of other Acts relating to Protestant Nonconformists, with the result that they alone are not forbidden to hold a meeting, assembly or congregation with the doors locked or barred; and that they cannot be required to make the declaration which may be demanded from dissenting ministers (*t*). Quakers enjoy special privileges in regard to marriage (*u*). Their right to contract and solemnise marriages after their own usage has been continuously recognised as valid in law (*v*). This right is extended to cases where only one of the contracting parties is a Quaker, and even where neither is a Quaker, provided that due notice is given to the superintendent registrar of the district, and at the same time a certificate is produced to him signed by a registering officer of the Society of Quakers, and stating that the notice is authorised under the rules of the society (*w*). Where notice has been given and the certificate issued, the marriage may take place in a building or place not situated in the district in which either of the contracting parties resides (*x*). The marriages may also be solemnised by licence, provided that the requirements of the Marriage Registration Act are duly carried out (*y*).

1591. Orders in Council issued for the purpose of discontinuing the use of burial-places, or restraining the creation of new burial-places in certain places, are not to apply to the burial-places of Quakers unless such are expressly mentioned in the Order (*a*)

Burial-places

1592. Special provision still exists for the recovery of tithes, payment of which is refused by Quakers (*b*), but the special

Tithes.

repealed by the Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), and provision is made for the taking of affirmations in place of oaths by persons to whose religious beliefs the taking of oaths is obnoxious (Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 11; Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 1). Special provision was made for the taking of an affirmation instead of the usual parliamentary oaths by such persons on becoming members of Parliament (Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), s. 4). Quakers lawfully convicted of having wilfully, falsely, and corruptly affirmed were and are liable to the same penalties as persons found guilty of wilful and corrupt perjury (stat. (1695) 7 & 8 Will. 3, c. 34, s. 2; Quakers and Moravians Act, 1838 (1 & 2 Vict. c. 77); Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 1). The effect of the separate treatment was that the Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), did not apply to Quakers; see s. 14 of that Act.

(*t*) See p. 813, *ante*.

(*u*) *Haughton v. Haughton* (1824), 1 Mol. 611. See generally title HUSBAND AND WIFE.

(*v*) Their marriages were excluded from the operation of the Marriage Act, 1823 (4 Geo. 4, c. 76), by s. 31 of that Act, and their validity is specifically recognised by the Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 2; Marriage Act, 1840 (3 & 4 Vict. c. 72), s. 5; stat. (1847) 10 & 11 Vict. c. 58).

(*w*) Marriage (Society of Friends) Acts, 1860 and 1872 (23 & 24 Vict. c. 18; 35 & 36 Vict. c. 10). As to the duties of the registering officer of the society, see Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), ss. 30, 31, 33, and Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), ss. 26; 28 and generally title REGISTRATION OF BIRTHS AND DEATHS.

(*x*) Marriage Act, 1840 (3 & 4 Vict. c. 72), s. 5.

(*y*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 21; see generally title HUSBAND AND WIFE.

(*a*) Burial Acts, 1852 and 1853 (15 & 16 Vict. c. 85, s. 3; 16 & 17 Vict. c. 134, s. 2); see generally title BURIAL AND CREMATION, Vol. III., p. 527.

(*b*) Stat. (1695) 7 & 8 Will. 3, c. 34, s. 3; stat. (1714) 1 Geo. 1, c. 6, s. 2; see p. 742, *ante*.

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Quakers.

provision for the recovery of tithe rentcharge from Quakers, which was included in the Tithe Act, 1836 (c), no longer exists (d), and the former special provisions would only apply to proceedings if such were taken for the recovery of tithe as distinguished from tithe rentcharge (e).

SECT. 5.—Unitarians etc.

Unitarians.

1593. Unitarians and others who deny the doctrine of the Holy Trinity were for many years subject to disabilities (f). These were relieved, so far as immunity from the penalties incurred by not taking oaths that might be required from other Protestant Non-conformists in 1813, and at the present day Unitarians are treated equally with the adherents of all other denominations. There is now no post under the Crown which is not open to them upon making the oath or affirmation required by the Promissory Oaths Act (g).

**Persons
having no
religious
belief.**

Persons who state that they have no religious belief (h) are now in the same position of equality.

SECT. 6.—Jews.

Legal status.

1594. The legal status and position of the Jews in England is anomalous, owing to historical causes (i). In the year 1290

(c) 6 & 7 Will. 4, c. 71, s. 84.

(d) Tithe Act, 1891 (54 Vict. c. 8), s. 11.

(e) *Ibid.*, s. 2 (1).

(f) They were unable to take the oaths prescribed by the Toleration Act, 1688 (1 Will. & Mar. c. 18), and, therefore, could not claim to benefit by it. By stat. (1697) 9 Will. 3, c. 35, they were disabled from holding any office, civil, military or ecclesiastical, upon conviction on the oaths of two credible witnesses, and upon a second conviction were disabled from instituting any legal proceedings, or to be the guardian of a child, or executor or administrator, or to receive any legacy or gift by deed, and were liable to three years' imprisonment. No relief was afforded them by the Nonconformist Relief Act, 1779 (19 Geo. 3, c. 44). They were, however, relieved from the disabilities and loss of privilege suffered under the Toleration Act, 1688 (1 Will. & Mar. c. 18), and stat. (1697) 9 Will. 3, c. 35, by stat. (1813) 53 Geo. 3, c. 160 (repealed by Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91)), but it was not until the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), which altered the form of the oaths of allegiance etc., that many public offices were open to them. It would seem that even now their ministers might be called upon to make the declaration which other dissenting ministers may be required by the Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), to make. See p. 813, *ante*.

(g) Oaths of allegiance, official and judicial oaths (Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), ss. 2, 3, 4); as to affirmations, see Oaths Act, 1888 (51 & 52 Vict. c. 46), and title EVIDENCE.

(h) Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 1. Before the passing of this Act, the phrase every "person for the time being permitted to make a solemn affirmation or declaration instead of taking an oath" (see Parliamentary Oaths Act, 1861 (29 & 30 Vict. c. 19), s. 4; Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 11) did not include an atheist (*Clarke v. Bradlaugh* (1881), 7 Q. B. D. 38, C. A.). The Oaths Act, 1909 (9 Edw. 7, c. 39), provides that in the case of a person who is neither a Christian nor a Jew the oath is to be administered in any manner which was at the passing of that Act lawful.

(i) Jews had probably settled in the country from the earliest times, and under the Norman and Angevin kings they were found here in considerable number and had acquired a special status as villeins or bondsmen of the King, being under the King's special protection and, though under strict regulations, entitled to many exemptions from the ordinary law. As villeins of the King their persons and property were at his disposal, and a special court, known as the

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Jews.
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Edward I. banished them by a royal proclamation or decree, and they do not appear again as a distinct body until the restoration of Charles II., who promised them protection and ordered that they should quietly enjoy the free exercise of their religion (*k*). Accordingly the Jews who came to this country and their descendants have not as such any special status; if they were born abroad they are aliens, unless they have been naturalised or obtained letters of denization, and have the rights and capacities of other aliens; but if they were born here they have the full rights of natural-born subjects (*l*).

1595. Since their return Jews have not been looked upon as a separate nationality or a distinct caste, but as members of a dissenting religious denomination, and they are accordingly described in Acts of Parliament and legal documents as “persons professing the Jewish religion” (*a*). Their personal capacity is therefore determined by the law of the country of their domicile, even although this may conflict with Jewish law (*b*), unless the law

Dissenters,
not separate
nationality.

Exchequer of the Jews, was established in the reign of Richard I. to deal with them. Their rights were further restricted by stat. 54 & 55 Hen. 3 (1270—1) (Rymer's *Fœdera*, Vol. I., p. 489), which prohibited them from holding lands in fee or having Christian servants, and by the statute “*de la Jeuerie*” or “*Statutum Judæismo*,” which forbade them to practise usury and compelled them to wear yellow badges on their outer garments and pay an annual poll tax to the King. Both these statutes were repealed by the Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59).

(*k*) They were still subject to the penal laws against recusants and the penalties imposed by the Acts of Uniformity (Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59), s. 2; see p. 811, *ante*); but from these penalties Jews were practically exempted by the exercise of the dispensing power of the Crown, which was evidenced by two Orders in Council made in their favour by Charles II. in 1673 and James II. in 1685 (see 1 Hag. Con., Appendix, pp. 1, 2; Henriques, *The Return of the Jews to England*, *passim*; *Lindo v. Belisario* (1795), 1 Hag. Con. 216, 217, n.; *Re De Wilton*, *De Wilton v. Montefiore*, [1900] 2 Ch. 481, *per* STIRLING, J., at pp. 489, 490).

(*l*) See title ALIENS, Vol. I., p. 306, and Henriques, *The Jews and the English Law*, pp. 63—65, 178; *Anon.* (1684), Lilly's *Practical Register*, Vol. I., p. 4; *Wells v. Williams* (1697), 1 *Ld. Raym.* 282.

(*a*) The principal Acts of Parliament referred to are the following:—Stat. (1723) 10 Geo. 1, c. 4 (to explain and amend the Act to oblige persons refusing to take the oaths to register their names and real estates); stat. (1739) 13 Geo. 2, c. 7; stat. (1753) 26 Geo. 2, c. 26; stat. (1753) 26 Geo. 2, c. 33; stat. (1754) 27 Geo. 2, c. 1; Marriage Act, 1823 (4 Geo. 4, c. 76); Marriage Act, 1836 (6 & 7 Will. 4, c. 85); Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86); Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59); Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81); Liberty of Religious Worship Act, 1355 (18 & 19 Vict. c. 86); Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119); Jews Relief Act, 1858 (21 & 22 Vict. c. 49); stat. (1860) 23 & 24 Vict. c. 63; stat. (1871) 34 & 35 Vict. c. 19; Factory and Workshop Act, 1878 (41 Vict. c. 16); Marriage Act, 1898 (61 & 62 Vict. c. 58); Factory and Workshop Act, 1901 (1 Edw. 7, c. 22); Marriage with Foreigners Act, 1906 (6 Edw. 7, c. 40). On the other hand, the provisions of the Charitable Donations Registration Act, 1812 (52 Geo. 3, c. 102), are declared not to extend to any funds applicable to charitable purposes for the benefit of any persons of the Jewish nation, but this is the only instance of such an expression in our statute law.

(*b*) On the other hand, the Marriage Acts expressly exempt Jewish marriages from their provisions and recognise the right of persons professing the Jewish religion to contract and solemnise marriages according to their own usages. Such usages must be proved in the same way as foreign laws are proved, and when proved will be enforced by our courts (*Lindo v. Belisario* (1795), 1 Hag.

SECT. 6.

Jews.

Toleration
Act.

of the domicile expressly confers some special privilege or exemption upon them (c).

The Toleration Act of 1688 (d), which relieved dissenters from the penalties of the penal laws and legalised their religion, did not legalise the Jewish religion, for it was provided that neither the Act nor anything therein contained should extend or be construed to extend to give any benefit to any papist or any person that should deny the doctrine of the Trinity as declared in the articles of the Church of England (e). The practice of the Jewish religion therefore remained extra legal and unprotected by the law, and in consequence an endowment established or a legacy bequeathed for Jewish religious purposes could not be sanctioned by the courts of law or equity and was liable to be directed to be applied to other purposes (f).

Toleration
extended to
the Jews,
1846.

1596. The Toleration Act was in 1846 extended to the Jews by the Religious Disabilities Act of that year, which provided that British subjects professing the Jewish religion should be subject to the same laws in respect to their schools, places for religious worship, education, and charitable purposes as Protestant dissenters from the Church of England. Inasmuch as the Acts of Toleration are liberally interpreted by the courts and even held to be retrospective in their operation (g), Jewish religious endowments and trusts are now recognised and executed by the courts, provided that they can be brought within one of the four categories especially mentioned in this statute (h); and persons who disturb the

Con. 216; *Goldsmid v. Bromer* (1798), 1 Hag. Con. 324; *Nathan v. Woolf* (1899), 15 T. L. R. 250; *Levy v. Solomon* (1877), 25 W. R. 842, where it was held that, although the Jewish law recognises legitimation *per subsequens matrimonium*, the children of a son born before the marriage of their parents cannot share in a bequest by a Jewish testator of his residuary estate to the children of his sons and daughters; *Re De Wilton, De Wilton v. Montefiore*, [1900] 2 Ch. 481, where it was held that persons professing the Jewish religion who are domiciled in England cannot contract a valid marriage which is permitted by Jewish but forbidden by English law).

(c) They were for a long time after their return excluded from many civil and political rights by reason of the method of administering the oaths or the forms of the oaths, declarations, or tests which were imposed as conditions precedent for the exercise of such rights. It was at one time thought that the Jews, because they were infidels, were *perpetui inimici regis et religionis*, and as such had no better status than that of alien enemies during time of war—that is to say, that they were without civil rights of any kind whatsoever; but this doctrine, though laid down by Sir EDWARD COKE, has long since been exploded; see *Calvin's Case* (1608), 7 Co. Rep. 1, 17 a, 1, 17 b; *Lilly's Practical Register* (1719), Vol. I., p. 4; *Wells v. Williams* (1697), 1 Salk. 46; *Omichund v. Barker* (1745), Willes, 538; Henriques, *The Jews and the English Law*, pp. 185—191.

(d) 1 Will. & Mar. c. 18; see p. 811, *ante*.

(e) *Ibid.*, s. 17; since repealed by 53 Geo. 3, c. 160, and the Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48).

(f) *Da Costa v. De Paz* (1754), Amb. 228, where it was ordered by Lord HARDWICKE that a sum of money left by will for the maintenance of a *yeshiba*, or school for daily reading the Jewish law and teaching the tenets of that faith, should be applied to the support of a preacher at the Foundling Hospital, who was to instruct the children under his charge in the Christian religion; *Isaac v. Gompertz* (1783), Amb. 2nd ed. 228, n.; *Re Bedford Charity (Masters etc.)* (1819), 2 Swan. 470, 522.

(g) *Re Michel's Trust* (1860), 28 Beav. 39.

(h) *Ibid.*

service of the synagogue can be punished in the same way as those who brawl or interfere with the worship in a church or chapel (i). Accordingly, since the year 1846 the Jewish religion has so far become one of the recognised religions of the country that a condition in a will or trust deed providing for the forfeiture of a beneficiary's interest in a fund if he should forsake the Jewish religion or marry a person who does not profess that religion, is valid and will be enforced by the courts (k).

SECT. 6.
Jews.
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1597. By the Places of Worship Registration Act, 1855 (l), a Jewish synagogue may be certified in writing to the Registrar-General of Births, Deaths, and Marriages, who will then register it in due course. There is, however, no obligation to certify a synagogue, and such a course is optional and not compulsory. The certification and subsequent registration of a building as a synagogue has, however, many advantages. A synagogue, if registered, but not otherwise, is exempt from uninvited interference by the Charity Commissioners (m), and, if exclusively appropriated to public religious worship, from parochial and municipal rates (n). Moreover, it is doubtful whether a synagogue that has not been certified would be entitled to the benefits conferred by s. 2 of the Religious Disabilities Act, 1846 (o), and if it is not so entitled a gift or legacy to it would be void; nor could contracts to hire seats in it be enforced, nor disturbers of its services punished. Furthermore, the minister of a synagogue which is not registered is not exempted from service upon a jury under the Juries Act, 1870 (p).

Registration
of synagogues

1598. With the exception of this exemption from service on a jury the minister of a Jewish synagogue has no special privilege or status by English law, and the tenure of his office is regulated solely by the agreement or contract under which he holds his appointment. The secretary of a synagogue has statutory powers and duties as to the keeping of marriage register books and the due registration of marriages between persons professing the Jewish religion under the provisions of the Births and Deaths Registration Act, 1836 (a), but he is not invested with such authority unless and until he has been certified in writing to be the secretary of a synagogue

Status of
Jewish
minister.

Secretary of
synagogue.

(i) As to brawling, see p. 817, *ante*.

(k) *Hodgson v. Halford* (1879), 11 Ch. D. 959; see also *Re Joseph, Pain v. Joseph*, [1908] 2 Ch. 507, O. A.

(l) 18 & 19 Vict. c. 81, s. 2. It had previously been held that a synagogue was not an unlawful establishment (*Israel v. Simmons* (1818), 2 Stark. 356). As to registration of places of worship generally, see p. 817, *ante*.

(m) See Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 9; and Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 15.

(n) See Poor Rate Exemption Act, 1833 (3 & 4 Will. 4, c. 30); Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 27. As to the exemption of places appropriated to religious worship and the trustees or ministers of such places from improvement rates and charges, see notes (p) and (q), p. 819, *ante*.

(o) 33 & 34 Vict. c. 77, sched. The words of exemption being "ministers of any congregation of Protestant dissenters and of Jews whose place of meeting is duly registered, provided they follow no secular occupation except that of a schoolmaster."

(a) 6 & 7 Will. 4, c. 86, ss. 30, 33, 35, 40, 42 *et seq.*

SECT. 6.
Jews.

in England of persons professing the Jewish religion by the president for the time being of the London Committee of Deputies of the British Jews (*b*). In the year 1842 a congregation of Jews, with a reformed ritual under the title of the West London Congregation of British Jews, was established, and, acting on the advice of the Chief Rabbi and other recognised Jewish ecclesiastical authorities, the president of the London Committee of Deputies of the British Jews refused to certify the secretary of the new congregation under the provisions of the Births and Deaths Registration Act of 1836. Accordingly, by the Marriage and Registration Act, 1856 (*c*), it is enacted that the secretary of the West London Synagogue of British Jews, if certified in writing to the Registrar-General by twenty householders being members of that synagogue, shall be entitled to the same privileges as if he had been certified by the president of the London Committee of Deputies of the British Jews, and is also empowered himself to certify to the Registrar-General any person who is the secretary of a synagogue in connection with the West London Synagogue, if it has been established for not less than one year and comprises not less than twenty members who are householders. And a secretary thus certified is invested with the power and duty of registering marriages under the Act (*d*).

Concessions
in courts
of justice.

1599. Since the return of the Jews to England in the reign of Charles II. it has been the custom of the courts, quite apart from any statutory enactments, to comply so far as possible with Jewish religious scruples; for instance, a Jew is and always has been allowed to be sworn as a witness upon the Pentateuch instead of upon the New Testament (*e*), and arrangements have been made for cases in which Jews are parties or necessary witnesses not to be taken upon a Saturday or other Jewish holiday (*f*), and a Jew has been excused from giving notice of dishonour of a bill of exchange on a Jewish holiday provided it is his custom to keep his place of business closed on such a day (*g*).

Elections.

Again, the Ballot Act, 1872, enables voters "of the Jewish persuasion," who object on religious grounds to mark the ballot paper on the Jewish Sabbath, to have, "if the poll be taken on Saturday," their votes recorded by the presiding officer in the same

(*b*) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 30. The London Committee of Deputies of the British Jews, which has received statutory recognition under this Act, is more generally known by the shorter title of the Board of Deputies. It was founded about the time of the accession of George III., in the year 1760, and is the representative body of the Jews in this country, to which every recognised synagogue in the British Empire is entitled to elect one or more deputies, a general election being held every three years.

(*c*) 19 & 20 Vict. c. 119.

(*d*) *Ibid.*, s. 22. See title HUSBAND AND WIFE.

(*e*) *Robeley v. Langston* (1668), 2 Keb. 314. An oath so taken is legal and binding at common law, and a witness so sworn, if he swear falsely, may be indicted and convicted of perjury (2 Hale, P. C. 279; *Omichund v. Barker* (1745), Willes, 538). Moreover, the Oaths Act, 1838 (1 & 2 Vict. c. 105), provides that any person is bound by an oath provided it has been administered in such form and with such ceremonies as he declares to be binding. See also the Oaths Act, 1909 (9 Edw. 7, c. 39).

(*f*) *Barker v. Warren* (1677), 2 Mod. Rep. 271.

(*g*) *Lindo v. Unsworth* (1811), 2 Camp. 602.

way as votes given by persons incapacitated by blindness or other physical cause. It should be observed that this privilege can be exercised by Jews only when the election takes place on a Saturday, and not when it takes place on any other Jewish festival or holiday (*h*).

SECT. 6.
Jews.
—

1600. An oath should be administered to a Jew in the same form as is used in swearing a Christian, save that where a testament is used the Old Testament is to be used instead of the New Testament (*i*). Administration of oath.

1601. Except under the Factories and Workshops Acts, there is no expressed provision exempting Jews from the ordinances against Sunday labour (*k*). A Jew may hold an advowson and the right of presentation to a church or ecclesiastical benefice, but he must of course present a duly qualified person (*l*). If, however, he holds an office in the gift of the Crown to which a right of presentation to any ecclesiastical benefice is attached, such right devolves and is to be exercised by the Archbishop of Canterbury for the time being (*m*). Nor may a Jew, under penalty of being guilty of a high misdemeanour and disabled from holding any office under the Crown, directly or indirectly advise the Crown concerning the appointment to or disposal of any office or preferment in the Church of England or in the Church of Scotland (*n*). Other rights and disabilities.

With these exceptions, Jews are on precisely the same footing in regard to political rights as their Christian fellow-subjects (*o*).

1602. The English law expressly recognises marriages solemnised according to the usages of the Jews (*p*). Marriages.

(*h*) Ballot Act, 1872 (35 & 36 Vict. c. 33), Sched. I., r. 26. See title ELECTIONS.

(*i*) See Oaths Act, 1909 (9 Edw. 7, c. 39), s. 2, and title EVIDENCE.

(*k*) *Goldstein v. Vaughan*, [1897] 1 Q. B. 549; and titles TIME; FACTORIES AND SHOPS.

(*l*) *Mirehouse v. Rennell* (1833), 7 Bli. (N. S.) 241, 322, H. L.

(*m*) Jews Relief Act, 1858 (21 & 22 Vict. c. 49), s. 4.

(*n*) *Ibid.*, s. 4. See also title CONSTITUTIONAL LAW, Vol. VI., p. 394.

(*o*) *Ibid.*, s. 3, is repealed by the Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48); see, generally, Heuriques, *The Jews and the English Law*, pp. 194, 195, 261—263. It would be unconstitutional for a Jew to be appointed Lord Chancellor; see title CONSTITUTIONAL LAW, Vol. VII., p. 56.

(*p*) See stat. (1753) 26 Geo. 2, c. 33, repealed by stat. (1754) 27 Geo. 2, c. 1; Marriage Act, 1823 (4 Geo. 4, c. 76); Marriage Act, 1836 (6 & 7 Will. 4, c. 85); Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119); Marriage Act, 1898 (61 & 62 Vict. c. 58); Marriage with Foreigners Act, 1906 (6 Edw. 7, c. 40); *Lindo v. Belisario* (1795), 1 Hag. Con. 216; *Goldsmid v. Bromer* (1798), 1 Hag. Con. 324; *Jones v. Robinson* (1815), 2 Phillim. 285; *Re De Wilton, De Wilton v. Montefiore*, [1900] 2 Ch. 481. See also note (*b*), p. 825, *ante*.

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